THE TWENTY-SEVENTH AMENDMENT: MEANING AND APPLICATION

GIANCARLO CANAPARO & PAUL J. LARKIN, JR.

ESSAY:
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INTRODUCTION

By 2021, lawyers have become accustomed to giving the term "law" a host of different meanings depending on its source. A law had one meaning under pre-Norman law, when it was one of the set of unwritten traditions embraced by decentralized local tribes or the written "dooms" issued by various local chieftains.[1] That term could take on a different meaning at English common law when Parliament was in its infancy and the royal courts were the source of most of the "law" known throughout the kingdom.[2] In this nation, "law" was the product of a similar trial-and-error process of definition[3] before Congress overtook the courts as the principal federal lawmaking body.[4] Of course, today the regulatory

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[1] *See*, *e.g.*, Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 329 (2017) ("English King Ethelbert drafted the first written code in approximately 600 A.D. Consisting of only 'ninety brief sentences,' Ethelbert's code—composed of *dooms* ('decrees') not *leges* ('laws'), because the concept of 'law' was as yet unknown in England—was essentially a tariff, a schedule of fines, payable in money known as the *wergild*, that a wrongdoer was obliged to give to the victim of a crime or his kin, principally for murder, mayhem, other acts of violence, or cattle-thievery. The hoped-for goal was to forestall violent retaliation and intertribal warfare.") (footnotes omitted); *id.* at 327–29.

[2] *See*, *e.g.*, ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (Liberty Fund 1986) (1966); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW (2d ed. 2009); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (Little, Brown & Co. 5th ed. 1956) (1929).

[3] *See*, *e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Dover Pubs. 2012) (1921); OLIVER WENDELL HOLMES, THE COMMON LAW (Dover Pubs. Rev. ed. 1991) (1881).

[4] The day when Congress was the primary federal law-making body, however, is now in the rear-view mirror; the administrative state annually promulgates far more rules than Congress passes statutes. *See*, *e.g.*, RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 14 (2019) ("By some estimates,

state issues far more "laws" than Congress does[5] and its assorted rules, regulations, and even letters might or might not have the same legal status as an act of Congress.[6] The bottom line is this: The term "law" could have an entirely different understanding today depending on whether an edict is found in the Constitution of the United States,[7] in

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more than 90 percent of American law is created by administrative rules issued by federal agencies."); CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2 (4th ed. 2011) ("Increasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of our many public programs."); *infra* note 5.

[5] *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in the judgment) ("Now, in the 21st century, the administrative state wields vast power and touches almost every aspect of daily life. Among other things, it produces reams of regulations—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U. S. Code. And agencies add thousands more pages of regulations every year.") (footnotes and internal punctuation omitted); Kevin R. Kosar, *Reasserting Congress in Regulatory Policy*, *in* 2 UNLEASHING OPPORTUNITY: POLICY REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 19, 19 (Yuval Levin & Emily MacLean eds., 2017) ("In recent years, Congress has enacted approximately 50 statutes annually on significant subject matter; the executive branch proposes 2,700 new regulations and finalizes another 4,000 rules each year.") (footnote omitted); Paul J. Larkin, Jr., & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y (forthcoming 2021) (manuscript at 20 & n.78) (on file with authors).

[6] *See*, *e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (agency rules properly issued pursuant to delegated authority "have the 'force and effect of law'") (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979)); *see generally* Paul J. Larkin, Jr., *Agency Deference after* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105 (2020) (discussing whether an agency's interpretation of its own rules is entitled to deference and, if so, what type and how much).

[7] *See*, *e.g.*, City of Boerne v. Flores, 521 U.S. 507, 524, 536 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."); Miranda v. Arizona, 384 U.S. 436, 442 (1966) ("These precious [Sixth Amendment] rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it.'") (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821)).

the United States Code,[8] in the Code of Federal Regulations,[9] or in an agency's memorandum.[10]

With that in mind, consider our most recent constitutional amendment, the Twenty-Seventh. Like many of its kin, that Amendment is a bit of a troublemaker. Not a big one, mind you, but a bigger one than its simple text might suggest. That text is this: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[11]

Ironically, the Twenty-Seventh Amendment was one of the first proposed in 1789 with the first draft of the Bill of Rights.[12] It wasn't until 1992—203 years later—that the requisite number of states ratified it. That action caused an immediate flurry of scholarly and political debate about several issues, such as whether the Amendment had expired, the implications for Article V of a delayed ratification,[13] and whether the amendment process was a useful means of obtaining desired political outcomes.[14] Those who argued that it had expired based their conclusions

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[8] *See*, *e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380–81 (2020) ("Our analysis begins and ends with the text. . . . It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts . . . . By introducing a limitation not found in the statute, respondents ask us to alter, rather than to interpret, the [act].") (citations and internal punctuation omitted); Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

[9] *See*, *e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (describing the legal effect to be given to an agency's interpretation of a statute it is responsible for implementing).

[10] *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (describing the legal effect to be given to an agency's interpretation of one of its own regulations).

[11] U.S. CONST. amend. XXVII.

[12] Which is why there is no merit to the argument, often made by free speech or free exercise advocates, that the First Congress put those guarantees ahead of the other Bill of Rights provisions because the Founding Generation considered those rights more important than the rest. What became the First Amendment was actually third in the list.

[13] U.S. CONST. art. V (describing the process for amending the Constitution).

