"IN TOTO" AND "*FOR EVER*": WHY STATES CANNOT RESCIND RATIFICATION OF CONSTITUTIONAL AMENDMENTS

INTRODUCTION

The Founding era is often idealized by a telling of history that portrays the Founders as flawless. This framing, however, undermines the Founders' recognition of their own shortcomings—the Founders did not purport to be perfect.[1] Far from viewing the Constitution they drafted as flawless and immutable, the Founders aimed to create a "*more* perfect union."[2] And Article V arose from their effort to help future generations "go on . . . perfecting" the document.[3]

Article V lays out two steps to the amendment process: proposal and ratification. *First*, Article V contemplates two methods of proposing the text of a potential amendment: (1) proposal by two-thirds of both houses of Congress or (2) proposal by a convention called for by two-thirds of the states. *Second*, Article V provides for two methods of ratification: (1) ratification by the legislatures of three-fourths of the states or (2) ratification by conventions of three-fourths of the states.[4] Rescission involves this second step of the process: ratification.

Today, this carefully crafted amendment process is eroding.[5] The withering of this process is clearly exemplified by the Equal Rights Amendment (ERA). The ERA is broadly supported by Americans—nearly 80% favor the ERA.[6] And, the requisite thirty-eight states have ratified the

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[1] *See* Gloria Steinem, *Foreword* to JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR THE EQUAL RIGHTS AMENDMENT IS NOW, at xiv (2015) ("Indeed, [the Founders] may have recognized their own imperfections better than we do."). As one delegate at the North Carolina ratifying convention remarked, most constitution-writers "thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diffidence of their capacities." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed., 1901) 176 (James Iredell in the North Carolina ratifying convention).

[2] U.S. CONST. pmbl. (emphasis added).

[3] Letter From Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-41-02-0255.

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

[5] In the past half-century, the Archivist of the United States has only once certified and published a constitutional amendment. U.S. CONST. art. V; U.S. CONST. amend. XXVII; *see also* 1 U.S.C. § 106(b) ("Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published….").

[6] Juliana Menasce Horowitz & Ruth Igielnik, *A Century After Women Gained the Right to Vote, Majority of Americans See Work to Do on Gender Equality*, PEW RESEARCH CENTER, July 7, 2020 ("About eight-in-ten U.S. adults (78%), including majorities of men and women and Republicans and

ERA. However, the United States Archivist refuses to carry out his statutory duty and issue a proclamation certifying the ERA as part of the Constitution.[7] Nevada and Illinois have jointly sued the Archivist to compel him to issue this proclamation.[8] Among the many issues raised by the litigation is whether the Archivist must remove from his list of ratifying states the five states that have purported to rescind their ratifications of the ERA.[9] This essay will show that permitting state rescission violates the text, structure, original intent, and consistent historical understanding of Article V.

I. THE TEXT

The text of Article V does not grant the power of rescission to the states. The provision lays out the amendment process in detail and explicitly delineates the powers granted to Congress and to the states.[10] In doing so, Article V crafts a careful balance of power between the states and the federal government, the "two loci of power" in the amendment process.[11] As the Supreme Court has noted, it is "an instrument drawn with . . . meticulous care."[12] Indeed, one Founder empathized that Article V created a system that would result in "little confusion."[13]

In its plain text, Article V speaks of ratification solely in positive terms: it only contemplates "*when*" a state ratifies an amendment.[14] Nowhere does

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Democrats alike, say they at least somewhat favor adding the Equal Rights Amendment (ERA) to the U.S. Constitution.").

[7] 1 U.S.C. § 106b.

[8] Virginia originally led the litigation efforts but, in early 2022, Virginia withdrew from the lawsuit. Justin Jouvenal, Laura Vozzella & Katie Mettler, *Virginia's New AG Pulls State from Effort to Recognize ERA Ratification*, WASH. POST*,* Feb. 18, 2022. *See* Illinois v. Ferriero, No. 21-5096 (D.D.C. June 16, 2022).

[9] Virginia v. Ferriero, 525 F.Supp.3d 36, 55 (D.D.C. 2021).

[10] U.S. CONST., art. V. ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.").

[11] Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issue,* 127 U. PA. L. REV. 494, 502 (1978).

[12] United States v. Sprague, 282 U.S. 716, 732 (1931).

[13] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (Jonathan Elliot, ed., 2d ed. 1836) (Quoting James Iredell in the North Carolina ratifying convention).

[14] *See* U.S. CONST. art. V. ("*when* ratified by the legislatures") (emphasis added).

the text of the Article discuss rejection of an amendment or rescission of ratification.[15] If a right to rescind ratification exists, it must derive from the penumbras of Article V.

