Duquesne Law Review

Volume 59
Number 1 *A Century Since Suffrage: How Did We Get Here? Where Will We Go? How Will We Get There?*

Article 4

2021

"An Atrocious Way to Run a Constitution": The Destabilizing Effects of Constitutional Amendment Rescissions

Danaya C. Wright

"An Atrocious Way to Run a Constitution"[1]: The Destabilizing Effects of Constitutional Amendment Rescissions

Danaya C. Wright[*]

I. INTRODUCTION

On January 27, 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment (ERA).[2] Yet despite having met the amending requirements of Article V, the Twenty-Eighth Amendment has not been promulgated by the National Archivist,

* Clarence J. TeSelle Professor of Law, University of Florida Levin College of Law. I would like to thank Jon Mills, Winsome McIntosh, and Dean Laura Rosenbury for their support of this research. I would also like to thank Rona Kitchen and the Program Committee of the 2020 AALS Women in Legal Education Section for their hard work in putting on such an amazing program. And I would also like to thank the students of the Duquesne Law Review for their scholarly assistance in bringing this article to print.

1. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 138 (1977) (testimony of Prof. Van Alstyne).

2. S.J. Res. 1, 2020 Leg. Reg. Sess. (Va. 2020); *see* Complaint at 10–11, Virginia v. Ferriero, 466 F. Supp. 3d 253 (D.D.C. June 12, 2020) (No. 20-242).

as required by federal statute.[3] The ERA remains in legitimacy limbo[4] as we await judicial resolution of a number of legal questions. And while we wait, the two-year window continues to wind down for federal, state, and local governments to implement the equality mandate of equal rights on the basis of sex.[5] Whether the Supreme Court will grant *certiorari*, or will decide the issues in favor of equality, are questions that only the nine unelected justices can answer. But the future implications of any decision the Court makes will likely stretch far beyond the Twenty-Eighth Amendment, as the ERA has landed in a vortex of constitutional indeterminacy. For nearly two-and-a-half centuries, numerous substantive and procedural questions have arisen, been dismissed or narrowed, lingered in the shadows, become moot, or otherwise left unresolved, apparently awaiting the perfect test case. Virtually all of these unresolved issues are implicated by the century-long passage of the ERA.

The ERA was first proposed in 1923 at the urging of suffragette Alice Paul. But it did not receive Congressional approval until forty-nine years later, in 1972. But when submitted to the states for ratification, it was saddled with a seven-year deadline in its preamble.[6] Only thirty-five states had ratified by the end of the seven-year deadline and five states had purported to rescind their ratifications. In 1978, Congress extended the deadline by three years and three months, until June 22, 1982;[7] however, no states ratified or rescinded during the extension period. When the ratification period expired, the proposal was lacking either three or eight ratifications to reach the thirty-eight required by Article V. In 2017, however, Nevada ratified the ERA, Illinois did so in 2018, and Virginia did in 2020, forty-eight years after it was sent to the states.[8] After ninety-seven years, the legal issues underlying the ERA are no longer mere abstractions, but present direct, unresolved

3. 1 U.S.C. § 106(b) (requiring the Archivist to cause the amendment to be published when he has received the requisite number of certificates of ratification).

4. Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 570 (1997).

5. Section 3 of the ERA provides that the amendment "shall take effect two years after the date of ratification." H.R.J. Res. 208, 92d Cong. (1972).

6. *Id.* ("*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (*two-thirds of each House concurring therein*), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress[.]").

7. *See* H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

8. Kathryn Elizabeth Colohan et al., *Ratification Info State by State*, ERA, https://www.equalrightsamendment.org/era-ratification-map (last visited Mar. 20, 2020).

constitutional questions about the scope and interpretation of the Article V process.

Article V provides two roles for Congress: to propose amendments with a two-thirds super majority (a power it shares with the states), and to determine the mode of ratification (between state legislatures and state conventions).[9] The mode-of-ratification power is not shared with the states, which have the sole power to ratify. Article V states that amendments shall be deemed "valid to all Intents and Purposes, as Part of [the] Constitution, *when* ratified by the Legislatures of three-fourths of the several States . . . ."[10] The relatively spare language of Article V does not expressly grant to Congress the power to impose deadlines on the states for ratification, nor does it expressly permit states to rescind their prior ratifications. It does not give to Congress the power to determine how, when, or whether an amendment shall be ratified. Nor does it grant to Congress the power to determine the legal sufficiency of state ratifications. These glaring gaps have been the subject of intense scholarship, some limited judicial precedents, and many self-serving pronouncements by members of Congress, and yet all these questions remain essentially unsettled.[11] More importantly, their resolution may have lasting effects on constitutional law and constitutional reform.