[14] For a very thorough history of the Twenty-Seventh Amendment, from proposal through ratification and early legal challenges, see Richard Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992). *See also* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS 161, 188, 195, 204–5 (Praeger 1979) (discussing how what would become the Twenty-Seventh Amendment came to be included in the original Bill of Rights and providing a detailed overview of the debates about the Amendment's late ratification and what that meant for Article V). *See generally*, for further discussion: William W. Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST.

primarily on dicta from *Dillon v. Gloss*,[15] in which the Supreme Court held that Congress could set a reasonable time period in which states must ratify the Eighteenth Amendment.[16] In dicta, the Court declared that "ratification must be within some reasonable time after the proposal."[17] Contemporaneity, it stated, is necessary to "reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[18] Some scholars considered the related question of whether the Court could or should resolve Article V questions or whether those issues were political questions best left to Congress.[19] Finally, for Professor Bernstein, the Twenty-Seventh Amendment raised concerns about "amendment politics" and the "willingness of right-wing politicians to reach for Article V as if it were a fire-ax on the wall."[20]

Those debates have simmered down, but disputes about the Amendment's text and application still pop up.[21] There has been litigation,[22]

COMMENTARY 9 (1993); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994); Don J. DeBenedictis, *27th Amendment Ratified: Congressional Vote Ends Debate Over 203-Year-Old Pay-Raise Proposal*, 78 A.B.A. J. 26 (1992); Christopher M. Kennedy, *Is There a Twenty-Seventh Amendment? The Unconstitutionality of a "New" 203-Year-Old Amendment*, 26 J. MARSHALL L. REV. 977 (1993); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993); JoAnne D. Spotts, *The Twenty-Seventh Amendment: A Late Bloomer or A Dead Horse?*, 10 GA. ST. U. L. REV. 337 (1994); Richard L. Berke, *1789 Amendment Is Ratified but Now the Debate Begins*, N.Y. TIMES, May 8, 1992, at A1; Don Phillips, *Proposed Amendment, Age 200, Showing Life*, WASH. POST, Mar. 29, 1989, at A23; Kimberly Wehle, *Can Members of Congress Carry Firearms On The Capitol Complex?*, THE HILL (Feb. 8, 2021, 9:30 AM), https://thehill.com/opinion/judiciary/537746-can-members-of-congress-carry-firearms-on-the-capitol-complex [https://perma.cc/GWN7-2JWS]; *see also* Yaniv Roznai, *Unconstitutional Constitutional Amendments—the Migration and Success of A Constitutional Idea*, 61 AM. J. COMPAR. L. 657, 657 (2013) (raising the (in our view, nonsensical) question, without mentioning the Twenty-Seventh Amendment, of whether a constitutional amendment can be unconstitutional).

[15] 256 U.S. 368 (1921).

[16] *Id.* at 375.

[17] *Id.*

[18] *Id.*

[19] *See, e.g.*, Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446 (1983); Kennedy, *supra* note 14; Spotts, *supra* note 14.

[20] Bernstein, *supra* note 14, at 552.

[21] *See, e.g.*, Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994) (rejecting the plaintiff's argument that automatic cost of living adjustments were "laws"); Schaffer v. Clinton, 240 F.3d 878 (10th Cir. 2001) (avoiding the same claim on procedural grounds).

[22] *See, e.g.*, *Boehner*, 30 F.3d at 161–62 (holding that automatic cost of living adjustments established by statute were not separate "laws" within the meaning of the Amendment); Shaffer v. Clinton, 54 F. Supp. 2d 1014 (D. Colo. 1999), *aff'd* on other grounds *sub nom*. Schaffer v. Clinton, 240 F.3d 878 (10th Cir. 2001) (same as *Boehner*,

some scholarly engagement,[23] and political dispute over the Amendment's meaning and application.[24] Disputes over the Amendment likely will continue to surface and require additional guiderails. This Essay attempts to provide them by ascertaining the Amendment's meaning and implications according to its text and history.

This Essay proceeds in three Parts, each of which focuses on issues of interpretation and implementation raised by components of the Amendment. Part I examines the term "law" and concludes that it has the same technical meaning that the word does for purposes of the Bicameralism and Presentment requirements of Article I: namely, bills passed by Congress and signed by the President (or repassed over his veto).[25] The Amendment does not apply to any other government action. We also examine an important implication of this conclusion, namely, the Amendment cannot be used as a basis for holding an act of Congress unconstitutional, with rare exceptions. Taken together with the Ascertainment Clause, however, the Amendment does prohibit Congress from delegating its compensation-setting power to any other body. Part I also discusses the problems raised by trying to find a uniform meaning of what should be an elementary term—"law"—in a charter devoted to the rule

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although the district court's holding was vacated when the Tenth Circuit reversed on the ground that no plaintiffs had standing).

[23] *See, e.g.*, Jonathan D. McPike, *Merit Pay and Pain: Linking Congressional Pay to Performance*, 86 IND. L.J. 335, 365–66 (2011) (considering whether paying members according to "incentive contracts" would violate the Amendment); Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 516–21 (2002) (examining the issues raised in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), as a "veil of ignorance" mechanism).

[24] *See* GianCarlo Canaparo, *Representatives Go On Offensive Against Pelosi's Mask Rule, Cite 27th Amendment. Will It Work?*, DAILY SIGNAL (July 29, 2021), https://www.dailysignal.com/2021/07/29/representatives-go-on-offensive-against-pelosis-mask-rules-cite-27th-amendment-will-it-work/; Andrew Solender, *Pelosi to Fine House Members Up To $10,000 for Evading Metal Detectors*, FORBES (Jan. 13, 2021, 9:09 PM), https://www.forbes.com/sites/andrewsolender/2021/01/13/pelosi-to-fine-house-members-up-to-10000-for-evading-metal-detectors/ [https://perma.cc/2HAT-LYMK] (describing an argument by Representative Thomas Massie that fines imposed for breaking House rules violated the Twenty-Seventh Amendment); Carey Vanderborg, *27th Amendment In Constitution Violated By GOP Budget Bill? House To Vote Wednesday*, INTERNATIONAL BUSINESS TIMES (Jan. 23, 2013, 11:27 AM), https://www.ibtimes.com/27th-amendment-constitution-violated-gop-budget-bill-house-vote-wednesday-1033836 [https://perma.cc/EV4N-533D]; Letter from Representative Andrew S. Clyde to Representative Theodore E. Deutch, Chairman, House Committee on Ethics (Feb. 23, 2021), https://ethics.house.gov/sites/ethics.house.gov/files/documents/Rep.%20Clyde%20Appeal%20Letter.pdf [https://perma.cc/J2BL-BTC7] (arguing that fines for violating House rules requiring members to pass through metal detectors violate the Amendment).

[25] U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .").

of law. Part II examines the meaning of "varying" and "compensation," and concludes that a law varies compensation when it changes the terms of an existing law enacted pursuant to the Ascertainment Clause.[26] Part III examines the meaning of "shall take effect" and "an election . . . shall have intervened" and concludes that the former refers to the moment when members are entitled to receive a quantifiable change to their compensation, and the latter means that a new Congress has been seated.