But the Supreme Court has specifically warned against searching beyond the text when interpreting Article V. The Court confirmed that a "mere reading demonstrates" that "article 5 is clear in statement and in meaning . . . and calls for no resort to rules of construction."[16] Acknowledging the importance of the Founders' careful balance, the Supreme Court cautioned against any attempts by the "courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."[17] Article V leaves no room for doubt about the powers of the states and the federal government in both steps of the amendment process—and rescission is not one of those powers.

Like Article V, the statutory framework that Congress enacted to govern the amendment process does not set forth a provision for rescinding a filed ratification. In 1 U.S.C. § 106b, Congress directed the Archivist to "cause [an] amendment to be published . . ." "[w]henever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution . . . ."[18] The statute's text never contemplates states sending the Archivist notices of rescission—only notices of adoption. Likewise, the 1818 predecessor statute to 1 U.S.C. § 106b required the Secretary of State,[19] "whenever official notice shall have been received, at the Department of State, that any amendment . . . proposed to the constitution of the United States, has been adopted . . . to cause the said amendment to be published . . . ."[20] Neither statute calls for the Archivist to be notified of a State's failure to ratify, nor is there any provision for rescinding a filed ratification.

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[15] Coleman v. Miller, 307 U.S. 433, 450 (1939) ("Article V, speaking solely of ratification, contains no provision as to rejection.").

[16] *Sprague*, 282 U.S. at 730.

[17] Hawke v. Smith, 253 U.S. 221, 227 (1920).

[18] 1 U.S.C. § 106b.

[19] Though the process for publishing constitutional amendments has remained largely the same throughout American history, the official responsible has changed. Originally, the Secretary of State was responsible for promulgation. *See* Act of Apr. 20, 1818, Pub. L. No. 15-80, 3 Stat. 439. Then, the obligation was transferred to the General Services Administration as part of a large governmental reorganization plan. *See* Reorganization Plan No. 20 of 1950, 15 Fed. Reg. 3178 (May 24, 1950); *see also* Act of Oct. 31, 1951, Pub. L. No. 84-248, 65 Stat. 710. Finally, in 1984, Congress created the National Archives and the National Archivist became responsible for promulgations. *See* Act of Oct. 19, 1984, Pub. L. No. 98-497, 98 Stat. 2291.

[20] *See* 3 Stat. at 439.

Both the constitutional and statutory text are clear: neither the Founders nor Congress created an avenue for state rescission.

II. THE STRUCTURE AND ORIGINAL INTENT

Rescission also violates the logic and structure of the amendment process. The Founders understood ratification of the Constitution as a final act, regardless of the laws or practices of each individual state which may permit rescission of certain legislative acts. The same logic applies to the ratification of amendments. This is because ratification is not a state legislative act, it is a federal one. When a state acts on a federal constitutional amendment, it is bound by the constraints of Article V. Rescission is thus antithetical to the original intent of the Founders and the structure of the amendment process.

The Founders believed that ratification was absolute and irrevocable. When the Founders drafted the Constitution, they created it not only for themselves but for "[p]osterity."[21] That is, the Constitution was designed to be transmitted, with amendments, from generation to generation. It follows that, once adopted, the Constitution could not be un-adopted by a state. During the ratification debates, James Madison affirmed this point to Alexander Hamilton. He wrote "[t]he Constitution requires an adoption *in toto,* and *for ever.*"[22] He warned Hamilton that "[a]n adoption [of the Constitution] for a limited time would be . . . defective" and concluded, "[i]n short any *condition* whatever must viciate the ratification."[23]

Madison was not alone in this belief. During the ratification debates, George Washington wrote to the Marquis de Lafayette noting approvingly that both Thomas Jefferson and Lafayette shared his "wise" opinion that the Constitution should be adopted "in toto."[24] There was a practical reason for this approach. The Founders sought to create a document which would "endure for ages to come," rather than one that could be up-ended constantly.[25] Allowing the states to ping-pong back and forth between ratification and rescission of the Constitution would yield tremendous uncertainty, something the young nation could not afford.

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[21] U.S. CONST. pmbl.

[22] Letter From James Madison to Alexander Hamilton, (July 20, 1788), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0086

[23] *Id.*

[24] Letter From George Washington to the Marquis de Lafayette (April 28-May 1, 1788), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/04-06-02-0211.

[25] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

The same logic for adopting the Constitution "*in toto*" applies to the ratification process for constitutional amendments.[26] Permitting rescission amounts to allowing the conditional ratification of an amendment, which is the exact scenario that Madison, Washington, Lafayette, and Jefferson explicitly rejected.[27] Notably, no state even attempted rescission during the Founding Era.[28] This suggests that, to the founding generation, ratifications—whether of the Constitution itself or its amendments—were irrevocable. As Professor Lawrence Tribe noted, "at the time article V was put in the Constitution" it was understood that "ratification must be without strings attached."[29]

A state's internal practices and laws cannot alter this arrangement because state legislative action is distinct from state ratification of a federal constitutional amendment. Since 1789, the Supreme Court has been clear: when a state ratifies an amendment, it is not carrying out a normal legislative function. In *Hollingsworth v. Virginia*,[30] the Supreme Court agreed with Virginia's argument that "[a]n amendment to the constitution, and the repeal of a law, are not, manifestly on the same footing."[31] Indeed, even though the casual observer may find similarities between a state legislature voting on a ratification resolution and on a traditional piece of legislation, the ratification process is "unconnected with the ordinary business of legislation."[32] Almost a century and a half later, in *Hawke v. Smith*, the Supreme Court reaffirmed this, writing that "ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word."[33]

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[26] *See* Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977) *in Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 7–27, 19 (1978) ("we see nothing to suggest that Madison's reasoning should not be applied with equal force to proposed constitutional amendments") [hereinafter *Harmon Memorandum*].

[27] Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 121 (1979).

[28] JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, § 582 (Chicago, Callaghan and Company 1887), https://hdl.handle.net/2027/hvd.32044090131491.

[29] *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 43 (1978) (testimony of Professor Lawrence Tribe) [hereinafter *1978 Hearing*].

[30] In *Hollingsworth,* the Supreme Court issued its decision, agreeing with Virginia, without describing its reasoning. Hollingsworth v. State of Virginia, 3 U.S. 378 (1798). However, in subsequent cases, the Court has treated the *Hollingsworth* decision as endorsing Virginia's arguments. *See* Hawke v. Smith, 253 U.S. 221, 229-30 (1920).

[31] *Hollingsworth*, 3 U.S. at 380-81.

[32] *Id.* at 381.

[33] *Hawke*, 253 U.S. at 229.

Traditional constraints on the typical state legislation process may not interfere with the ratification process for federal constitutional amendments because ratification is a federal, rather than a state, action. Upon ratifying the Constitution, the states "surrendered to the general government" the power to amend the "supreme law of the land."[34] Then, Article V returned specific powers to the states, including in the ratification process. It is Article V "alone [that] confer[s] the power to amend and determine[s] the manner in which that power could be exercised."[35] Therefore, the states act *only* under "authority from the federal Constitution"[36] and their power to amend the Constitution "exists *only* by virtue of a special grant in that Constitution."[37] Under Article V, the ratification of state legislatures "shall be taken as a decisive expression of the people's will and be binding on all."[38] Once a state has acted in the affirmative, it has completed its role in the amendment process and cannot then withdraw its consent.[39]

Throughout the Founding period, Congress reaffirmed this understanding of the final character of ratification. For example, in the three pre-Civil War congressional resolutions proposing amendments to the states, Congress wrote only in positive terms about ratification.[40] Arguing in favor of the Bill of Rights before the First Congress, Madison asserted that the ten amendments were necessary "to satisfy the public mind that their liberties will be perpetual."[41] The Founders believed that amendments, like the

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[34] *Id.* at 226.

[35] Coleman v. Miller, 307 U.S. 433, 438 (1939).

[36] *Hawke*, 253 U.S. at 230 (emphasis added). *See also* Leser v. Garnett, 258 U.S. 130, 137 (1922) ("the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution").

[37] JAMESON, *supra* note 28, § 583.

[38] Dillon v. Gloss, 256 U.S. 368, 374 (1921).

[39] A state can, however, reject and then approve an amendment. Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 120 (1979) ("If ratification is defined exclusively as an affirmative pronouncement, the article V power to ratify cannot be exhausted by an act other than an assent to the proposal; the problem of post-ratification actions is not raised since ratification does not occur until the state legislature votes affirmatively. Thus, rejection of a proposed amendment has no constitutional significance.")

[40] The ten amendments which now make up the Bill of Rights were proposed in a single congressional resolution. Joint Resolution Proposing Twelve Amendments to the Constitution, 1st Cong.,1 Stat. 97 (1789) (the amendments "when ratified by three fourths of the [state] legislatures" will be "valid to all intents and purposes, as part of said Constitution"). The resolutions for the Eleventh and Twelfth Amendment contain similar language. Joint Resolution Proposing the Eleventh Amendment to the Constitution, 3d Cong., 1 Stat. 402 (1794) ("when ratified by three-fourths of the said legislatures" the Eleventh Amendment "shall be valid as part of the constitution"); Joint Resolution Proposing the Twelfth Amendment to the Constitution, 8th Cong., 2 Stat. 306 (1804) ("when ratified by three fourths of the legislatures of the several states, [the Twelfth Amendment] shall be valid to all intents and purposes as part of the said constitution").