I. THE MEANING OF "LAW"

The Twenty-Seventh Amendment provides that "no law" may take effect until a House election has intervened.[27] The Constitution does not define "law" and the word has more than one meaning in that document. Article I, Section 7, for example, provides a technical definition: a bill passed by both houses of Congress and signed by the president (or repassed over his veto).[28] But the First Amendment's declaration that "Congress shall make no law. . . ."[29] prohibits much more than Article I "Laws" as do the words "No State shall make or enforce any law" in the

[26] U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.").

[27] *Id*. amend XXVII.

[28] *See id.* art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983). To ensure that Congress cannot evade that intentionally onerous procedure through legislative shenanigans (such as by labeling a "Bill" as something else) and create a "Law" by labeling a proposal as something other than a "Bill," Article I expressly applies to any "Bill" and "[e]very Order, Resolution, or Vote" requiring the approval of both chambers other than an "Adjournment." U.S. CONST. art. I, § 7, cl. 3. That is why Congress cannot escape the Twenty-Seventh Amendment by voting itself a pay raise and calling it a "bonus."

[29] U.S. CONST. amend I.

Fourteenth Amendment.[30] Article I, Section 8, Clause 10, meanwhile, refers to the "Law of Nations." [31]

It turns out that the debate over the meaning of the term "law" in the Twenty-Seventh Amendment raises a marvelously complex issue of constitutional law. The reason is that, over time, the Supreme Court has followed different processes of legal interpretation that can lead to very different outcomes depending on the methodology that one adopts. A common-law method of interpretation, for example, would deemphasize the text of the Constitution and accentuate the Supreme Court's rulings construing the charter's terms, as well as the policies that a particular provision sought to protect and foster, all in the name of giving effect to the subjective intent of the people who drafted and approved the Constitution.[32] By contrast, a textually oriented approach to constitutional interpretation would highlight the text that the Framers and Ratifying Conventions considered and approved in recognition of the facts that words have generally well understood meanings for particular people at specific times and that this geographically and temporally defined range of meanings supplies the universe of legitimate interpretations that the

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[30] *Id.* amend XIV. With respect to the expansive definition of "*Congress* shall make no *law*," see, for example, Gitlow v. New York, 268 U.S. 652, 666 (1925) (establishing the foundation of the Incorporation Doctrine, whereby the First Amendment—and later other amendments—would be held to apply against the states via the Fourteenth Amendment's Due process Clause); Sherbert v. Verner, 374 U.S. 398, 409–10 (1963) (holding that the First Amendment applied to a state administrative agency's decision denying unemployment benefits to an employee fired for refusing to work on the Sabbath); New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (holding that the First Amendment prevents a state court from entering a civil verdict in favor of a public official suing for defamation unless the official can prove actual malice); Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (extending the holding of *New York Times* to intentional infliction of emotional distress); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993) (applying the First Amendment to a city ordinance); McCreary County v. ACLU of Kentucky, 545 U.S. 844, 881 (2005) (holding that the First Amendment prohibited county officials from displaying the Ten Commandments on public land). With respect to the Fourteenth Amendment, the Court has read expansively the words "No State shall make or enforce any law" but, at the same time, has nearly nullified the clause in which those words appear by reading narrowly the words "privileges or immunities." *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 133 (1873) (applying the Privileges or Immunities Clause to a state supreme court's decision to deny a woman admission to the state bar, but holding that the right to practice a profession is not a "privilege or immunity"); United States v. Cruikshank, 92 U.S. 542, 552–53 (1876) (applying the Clause to a criminal judgment entered after a guilty verdict but also holding that the Privilege or Immunities Clause did not bar a state from violating the rights listed in the First and Second Amendments); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 80–83 (1873) (narrowly construing the Fourteenth Amendment Privileges or Immunities Clause).

[31] U.S. CONST. art. I, § 8, cl. 10.

[32] *See generally* Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

text may have.[33] Still other methods of interpretation might lead to any number of meanings.

Professor Adrian Vermeule, for example, seems to pick out of thin air a theory interpreting the Twenty-Seventh Amendment based on a thought experiment by John Rawls, which Vermeule argues, explains the Amendment's purpose.[34] Of course, as far as the Framers were concerned, Vermeule's Rawlsian theory of interpretation might as well have been Martian because a novel theory created by someone born 134 years after the Convention of 1787 had adjourned did not play, and could not have played, any role in the Framers' understanding of the words they put on paper.

Because of the Supreme Court's inconsistent approach to defining "law," to pick one interpretive method is to take a position that is at odds with some body of case law. Here, for example, we take a textually oriented approach to defining "law" (and the other terms of the Amendment) that reveals a meaning irreconcilable with the Court's reading of the same word in the First Amendment. The unavoidable conclusion is that either we are wrong or the Court is wrong. We have opinions about that question, but this is not the time or place to set out a grand unified theory of the meaning of a "law."[35] Suffice it to say, we acknowledge that the originalist approach we follow here is at odds with and has

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[33] *See*, *e.g.*, Nixon v. United States, 506 U.S. 224, 233–38 (1993) (interpreting the word "sole" in the Senate Impeachment Clause as precluding judicial review of the Senate's decision to remove a federal official from office); United States v. Jacobsen, 466 U.S. 109, 125 (1984) (limiting the scope of the Fourth Amendment to "searches" and "seizures"); United States v. Marion, 404 U.S. 307, 325–26 (1971) (construing the term "accused" in the Sixth Amendment to require that a formal charge have been filed against someone); *see generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Princeton University Press, 1998).

[34] *See* Vermeule, *supra* note 23, at 511 (arguing that the Amendment represents a "veil of ignorance" rule that increases the chance that Congress will enact a normatively good law because it lacks the information necessary to make a bad one); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 400 (2001); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1149 (2009) (arguing, in similar fashion, that American administrative law can be explained by the legal theories of Carl Schmitt).