[41] 1 ANNALS OF CONG. 449 (1789) (Joseph Gales ed., 1834).

original text, were for "posterity."[42] Congress in the early years of the republic was clear: ratifications are "*for ever*."[43]

III. CONSISTENT HISTORICAL UNDERSTANDING

Given the Founders' clear intent and careful wording of Article V, it is unsurprising that the Legislative and Executive Branches have consistently rejected state rescission of ratification throughout the nation's history. Since the Civil War, several states have attempted to rescind their ratifications of constitutional amendments including the Fourteenth, Fifteenth, and Nineteenth Amendments. Each time, Congress rebuffed these attempts. In 1978, the Office of Legal Counsel (OLC) affirmed: "an examination of the history of ratification of the Constitution and amendment thereto demonstrates uniform applications and acceptance of this position . . . ratification must be unconditional and irrevocable."[44]

A. The Reconstruction Amendments

The question of rescission was first put to the test in 1868. Both New Jersey and Ohio ratified the Fourteenth Amendment and then attempted to rescind their ratifications.[45] But Congress did not entertain either attempt. Upon receipt of New Jersey's resolution in March 1868 "purporting to withdraw the assent of said State to the constitutional amendment," the United States House of Representatives passed a resolution calling New Jersey's act "disrespectful to the House and scandalous in character."[46]

In the following months, ratifications continued to come in from state legislatures around the nation. By July 1868, Secretary of State William H. Seward, still responsible for promulgating new amendments, found himself in a bind.[47] Based on the number of ratifications he had received, the Fourteenth Amendment had reached the requisite three-fourths threshold and he was statutorily required to certify it as part of the Constitution. However, if he discounted the ratifications of New Jersey and Ohio, the

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[42] U.S. CONST, pmbl.

[43] Letter from James Madison to Alexander Hamilton (July 20, 1788), *in* THE PAPERS OF ALEXANDER HAMILTON DIGITAL ED., 184 (Harold C. Syrett ed., 2011), https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0086

[44] *Harmon Memorandum*, *supra* note 26, at 19.

[45] Coleman v. Miller, 307 U.S. 433, 448 (1939).

[46] CONG. GLOBE, 40th Cong., 2d Sess. 2226 (1868).

[47] In 1868, the Secretary of State remained responsible for the promulgation of amendments. *See supra* note 19.

ratification of one more state was still required to pass the Amendment.[48] Seward asked Congress "if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding [the purported rescissions]."[49] In response, both houses of Congress passed a concurrent resolution and "declared [the Fourteenth Amendment] to be a part of the Constitution."[50] Congress included both New Jersey and Ohio in its list of states that had ratified the amendment.[51] With Congress's blessing, Seward proceeded to certify the amendment as "valid to all intents and purposes as a part of the Constitution."[52] In his certification, Seward counted both New Jersey and Ohio among the states who "adopted" the amendment.[53]

Ignoring the cautionary example set by her sister states, New York tried her hand at rescission with the Fifteenth Amendment. After ratifying the Fifteenth Amendment, New York's legislature passed a resolution "claiming to withdraw the said ratification."[54] The Secretary of State treated this purported rescission as legally null.[55] Following the practice established during ratification of the Fourteenth Amendment, the Secretary of State included New York as a ratifying state in his certification of the Fifteenth Amendment.[56] As the OLC observed, the resolution "tends to indicate that the Secretary of State did not recognize the withdrawal of New York to have been effective."[57] Once again, the Secretary of State, taking direction from Congress, rebuffed a state's effort to rescind ratification.[58]

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[48] Joint Resolution Proposing the Fourteenth Amendment to the Constitution, 39th Cong., 15 Stat. 706, 707 (1868).

[49] *Id.*

[50] CONG. GLOBE., 40th Cong., 2d Sess. 4295-96 (1868); *see also* 15 Stat. 709, 710 (1868) (declaring the ratification of the Fourteenth Amendment).

[51] CONG. GLOBE., 40th Cong., 2d Sess. 4295 (1868). ("Whereas the Legislatures of the States of… New Jersey… [and] Ohio… have ratified the fourteenth article of amendment to the Constitution of the United States").

[52] In the time between Congress's concurrent resolution and Seward's proclamation, Congress received Georgia's official notice of ratification, which would have been enough to secure the three-quarters requirement without counting either New Jersey or Ohio. *Harmon Memorandum*, *supra* note 26, at 21. However, when *Congress* passed its resolution, it was still waiting to receive official confirmation of Georgia's ratification. *Id.* at 20-21; *see also* 15 Stat. 708, 711 (1868) (certifying the ratification of the Fourteenth Amendment).

[53] 15 Stat. at 710-711.

[54] CONG. GLOBE, 41st Cong., 2nd Sess. 2298 (1870).

[55] *Id.*

[56] Given that the amendment could have been ratified without New York's assent, the Secretary of State's decision to include New York served as an even more pointed rebuke of rescission. *Id.*

[57] *Harmon Memorandum*, *supra* note 26, at 22.