[35] For example, consider the debate between H.L.A. Hart, on the one hand, and Lon Fuller and Ronald Dworkin, on the other, regarding the prerequisites for an edict to be deemed a "law." Hart, a legal positivist, would classify as a law any directive issued by the governing authority in a polity. Considerations of morality did not enter into the question. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958). By contrast, Fuller and Dworkin demanded that a "law" satisfy a series of requirements in order to be entitled to the moral force that is implied by that term. *See* LON L. FULLER, THE MORALITY OF LAW (3d ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630 (1958); RONALD DWORKIN, LAW'S EMPIRE 15–20 (1988). The debate is a fascinating one, but it is beyond the scope of this Essay.

implications for the Supreme Court's interpretation of that term in other contexts. But that is a question for another day. Here and now, we turn our attention solely to the meaning of that word in the Twenty-Seventh Amendment. As it turns out, there are very good reasons why, in that context, "law" does not and should not bear the same expansive definition the Court has given it in other settings.

That conclusion, however, is not necessarily intuitive when we consider that, originally, James Madison intended for the "compensation amendment" to accompany the First Amendment in the Bill of Rights.[36] It may be tempting, therefore, to interpret "No law . . . shall take effect" in a similar manner to "Congress shall make no law." Both phrases, after all, are the only constraints included in the original Bill of Rights that expressly limit lawmaking.[37] Indeed, in several Twenty-Seventh Amendment disputes to-date, one party has argued that "law" means something other than a bill passed by both houses and signed by the president.[38] Those arguments suggest an understanding of "law" that is more aligned with the expansive meaning of that term that the Supreme Court has given it in the First Amendment.

There are two good reasons, however, not to give "law" in the Twenty-Seventh Amendment a loose meaning like it has in the First Amendment. The first reason is that the Twenty-Seventh Amendment's text and history foreclose it. The Amendment was not born of nothing and poured out over blank parchment like light over the dark face of the deep.[39] Rather, it followed and was meant to amend the Ascertainment Clause, which says that compensation for members of Congress shall be

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[36] *See* Bernstein, *supra* note 14, at 522 (referring to the Amendment as the compensation amendment pre-ratification because it was included in the original Bill of Rights as the second amendment).

[37] Of course, other amendments in the Bill of Rights have the *effect* of limiting lawmaking, but only these two explicitly mention it. *Cf.* U.S. CONST. amends. II ("shall not be infringed"), III ("[n]o Soldier shall . . . be quartered"), IV ("shall not be violated"), V ("no person shall be"), VI ("the accused shall enjoy the right"), VII ("the right of trial by jury shall be preserved"), VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."), X ("[t]he powers not delegated . . . are reserved").

[38] *See* Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994) (rejecting the plaintiff's argument that automatic cost of living adjustments were "laws"); Schaffer v. Clinton, 240 F.3d 878, 886 (10th Cir. 2001) (avoiding the same claim on procedural grounds); Solender, *supra* note 24 (describing an argument by Representative Thomas Massie that fines imposed for breaking House rules violated the Twenty-Seventh Amendment).

[39] *Genesis* 1:2–3 ("And the earth was without form, and void; and darkness was upon the face of the deep. And the Spirit of God moved upon the face of the waters. And God said, Let there be light: and there was light.").

"ascertained by Law."[40] Indeed, any examination of the meaning of the Twenty-Seventh Amendment must start with the Ascertainment Clause; the Amendment cannot be divorced from it.[41]

It would be a mistake to give an expansive reading to the term "law" in the Twenty-Seventh Amendment. The history of the Ascertainment Clause makes clear that, "Law" has its technical Article I meaning—a bill passed by both houses and signed by the president.[42] There had been a fierce debate among the Framers about how members of Congress ought to be paid.[43] One faction believed the states ought to pay their representatives, while the other thought that the nation, through the federal government, ought to do so.[44] The debate seems to have assumed, as a matter of course, that if the federal government paid the members, that pay would be set by law.[45] This makes sense because the Constitution the Framers were debating gave the power over the federal purse to Congress.[46] Moreover, the Framers were acutely aware of the battles between Parliament and the English Crown over spending authority and realized that "control over the power of the purse was the foundation

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[40] U.S. CONST. art. I, § 6, cl. 1; *see also* Bernstein, *supra* note 14, at 502. The House committee tasked with framing the proposed amendment did it this way:

> ART. I, Sec. 6 — Between the words "*United States*" and "*shall in all cases*" strike out "*they*," and insert, "But no law varying the compensation shall take effect until an election of Representatives shall have intervened. The members."

H.R. SELECT COMM. REP. (July 28, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 30 (Helen E. Veit et al., eds., 1991).

[41] That understanding of the Amendment is reflected clearly in the three proposals—from Virginia, New York, and North Carolina—that prompted Madison to include it in the original Bill of Rights. *See* Bernstein, *supra* note 14, at 514. New York's proposal most clearly expresses this relationship:

> That the compensation for the Senators and Representatives be ascertained by standing Laws; and that no alteration of the existing rate of Compensation shall operate for the Benefit of the Representatives, until after a subsequent election shall have been had.

Id. (reprinting the proposal).

[42] *See id.* at 502–08 (recounting the history of that provision and its bearing on what would later become the Twenty-Seventh Amendment).

[43] *Id.*

[44] *Id.*

[45] *See id.*

[46] *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[.]"); Paul J. Larkin, Jr. & Zack Smith, *"Brother, Can You Spare a Million Dollars?": Resurrecting the Justice Department's "Slush Fund,"* 19 GEO. J.L. & PUB. POL'Y (forthcoming 2021) (manuscript 9–12) (on file with authors).

of Parliament's ability to resist the authority of the king."[47] That power, James Madison also noted, was in House members "alone."[48] Accordingly, the Ascertainment Clause's use of the word "Law" means, very simply, that members' compensation must be set by the legislative process defined by Article I.

It follows that "law" in the Twenty-Seventh Amendment should have the same meaning as it does in Article I because that Amendment fixes conditions on the legislative process and timing of the laws enacted pursuant to the Ascertainment Clause.[49] In this way, the Twenty-Seventh Amendment is like the Origination Clause[50] and the bicameralism and presentment requirements.[51] All of these provisions establish procedural requirements that must be satisfied before an act of Congress may either become law or take effect.

The second reason that the Court's expansive definition of "law" in the First Amendment need not apply to the Twenty-Seventh Amendment is that the amendments serve different purposes. Unlike the First Amendment, the Twenty-Seventh is concerned "with an issue of governmental structure rather than substantive individual right[s]."[52] It is more accurate to say the Twenty-Seventh Amendment is concerned with legislative procedure than governmental structure, but the point stands.

The conclusion that "law" within the Twenty-Seventh Amendment takes on the narrow technical definition of Article I resolves two of the debates about the Amendment.[53] The first was raised in *Boehner v. Anderson*.[54] There, Representative John Boehner challenged part of the Ethics Reform Act of 1989 that created automatic annual cost of living adjustments (COLAs) for members of Congress.[55] He argued, in relevant part, that each COLA was a new "law" for purposes of the Amendment,

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[47] Todd David Pearson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 329–30 (2009).

[48] THE FEDERALIST No. 58, at 356–57 (James Madison) (Clinton Rossiter ed., 1961).

[49] *See* sources cited *supra* note 19.

[50] U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[51] *Id.* cl. 2.

[52] Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1145 (1991); *see also* Bernstein, *supra* note 14, at 512–16, 530 (explaining that the inclusion of two "structural amendments," to the Bill of Rights was a political compromise that James Madison thought necessary to bridge the divide between Federalists and Anti-Federalists and describing those two amendments as "ha[ving] nothing to do with rights.").

[53] It is not the only way to resolve these debates as we discuss in Part II.

[54] 30 F.3d 156 (D.C. Cir. 1994).

[55] Pub. L. No. 101–194, 103 Stat. 1716 (1989) (codified at 2 U.S.C. § 31(2) and 5 U.S.C. § 5318 note)

and that they were therefore unconstitutional because half of them (those in odd-numbered years) took effect without an intervening election.[56] The court acknowledged that "[t]he Constitution does not define a law except to say (at least implicitly) that it is the product of the legislative process."[57] By that measure, the only law at issue was the Ethics Reform Act itself, which established the COLAs starting in 1991, after an intervening election.[58] The only other court to reach this issue came to the same conclusion.[59]

The most recent debate over the Twenty-Seventh Amendment is also resolved by giving "law" its narrow Article I meaning. In 2021, the House passed rules requiring Representatives to use metal detectors when entering the House Chamber enforced by fines that would be deducted from their salaries.[60] Several members objected on the grounds that the fines violated the Twenty-Seventh Amendment.[61] This argument fails because the House rules are not Article I laws, and therefore fall outside the scope of the Twenty-Seventh Amendment.[62] This conclusion is bolstered by Section 5 of Article I, which permits each House to "determine the Rules of its Proceedings, punish its members for disorderly Behaviour . . . ."[63] That the Constitution draws a line between House rules and laws supports the argument that the one is not the other. Finally, a deduction from a member's pay—whether because of a violation of a

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[56] *Boehner*, 30 F.3d at 161. As Professor Vermeule notes, that argument amounted to "an attempt to resurrect, in Twenty-Seventh Amendment guise, the implausible version of the Ascertainment Clause that would require each change in congressional pay to be enacted by separate statutes." Vermeule, *supra* note 23, at 519.

[57] *Boehner*, 30 F.3d at 161 (citing U.S. CONST. art. I, § 7).

[58] Of course, the Twenty-Seventh Amendment had not been ratified yet, but the court did not have to decide if it applied retroactively because the Ethics Reform Act satisfied its requirements. The question of retroactivity is now safely behind us, and we need not spend time on it.

[59] Shaffer v. Clinton, 54 F. Supp. 2d 1014, 1023–24 (D. Colo. 1999) (giving "law" its Art. I, § 7, definition and saying of the COLAs that "a formula to create annual salary adjustments does not create a new law with each adjustment since the adjustments are not contingent upon passage by Congress and the President's signature."). This holding was vacated on appeal when the Tenth Circuit concluded, contra the district court, that no plaintiff had standing. *See* Schaffer v. Clinton, 240 F.3d 878, 886 (10th Cir. 2001).

[60] H.R. Res. 73, 117th Cong. (2021).

[61] *See, e.g.*, Letter from Representative Andrew S. Clyde to Representative Theodore E. Deutch, Chairman of the House Committee on Ethics (Feb. 23, 2021) (available at https://ethics.house.gov/sites/ethics.house.gov/files/documents/Rep.%20Clyde%20Appeal%20Letter.pdf [https://perma.cc/J2BL-BTC7]) (arguing that the fines violate the Twenty-Seventh Amendment); Solender, *supra* note 24 (describing the same argument made by Representative Massie).

[62] It also fails, as we explain below, because the fines imposed do not vary Representatives' compensation.

[63] U.S. CONST. art. I, § 5, cl. 2.

congressional rule, a parking ticket, or an increase in the federal income tax—does not implicate the accountability concerns that underlie the Twenty-Seventh Amendment.[64]

That "law" takes its technical definition carries an important, but heretofore overlooked, implication: in general, the Amendment may not be used to strike down laws that violate it. Instead, it should be read as providing a default timing rule that is incorporated by any law varying compensation that lacks a similar timing term or that replaces the timing term in a law that purports to vary compensation *before* an election has intervened. This is implied by the Amendment. It does not prevent passage of a law that would violate its terms; instead, it merely prevents that law from taking effect "until an election of Representatives shall have intervened."[65] Unlike the Origination Clause and the bicameralism and presentment requirements, the Twenty-Seventh Amendment imposes its requirement *after* a law has fulfilled the Constitution's procedural requirements. Other limitations on government action, both procedural and substantive—including the Origination Clause, the bicameralism and presentment requirements, the Bill of Attainder Clause,[66] the Emoluments Clause,[67] the First Amendment, and so forth—either state or imply that violations are void from the outset. Not so with the Twenty-Seventh Amendment. It permits enactment of laws that violate it but delays their effect until its timing condition is satisfied.