[58] After the Secretary of State's resolution was read on the House floor, one congressman argued that New York had not ratified the amendment. In response, another quipped, "We think she has." The *Congressional Globe* notes that this prompted laughter and the subject was not raised again. CONG. GLOBE., 41st Cong., 2nd Sess. 2298 (1870). The Supreme Court, in dicta, declined to question

B. Post-Reconstruction

Tennessee became the next state to attempt rescission. Only thirteen days after ratifying the Nineteenth Amendment in 1920 and five days after the Secretary of State certified the amendment as part of the Constitution, Tennessee sought to rescind its ratification.[59] Following the practice established a half-century prior by the Legislative and Executive Branches, the Secretary of State declined to recognize Tennessee's belated rescission and did not revise his certification of the Nineteenth Amendment.[60] Tennessee's ratification was necessary to push the amendment over the three-quarters threshold—and to secure women's right to vote.[61] The United States Supreme Court then affirmed that the Nineteenth Amendment was properly ratified and reminded the states that while their legislatures "had power to adopt the resolutions of ratification," once these resolutions were received by the Secretary of State, they were "conclusive upon him, and, being certified to by his proclamation, [were] conclusive upon the courts."[62] As the history of the Fourteenth, Fifteenth, and Nineteenth Amendments shows, various states have tried rescission, but, Congress has rejected their attempts at every turn.

By the end of the nineteenth century, constitutional scholars viewed the question of rescission as resolved. Writing in 1887, John Jameson asserted that Congress had settled any doubt on the question of rescission when it "declared by resolution that [New Jersey and Ohio] were to be counted among the ratifying States" for the Fourteenth Amendment.[63] Jameson reflected the prevailing view among legal scholars.[64] The American

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Congress's determination to include the rescinding states in the ratification certificates for the Fourteenth and Fifteenth Amendments, writing that "[t]he action of Congress upon the subject [of amendments] cannot be inquired into." White v. Hart, 80 U.S. 646, 649 (1871).

[59] On August 18th, 1920, Tennessee ratified the Nineteenth Amendment. On August 26th, 1920, the Secretary of State certified that the Amendment had been adopted by the requisite number of states. On August 31, Tennessee attempted to rescind its ratification. *Harmon Memorandum*, *supra* note 26, at 22.

[60] *Id.* at 23; Joint Resolution Proposing the Nineteenth Amendment to the Constitution, 66th Cong. 41 Stat. 1821, 1823 (1920).

[61] In 1920, there were 48 states thus 36 states were necessary for ratification. The Secretary of State's resolution contains exactly 36 states. *See* "1920 Fast Facts," CENSUS BUREAU, (last visited December 9, 2021), https://www.census.gov/history/www/through_the_decades/fast_facts/1920_fast_facts.html.

[62] Leser v. Garnett, 258 U.S. 130, 137 (1922).

[63] JAMESON, *supra* note 28, § 584, at 633.

[64] *See* BURDICK, CHARLES & FRANCIS MARION BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT, § 20 (1922), https://link.gale.com/apps/doc/F0153219359/MOML?u=virginia_law&sid=bookmark-MOML&xid=b0198b05&pg=58. ("the act of ratification is final in each case"); COOLEY, THOMAS, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 203-04 (1880),

Historical Association, in its 1896 *Annual Report to Congress*, wrote, "it would seem that practice has decided that a State having once given its consent [to an amendment] the question is closed and it can not recall its action."[65]

C. The Wadsworth-Garrett Amendment

Facing this mountain of textual, historical, and scholarly opposition, supporters of rescission needed a new strategy. In 1924 Senator James Wadsworth of New York and Congressman Finis Garrett of Tennessee proposed a constitutional amendment to allow any state to "change its vote" on an amendment up until its ratification by three-quarters of the states.[66] However, both sponsors acknowledged that rescission would only be permissible if Article V was amended. Speaking at length about his proposal on the House floor, Congressman Garrett conceded that "it may be said—and I think it is generally regarded to be—the law that a State may reconsider and change a rejection, but may not reconsider and change a ratification."[67] Addressing the Senate, Senator Wadsworth concurred:

> It is apparent that under Article V, as now drawn, no State can change its vote from the affirmative to the negative in the matter of a constitutional amendment. Once ratified by a State, that State can not change, even though it does so before a sufficient number of States have ratified so as to insert the amendment in the Constitution itself. Tennessee tried to change [it's ratification of the Nineteenth Amendment]. It can not be done under Article V.[68]

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https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1048&context=books (failing to conclusively determine the matter but noting "in a somewhat analogous case, it has been repeatedly decided that consent once given is given finally"); W.F. Dodd, *Amending the Federal Constitution* 30 YALE L.J. 321, 346 (1921) ("Jameson takes the view, and the view is incontrovertible, that a state, once having ratified, may not withdraw that ratification….The function of ratification seems to be one which, when once done, is fully completed, and leaves no power whatever in the hands of the state legislature.").