Two examples illustrate how the Amendment works. Consider first a law that changes members' salaries but that sets no date upon which that change shall take effect. The law is missing a required term: A date after the next election. A straightforward reading of the Amendment does not lead to the conclusion that the law should be struck down, only that the earliest moment at which it may take effect is after the next House election. Moreover, a court would avoid striking it down as unconstitutional because a plausible constitutional explanation is present.[68] That is, the Amendment provides the default term for any statute

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[64] *See* United States v. Hatter, 532 U.S. 557 (2001) (holding that Social Security and Medicare taxes do not violate the Article III guarantee that the salary of federal judges "shall not be diminished during their Continuance in Office").

[65] U.S. CONST. amend. XXVII.

[66] *Id.* art. I, § 9, cl. 3.

[67] *Id.* art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States[.]").

[68] *See, e.g.*, Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499–501, 504 (1979)) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

that omits a provision setting the effective date of the change in compensation. Thus, the change in salary effected by any such law would simply be deferred until immediately after the next election.

Next, consider a bill that explicitly changes members' salaries effective *before* the next election. The Amendment does not prevent that bill from becoming law. So again, a court faces the choice between striking down the law or superseding its timing provision with the Twenty-Seventh Amendment's. The latter option accords both with the text of the Amendment and the avoidance doctrines.[69]

The takeaway from all this is that the Amendment generally cannot be used to strike down laws that vary compensation before an intervening election.[70] An exception to that rule might exist, however, for a law that makes an immediate change to compensation in response to a discrete event such that substituting the Amendment's timing provision for the existing one would entirely frustrate the law's purpose.[71] For example, in 2013 the House Rules Committee proposed a bill that would withhold Congress' pay if members failed to pass a budget by April 15 and release the pay either when they passed a budget or at the end of the current Congress.[72] It is impossible to include the Amendment's timing provision without frustrating the purpose of the bill. If members failed to pass a budget, their pay could not be withheld until after the next election, but by then their salaries would be restored regardless of

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construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). For a thorough discussion of these rules of avoidance see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

[69] One might object that this sounds like the sort of activism—judges rewriting a law according to some set of subjective values—that textually-oriented scholars usually find objectionable. But that criticism finds no purchase here for the simple reason that this substitution is neither subjective nor imposed on a judge's whim. It is, instead, a specific term mandated by the Constitution. Reading the Amendment as providing a default term, therefore, amounts to nothing more unusual than a reiteration of the principle that the Constitution is supreme over statutes.

[70] It would, however, support a claim for injunctive relief to prevent an untimely change in compensation from taking effect until an election has intervened—assuming (which is dubious) that a plaintiff with Article III standing could bring such a lawsuit. Similar types of lawsuits have not gained much traction. *See*, *e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007); Frothingham v. Mellon, 262 U.S. 447 (1923) (all ruling that a taxpayer cannot challenge the constitutionality of a law on the ground that it would make an impermissible use of his taxes).

[71] *See* DeBartolo, 485 U.S. at 575 ("[T]he Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent of Congress*.") (emphasis added).

[72] Carey Vanderborg, *27th Amendment in Constitution Violated By GOP Budget Bill? House To Vote Wednesday*, INT'L BUS. TIMES (Jan. 23, 2013, 11:27 AM), https://www.ibtimes.com/27th-amendment-constitution-violated-gop-budget-bill-house-vote-wednesday-1033836 [https://perma.cc/HJG4-7Z2A].

whether the Congress had passed a budget. Thus, using the Twenty-Seventh Amendment as a source of default language would entirely frustrate Congress's intent. In that limited circumstance the Amendment might be used to strike down a law.

One final observation and implication. As the Ascertainment Clause informs our understanding of the Twenty-Seventh Amendment, so too does the latter inform our understanding of the former. The purpose of the Amendment is to make Congress politically accountable for the salary decisions it makes pursuant to the Clause.[73] It follows from this purpose that Congress may not escape this political accountability by delegating its power (or obligation) to set members' compensation. To delegate compensation-setting authority to any other body conflicts with the text of both provisions, which require an Article I law, and with the purpose of the Amendment because it would relieve Congress of the political accountability that the Amendment creates.[74]

The history of salary laws accords with that understanding. Congress set members' compensation by law for the first 179 years after the states ratified the Constitution.[75] It was not until the Postal Revenue and Salary Act of 1967 that Congress first attempted to delegate its salary-setting authority.[76] The Salary Act empowered a commission to recommend congressional salaries to the President and provided that if the President accepted the salaries, they would take effect unless one House of Congress expressly disapproved of them.[77] Before the Twenty-Seventh Amendment was ratified, that delegation was upheld by a district court on no firmer basis than that the "growing complexity of all governmental functions" made it necessary to accommodate a "flexible approach."[78]

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[73] *See generally* Bernstein, *supra* note 14. James Madison said that the Amendment would prevent changes in compensation from inuring to "the particular benefit of those who are concerned in determining the value of the service." 1 ANNALS OF CONG. 458 (Joseph Gales ed., 1834) (1789).

[74] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 167–70 (1993) (arguing for courts to police delegations in part because they "interfere[] with democratic accountability"); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1512 (2015) (discussing how "delegations erode the accountability of members of Congress" and "the lawmaking procedures of Article I, Section 7.").

[75] *See* Pressler v. Simon, 428 F. Supp. 302, 303–04 (D.D.C. 1976), *vacated sub nom.* Pressler v. Blumenthal, 431 U.S. 169, (1977) (recounting the history of Congressional compensation laws and calling the Postal Revenue and Salary Act and the Adjustment Act "a major break with tradition.").

[76] Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206 § 225, 81 Stat. 613, 642-45 (1967) (codified as amended at 2 U.S.C. § 351).

[77] *Id.*

[78] Pressler v. Simon, 428 F. Supp. at 306. The Supreme Court later summarily affirmed this decision without opinion, but in concurrence, then-Justice Rehnquist noted

That decision cannot be squared with text of the Ascertainment Clause, and it cannot be squared with the subsequently ratified Twenty-Seventh Amendment, which underscores that Congress may not escape political accountability for its compensation decisions.[79]

II. THE MEANING OF "VARYING" AND "COMPENSATION"

We begin with "compensation" because when considering whether and when compensation has been varied, it helps first to exclude whatever is not compensation.