[65] AM. HIST. ASS., ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, H.R. DOC. NO. 54-353 at 300 (1896), https://heinonline.org/HOL/Page?collection=usccsset&handle=hein.usccsset/usconset49666&id=1&men_tab=srchresults.

[66] Congressman Garrett had also submitted the same amendment in the prior Congress. 66 CONG. REC. 2152 (1925).

[67] *Id.* at 2159.

[68] 65 CONG. REC. 4475, 4492 (1924).

Despite their efforts, the Wadsworth-Garrett Amendment never received a vote in either house.[69] The Wadsworth-Garrett Amendment may have been a nod by rescission's supporters to the reality that Article V forbade such state action. Rarely is legislative history so clear: even rescission's most passionate supporters yielded to the reality that rescission is proscribed under Article V.

IV. RESCISSION AND THE EQUAL RIGHTS AMENDMENT

Fifty years later, the ERA ushered the question of rescission to the forefront once again when five states—Idaho, Kentucky, Nebraska, South Dakota, and Tennessee—purported to rescind their ratifications of the Amendment.[70] There is no reason to treat these rescissions any differently than the rescissions rejected in decades prior. The ongoing litigation considers two distinct issues: (1) the validity of the Congressionally imposed time limit for ratification and (2) the validity of ratification rescissions.[71] The initial ratifications of the five states purporting to rescind should be counted towards the thirty-eight required for ratification of the ERA.

A. A History of the ERA

Women's rights advocates have lobbied for the adoption of the ERA since 1923. Indeed, they succeeded in introducing some version of it in each session of Congress between 1923 and 1972.[72] In 1972, Congress finally proposed the ERA to the states.[73] The operative words of the amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[74] Additionally, in the preamble to the ERA resolution, Congress stated that the Amendment "shall be valid to all intents and purposes as part of the Constitution when ratified

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[69] *Harmon Memorandum*, *supra* note 26, at 23.

[70] Nebraska purported to rescind in 1973, Tennessee in 1974, Idaho in 1977, Kentucky in 1978, and South Dakota in 1979. *Equal Rights Amendment – Proposed March 22, 1972: List of State Ratification Actions*, NAT'L ARCHIVES, (last visited December 9, 2021), https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf. [hereinafter *List of State Ratifications*].

[71] Plaintiff's Motion for Summary Judgement, Virginia v. Ferriero, 525 F.Supp.3d 36 (D.D.C. 2021) (No. 1:20-cv-00242).

[72] Melissa Murray, *The Equal Rights Amendment: A Century in the Making Symposium Foreword*, 43 HARBINGER 91, 93–94 (2019).

[73] *Id.* at 95.

[74] The rest of the amendment reads: "Sec. 2 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Sec. 3. This amendment shall take effect two years after the date of ratification." H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."[75]

At first, the Amendment received wide-spread support. Both political parties supported the ERA as part of their political platforms.[76] Within a year, the Amendment received endorsements from twenty-two of the required thirty-eight states.[77] However, the momentum behind the amendment waned, and the pace of ratifications slowed to a trickle.[78] Between 1973 and 1978, four states voted to rescind their ratifications.[79] By 1978, the end of Congress's seven-year timeframe, only thirty-five states, including the four who attempted to rescind, had ratified the amendment.[80] Congress then extended its deadline by three years and three months.[81] In the next three years, the ERA failed to receive additional ratifications[82] and South Dakota joined the "reverse bandwagon of rescissions."[83] After the second congressional deadline passed, many ERA supporters assumed the measure was dead.[84]

Forty years after the congressional deadline, in the wake of #MeToo and a revived feminist movement, the ERA received renewed support.[85] Nevada ratified it in 2017, Illinois in 2018, and Virginia—the thirty-eighth and last state required—in 2020.[86] Though the ERA has now completed both steps of the Article V amendment process—Congressional proposal and ratification by three-fourths of the states—the Archivist of the United States

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[75] *Id.*

[76] *1976 Republican Platform: Equal Rights and Ending Discrimination*, THE PRESIDENT FORD LIBRARY & MUSEUM (last visited December 29, 2021) https://www.fordlibrarymuseum.gov/library/document/platform/rights.htm; *1976 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT, UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, (last visited December 29, 2021) https://www.presidency.ucsb.edu/documents/1976-democratic-party-platform.

[77] Murray, *supra* note 72, at 96.

[78] *Id.* at 96.

[79] These four states are Idaho, Kentucky, Nebraska, and Tennessee. *List of State Ratifications*, *supra* note 70.

[80] *Id.*

[81] Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 919 (1979).

[82] *List of State Ratifications, supra* note 70.