As with "law," the meaning of "compensation" becomes clear when we examine the Twenty-Seventh Amendment in light of the Ascertainment Clause. Because the Twenty-Seventh Amendment imposes a limitation on laws passed under the Ascertainment Clause, "compensation" simply means: Anything included in a law enacted pursuant to that clause. At first this may seem circular, but it is not. At no point in history could the Twenty-Seventh Amendment have pre-existed a law enacted pursuant to the Ascertainment Clause. The first such law was enacted in 1789 while the Twenty-Seventh Amendment was still being debated as the second amendment in the proposed Bill of Rights.[80] Even if the Twenty-Seventh Amendment had been ratified in 1791 with the Bill of Rights, there would already have been a compensation law on the books. Of course, because it was ratified 202 years after its proposal, there were scores of such laws on the books. The words "varying compensation," therefore, assume the pre-existence of a law enacted pursuant to the Ascertainment Clause and must be defined in reference to it. In sum, a law varies compensation when it varies the terms of a previous compensation law.

What does it mean to vary? The history of the Twenty-Seventh Amendment makes clear that that word encompasses both increases and decreases to compensation.[81] The possibility that members of Congress would increase their salaries to enrich themselves was obvious to

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that the affirmance "does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits of the Ascertainment Clause question" because the district court also decided that the plaintiff lacked standing. Pressler v. Blumenthal, 434 U.S. 1028, 1028–29 (1978) (Rehnquist, J., concurring).

[79] Recently, the Supreme Court rejected the same argument that the "complexities of modern society" justify departing from the text, history, and tradition of the Constitution in the context of the Fifth Amendment. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077–78 (2021).

[80] *See* Bernstein, *supra* note 14, at 533 (citing 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 1833–35 (Charlene Bangs Bickford & Helen E. Veit eds., 1986)).

[81] *See id.* at 500–05, 526–27; *see also* Vermeule, *supra* note 23, at 520 ("Self-interest, however, may push in the direction of decreasing salaries as well as in the opposite direction, for in the former case the political benefits of conspicuous self-denial may dominate purely financial losses.").

the Framers. But they were also aware of the practice in Britain, and in the States under the Articles of Confederation, of lowering representatives' wages for political gain and of enacting property requirements that excluded challengers who lacked independent means. The Framers aimed to avoid those problems.[82] On the question of increases or decreases, therefore, the answer is both.

The more difficult question, however, is: *When* does a law vary compensation—when it is enacted or when the change goes into effect? This issue was raised in *Boehner v. Anderson*.[83] The Ethics Reform Act provided automatic annual COLAs, one of which was due to be paid on January 1, 1994.[84] On March 4, 1993, however, Congress passed another law that cancelled the upcoming COLA without an intervening election.[85] The plaintiff argued that the law varied members' compensation as of January 1.[86] The defendants argued that no variance in compensation occurred because the second law merely "extend[ed] the period during which their compensation remain[ed] unchained."[87] The court did not reach the issue because it was improperly raised for the first time on appeal.[88]

For his part, Professor Vermeule argues, as a normative matter, that

> The Twenty-seventh Amendment vesting rule should be that legislators' "compensation" vests when statutory changes are enacted, not when they become effective. This does *not* mean that, once the Congress has enacted a scheduled adjustment, the adjustment may never be blocked, but merely that it may not be blocked after the election of the very Congress in which it will become effective. A statute enacted in 2001 that schedules a COLA for January 4, 2005 may be blocked by a supervening statute at any time before the congressional elections in November 2004.[89]

This is so, he argues, because the Amendment is designed to prevent sitting members of Congress from knowingly adjusting their own salaries.[90] His argument is normatively compelling and aligns with the Amendment's originally intended purpose.[91] Consider the example he gives:

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[82] Bernstein, *supra* note 14, at 500–05, 526–27.
[83] 30 F.3d at 162–63.
[84] *Id.* at 162.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 163.
[89] Vermeule, *supra* note 23, at 521 (emphasis in original).
[90] *Id.*
[91] *See supra* note 73.

In Year 1, Congress enacts a future decrease, scheduled to go into effect on January 4 of Year 3, the beginning of the following Congress; there is an intervening election in Year 2; and on the afternoon of January 3, the new Congress enacts, as its first measure, a law blocking the next day's decrease. On a "veil of ignorance" approach, this should be held a straightforward violation of the Amendment. Legislators voting on the January 3 statute presumptively suffer from the very decisionmaking distortion that provoked the Amendment; the new Congress has, in effect, knowingly adjusted its own salary.[92]

But does this argument align with the text? The text separates "varying" from "taking effect" suggesting that a law may vary compensation without taking effect. We find further support for this reading if we, again, view the Twenty-Seventh Amendment in light of the Ascertainment Clause.[93] The Twenty-Seventh Amendment was intended to modify the Ascertainment Clause by imposing a timing condition on laws enacted under it.[94] If compensation means the provisions of any such law, then "varying" means any increase or decrease to the provisions of that law. Thus, the most natural reading of the Amendment is that a law varies compensation whenever a new law changes a preexisting compensation law—that is, upon enactment.

That conclusion is bolstered by comparing the Twenty-Seventh Amendment to the Presidential Compensation Clause[95] and the Judicial Compensation Clause.[96] The first fixes the president's compensation during his four-year term, and the second provides that judges' salaries cannot be decreased during their service. Both explicitly prohibit certain changes in compensation during a period of time. The Twenty-Seventh Amendment does not. It allows changes to occur but stops them from taking effect until an election has intervened.

Reading the Amendment this way reveals that both parties in *Boehner* were wrong. The law blocking the COLA *did* vary compensation because it changed the terms of a prior compensation law, but it complied with the Amendment's timing condition because the variance occurred the moment the law was enacted. This reading also provides a second way to resolve the debate over House rules that deduct fines from

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[92] Vermeule, *supra* note 23, at 520–21.

[93] *See supra* text accompanying notes 39–41, 49–51.

[94] *See* sources cited *supra* note 40.

[95] U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . . .").

[96] *Id.* art. III, § 1 ("The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

Representatives' salaries if they fail to use metal detectors.[97] Not only are the rules not "laws," they also do not vary compensation because they do not change the terms of previous compensation laws. They are fines for misconduct, as are parking tickets. Neither one changes a member's salary.

III. THE MEANING OF "SHALL TAKE EFFECT" AND "SHALL HAVE INTERVENED"

The previous conclusion—that a law varies compensation when it is enacted—largely resolves the question of what "shall take effect" means. The Amendment describes two discrete actions, "varying" and "taking effect." If a law varies compensation when it is enacted regardless of whether members have seen a change to their paychecks, then "taking effect" must refer to that moment when members are entitled to receive a quantifiable change to their compensation. The court in *Boehner* adopted this reading, equating "taking effect" with the "operation" of a law varying compensation.[98] The court said that this operation occurs "at the earliest [when] the new Congress has been seated."[99]

That assumes, however, that the words "an election . . . shall have intervened" mean not only that an election has occurred, but also that the new members have taken their seats. An alternative reading of the phrase "shall have intervened" might mean simply that an election has occurred. It turns out that the *Boehner* court's assumption aligns with the best reading of the Amendment for three reasons. First, before the age of trains, automobiles, and planes, Congress adjourned several months before each election and did not return until several months after them in order to accommodate the long travel times to the furthest reaches of the Republic.[100] Second, James Madison—author of the Amendment—understood "an election . . . shall have intervened" to mean "a change in the Legislature."[101] He used the latter phrase in a speech describing the Amendment even while presenting the text as currently written, suggesting that he viewed those two phrases interchangeably.[102] Finally, the alternative—that an election intervenes the moment it concludes but before new members take their seats—renders

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[97] *See supra* text accompanying notes 28–31.

[98] *Boehner*, 30 F.3d at 162.

[99] *Id.*

[100] *See* UNITED STATES HOUSE OF REPRESENTATIVES, SESSION DATES OF CONGRESS, https://history.house.gov/Institution/Session-Dates/1-9/ [https://perma.cc/DC87-PC56] (showing the adjournment dates of all Congresses).

[101] 1 ANNALS OF CONG., *supra* note 73, at 458 (Madison: "I have gone, therefore, so far as to fix it, that no law, varying the compensation, shall operate until there is a change in the Legislature; in which case it cannot be for the particular benefit of those who are concerned in determining the value of the service.").

[102] *See id.*

nonsensical his and others' descriptions of the Amendment's purpose and effect.

James Madison's apparently casual substitution of "change in the Legislature" for "an election . . . shall have intervened" shows that he, at least, viewed the Amendment as delaying the effect of laws varying compensation until new members are seated. The legislature, after all, has not changed until newly elected members take their seats. Unfortunately, Madison's statement is one of only a very few that illuminates the Framer's understanding of the Amendment. When, on August 14, 1789, the Committee of the Whole House turned its attention to it, the debate was exceedingly brief.[103] Only four members discussed it, one of whom was Madison who responded to a comment from another member that was not related to the Amendment.[104] Of the two who commented on the Amendment, one had just three sentences to say about it; the other had but two. Theodore Sedgwick of Massachusetts, seems not to have fully understood the Amendment because his argument—that it might be used by "designing men" to gain popularity and exclude poor but meritorious challengers by lowering their own salaries—is a critique better suited to the Ascertainment Clause itself than to the Amendment.[105] Jacob Vining of Delaware supported the Amendment because it would avoid "the disagreeable sensation, occasioned by leaving it in the breast of any man to set a value upon his own work . . . ."[106]

None of that brief debate speaks directly to the meaning of "intervene," but it does reinforce our understanding that the Framers intended the Amendment to prevent sitting members of Congress from enriching themselves or gaining a political advantage by controlling their own salaries.[107] Even Representative Sedgwick's poorly aimed criticism supports this view because the Amendment attempts to solve the problems he identified, which flow from the Ascertainment Clause. If, as seems clear, the Framers understood the Amendment as preventing sitting members from exploiting changes to their compensation, then "an election . . . shall have intervened" must mean that a new Congress has been seated. If it does not, then for that brief period of time between an

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[103] *Id.* at 526–27 (quoting Debates in the House of Representatives (Aug. 14, 1789), *in* The Congressional Register, Aug. 14, 1789, *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 40, at 149–50) (reprinting the entire "listless and desultory discussion").

[104] *See id.* at 527.

[105] *Id.* at 526–27. The problems he identifies are created by the Ascertainment Clause, not the Amendment. The Amendment attempts to solve them by ensuring that no Representative who votes for a change in compensation can know for certain whether he or she will remain in Congress when it goes into effect.

[106] *Id.* at 527.

[107] *Id.* at 500–05, 526–27.

election and a "change" in the legislature,[108] sitting members may change their own compensation and benefit from it. They might even lower compensation so that successful challengers who lack independent means might have to relinquish their newly won seats.

CONCLUSION

The Twenty-Seventh Amendment sparks more debates than its simple text suggests it should, and few courts or scholars have spent much time parsing its text to help resolve those debates. This Essay aims to do that by interpreting the Amendment according to its text and history. That interpretation leads to the following conclusions: "law" has its technical Article I definition (a bill passed by both houses and signed by the president), "varying compensation" means any increase or decrease to the terms of pre-existing laws enacted pursuant to the Ascertainment Clause, "shall take effect" refers to the moment when members are entitled to receive a quantifiable change to their compensation, and "an election . . . shall have intervened" means that a new Congress has been seated. The best reading of the Amendment views it as a narrow provision that sets a timing condition on the operation of laws varying members' compensation; it does not apply to other government conduct such as House rules that deduct fines from members' salaries for misconduct. It does, however, inform our understanding of the Ascertainment Clause as prohibiting Congress from delegating its power to set compensation to any other body. The Amendment does not prohibit the passage of any compensation laws. Rather, it simply delays laws varying compensation from taking effect until an intervening House election has occurred. Accordingly, the Amendment cannot be used to strike down laws that do not comply with its timing requirement except in rare circumstances. Instead, the law is best read as providing a default timing term to laws varying compensation that either lack such a term or include a term that does not comply with the Amendment. One or more of those conclusions resolves the existing debates about the Twenty-Seventh Amendment and, hopefully, will do the same for any debates that arise in the future.

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[108] *Id.* at 458.