[83] South Dakota's rescission was distinct. South Dakota would only "withdraw[] its ratification" if the amendment failed to be ratified by three-fourths of the states by the original congressional deadline.125 CONG. REC. 4862 (1979); *1978 Hearing*, *supra* note 29, at 44 (testimony of Prof. Lawrence Tribe).

[84] Virginia v. Ferriero, 525 F. Supp. 3d 36, 43 (D.D.C. 2021).

[85]John F. Kowal, *The Equal Rights Amendment's Revival: Questions for Congress, the Courts, and the American People*, 43 HARBINGER 141, 145 (2019).

[86] *List of State Ratifications, supra* note 70.

has refused to publish it as part of the Constitution.[87] Illinois and Nevada, two of the last three states to ratify the amendment, are currently seeking mandamus relief to compel the Archivist to promulgate the amendment.[88] They argue that Article V did not empower Congress to impose extra-textual constraints on states ratifications; that is, by empowering Congress to "propose" amendments and select one of two "mode[s] of ratification," Article V did not empower Congress to place additional constraints on state ratification.[89]

B. The Question of Rescission as Applied to the ERA

The efforts of five states to rescind their ratifications of the ERA are no different than prior rescission attempts—all are equally invalid. This fact has been recognized, implicitly or explicitly, by the Department of Justice, the Archivist and, in some cases, by the states themselves.

For over forty years, the Department of Justice (DOJ) has maintained the position that rescissions are invalid. When Congress debated extending the ERA's ratification deadline in 1978, the OLC provided extensive written and oral testimony on the issue of rescission. The OLC was clear:[90]

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[87] Press Release, Nat'l Archives and Rec. Admin., *NARA Press Statement on the Equal Rights Amendment* (Jan. 8, 2020), https://www.archives.gov/press/press-releases-4 (last visited Dec. 10, 2021) (The Archivist will abide by the Department of Justice's guidance that the ERA should not be certified "unless otherwise directed by a final court order.") [hereinafter NARA Press Statement].

[88] *Attorney General Mark Herring Continues Fight to Have ERA Recognized as Part of the Constitution*, (May 3, 2021), https://web.archive.org/web/20210517224610/https://www.oag.state.va.us/media-center/news-releases/2044-may-3-2021-herring-continues-fight-to-have-era-recognized-as-part-of-the-constitution; *Attorneys General Ford, Raoul Issue Statement After Argument in Equal Rights Amendment Litigation*, (Sept. 28, 2022), https://ag.nv.gov/News/PR/2022/Attorneys_General_Ford,_Raoul_Issue_Statement_After_Argument_in_Equal_Rights_Amendment_Litigation/ (last visited Oct. 19, 2022).

[89] Placement of the deadline in the preamble (rather than the text) of the ERA is in contrast to other amendments which placed deadlines in the text of the amendments themselves. *See, e.g.*, U.S. Const. amend. XVIII, § 3 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."). In the case of those amendments, states were not stripped of the ability to ratify expired amendments, rather, an expired amendment by its own terms would become inoperative when ratified.

[90] As several members of Congress noted, in 1978, OLC held the unmistakable position that rescission is unconstitutional. *See* 1978 Hearing, *supra* note 29, 33-34 (1978) (Ms. Holtzman thanking Assistant Attorney General John Harmon for "the clarity and lucidity of [his] presentation"); *id*. at 31 (Mr. Drinan thanking the Department of Justice (DOJ) for taking a "clear and categorical" position and Mr. Butler appreciating "the witness' candor"). In 1977, the year prior, DOJ had declined to take a firm position on rescission advising the General Service Administrator to either reject rescissions or submit the question to Congress. But it noted that "[v]arious commentators have agreed with the 1868 congressional ruling" that rescissions were invalid. *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 OP. O.L.C. 13, 14 (1977).

"ratification must be unconditional and irrevocable."[91] Looking at the text of the Constitution, the OLC argued that Article V "prohibit[s] rescission."[92] Like Senator Wadsworth and Congressman Garrett, the OLC agreed rescission could *only* be authorized by a constitutional amendment to Article V.[93] Furthermore, under the Trump administration, the OLC weighed in on various constitutional questions posed by the ERA. In its lengthy opinion, the OLC declined to return to the question of rescission or revise its earlier conclusion that "the Constitution does not permit rescissions."[94]

During the Obama administration, the Archivist concurred with DOJ's position. Responding to a letter from Congresswoman Carolyn Maloney, National Archivist David Ferriero unqualifiedly informed the Congresswoman that "a later rescission of a state's ratification is not accepted as valid."[95] Like Congress, the Executive Branch has maintained the position—under Democratic and Republican administrations alike—that rescission is invalid.

Even some of the states now purporting to rescind ratification have previously agreed with this position. The Kentucky Supreme Court held in *Wise v. Chandler* that once the state votes on a proposed federal constitutional amendment "it has exhausted its power further to consider the question."[96] Likewise, the Idaho and South Dakota Attorneys General have published official opinions against rescission. Idaho's Attorney General opined that "once a state acts through its legislative process to ratify a proposed amendment to the United States Constitution, it has cast its one vote, and exhausted its power to affect the course of the proposed amendment."[97] Two years later, the South Dakota Attorney General agreed. Responding to a query from a state representative, the Attorney General wrote: "We think the conclusion is inescapable that a state can act but once . . . upon a proposed amendment."[98] The South Dakota state legislature voted to rescind ratification despite its own Attorney General's opinion "that this Legislature or any future Legislature is without authority to withdraw

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[91] *Harmon Memorandum*, *supra* note 26, at 19.

[92] 1978 Hearing, *supra* note 29, at 37 (testimony of John Harmon).

[93] *Id.* at 36.

[94] *Ratification of the Equal Rights Amendment*, OP. O.L.C. slip op. at 37 (Jan. 6, 2020).

[95] Letter from David S. Ferriero to the Hon. Carolyn Maloney (Oct. 25, 2012), https://voteequality.files.wordpress.com/2020/07/archivist-letter-to-maloney-2012.pdf.

[96] Wise v. Chandler, 108 S.W.2d 1024, 1033 (Ky. 1937).

[97] Official Opinion No. 73-166, Idaho Op. Att'y. Gen. (Jan. 24, 1973), https://www.ag.idaho.gov/content/uploads/2018/01/FY1973.pdf.

[98] Official Opinion No. 75-33, S.D. Op. Att'y. Gen. (Feb. 21, 1975), https://atg.sd.gov/OfficialOpinions/Official%20Opinion%2075-33.pdf.

the previous ratification of the Equal Rights Amendment."[99] Thus, several of the states that have attempted to rescind the ERA, namely Kentucky, Idaho, and South Dakota, have recognized the limitations on their own powers.

Rather than carry out his statutory duty, the Archivist has turned the question of the ERA's ratification to the courts.[100] In 2020, the Archivist refused to publish the ERA "unless otherwise directed by a final court order."[101] As to rescissions, the United States Supreme Court has not directly ruled on the issue[102] and the only federal district court opinion squarely addressing rescission was later vacated.[103] But, the lower courts are not without guidance. When the Court has dealt with the question of rescission on the periphery of its cases, it has deferred to Congress and "historic precedent."[104] The historic precedent, along with the Article V's text, original intent, and the conclusions of both the Article I and Article II branches, are all clear: rescission is unconstitutional. The judiciary should join its two co-equal branches in affirming this core feature of our amendment process.

CONCLUSION

This conclusion regarding the legality of rescission does not imply that states who regret ratifying an amendment lack recourse. States whose legislatures oppose an amendment after ratification can seek a new amendment repealing the amendment with which they disagree. Indeed, this is precisely what happened with prohibition: the Eighteenth Amendment was repealed by the Twenty-First Amendment.[105]

In 1788, Jefferson acknowledged the "faults" in the Constitution but drew "hope" in the ability of the people to "correct[] what is amiss in it."[106] The

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[99] *Id.*

[100] NARA Press Statement, *supra* note 87.

[101] *Id.*

[102] Kowal, *supra* note 85, at 144.

[103] In 1981, the Idaho District Court ruled that states have the power to rescind prior ratifications up to the point that the requisite three-quarters of states have ratified the amendment. State of Idaho v. Freeman, 529 F. Supp. 1107, 1155 (D. Idaho 1981). However, the following year the Supreme Court vacated the District Court's judgement. Nat'l Org. of Women v. Idaho, 459 U.S. 809, 809 (1982). *See also* Virginia v. Ferriero, 525 F. Supp. 3d 36, 61 (D.D.C. 2021) ("Equally significant as the Court's holding is what it does not hold…the Court does not reach the question of whether states can validly rescind prior ratifications."); Equal Means Equal v. Ferriero, 478 F. Supp. 3d 105, 125 (D. Mass. 2020) (refusing to consider the question of rescission because the plaintiffs lack standing).

[104] *Coleman*, 307 U.S. at 450 (1939).

[105] U.S. CONST. amend. XVIII; U.S. CONST. amend. XXI.

[106] Letter from Thomas Jefferson to Moustier, (May 17, 1788), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-13-02-0095.

Founders outlined this process in Article V. They carefully laid out a system for amendments, balancing the interests of the states and federal government. To date, the American people have chosen to amend their supreme law twenty-eight times, most recently with their adoption of the ERA. The courts should not obstruct the peoples' will.

As Jefferson concluded, "we must be contented to travel on towards perfection, step by step."[107] The Equal Rights Amendment is but one step further in our national quest to create a "more perfect union."[108]

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[107] *Id*.
[108] U.S. CONST. pmbl.