In a nutshell, there are at least four unprecedented legal issues that require resolution to determine the validity of the ERA: two substantive and two procedural. First, it must be determined if the seven-year deadline for ratification is a permissible exercise of Congress' Article V powers, or if it is an impermissible infringement of the states' sole power to control ratification. For a variety of structural and federalism reasons, the history and allocation of powers of Article V suggest that Congress may not impose such a draconian limit on the states, which potentially thwarts their constitutional function to determine both whether to ratify and when to ratify

9. Article V states in full:

> [t]he 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 . . . .

U.S. CONST. art. V.

10. *Id.* (emphasis added).

11. For the most thorough and measured exposition of virtually all matters involving Article V, see DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015 (2016).

proposed constitutional amendments.[12] Second, it must be determined if the five states that purportedly rescinded their ratifications may do so. Although states have attempted to rescind in the past, no rescission has ever been recognized as valid.[13] As yet, however, the federal courts have not weighed in on the matter.[14]

Third, the procedure for certifying an amendment calls for the National Archivist to proclaim the amendment's passage when he receives the required number of state ratification certificates.[15] This duty was first assigned to the Secretary of State, then to the Administrator of General Services, and now resides with the Archivist.[16] It is a ministerial duty and does not authorize the Archivist to judge the legal sufficiency of the ratifications he has received and yet, to date, the Archivist has not proclaimed the ERA as the Twenty-Eighth Amendment.[17] He is relying on a Department of Justice opinion that the seven-year deadline is valid to justify his failure to act.[18] That reliance may violate his statutory obligation, and potentially interposes the executive branch in the Article V amendment process. And fourth, Supreme Court precedent has been interpreted to hold that determining the answer to some or all of these questions might fall within the political question doctrine and should be left to Congress, one of the parties whose Article V powers is at issue.[19]

These four questions create a truly tangled web of constitutional indeterminacy. If Congress has the sole jurisdiction to settle Article V controversies, then it has the power to aggrandize itself at the expense of the states. If Congress may give the Archivist the power

---

12. *See* Danaya C. Wright, "*Great Variety of Relevant Conditions, Political, Social and Economic": The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V*, 28 WM. & MARY BILL RTS. J. 45 (2019).

13. *See* discussion *infra* notes 95–113 and accompanying text.

14. The federal District Court for the District of Idaho did address the validity of Idaho's rescission of the ERA in *Idaho v. Freeman*, 529 F. Supp. 1107, 1111 (D. Idaho 1981), but that decision was vacated by the Supreme Court when the deadline passed. *See* Nat'l Org. for Women v. Idaho, 459 U.S. 809 (1982) (mem.). What that Court planned to do with the decision, which is ill-reasoned and problematic on many levels, as explained below, is anyone's guess. What the current Court will do, is also anyone's guess.

15. 1 U.S.C. § 106(b).

16. Until 1818, the Secretary of State certified amendments as a matter of course. In 1818, Congress enacted a statute officially assigning that duty to the Secretary. In 1951, Congress amended the statute to transfer the responsibility to the Administrator of General Services who was in charge of publishing the Federal Register. *See* H.R. 3899, 82d Cong. § 106(b) (1951). In 1984 the job was transferred to the National Archivist. *See* 1 U.S.C. § 106(b).

17. Press Release, National Archives, Statement on Equal Rights Amendment Debate (Dec. 19, 2019), https://www.archives.gov/press/press-releases/2020/nr20-26 (requesting guidance on actions to take after the ERA's ratification from the Office of Legal Counsel).

18. Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 1 (2020).

19. Coleman v. Miller, 307 U.S. 433 (1939).

to determine the validity of state ratifications, then Congress is giving power to the Executive branch that Article V clearly does not grant to it. Logically, the federal courts, and the Supreme Court in the end, are the sensible repositories of power to resolve these questions, and yet the Court has historically been very reluctant to interpose. In the rare instances in which the Court has addressed Article V challenges, it has generally upheld the questioned acts, whether they are allegedly improper state ratifications or the validity of an amendment saddled with an arguably unconstitutional deadline.[20] In some instances, the Court has held that certain matters are conclusive, like the Secretary of State's certificate of ratification, and that there is no scope for judicial review of the adequacy of earlier steps in the amendment process.[21] Of most concern, however, is the Court's suggestion that Article V issues are non-justiciable political questions, leaving to Congress the power to decide whether states have properly ratified amendment proposals.[22] And in analyzing these issues together, one is easily turned around and upside down, dizzy with trying to make sense of the Court's brief and enigmatic pronouncements in this area.

Yet, if we disaggregate the various issues and hone in on the substantive merits of each, we can begin to make some sense of the unprecedented indeterminacy underlying Article V. In this article, I focus exclusively on the narrow issue of whether states may change their minds, whether they may ratify after having rejected an amendment, and whether they may rescind after having ratified. The Supreme Court has held that a state may ratify after rejection,[23] but it has not provided any clear precedent on whether states may rescind, and Article V does not provide any explicit power to do so. Any implied powers seem inconsistent with the text and historical understanding of Article V, and prior precedents have denied states the power to rescind.[24] Moreover, legislation and amendments proposed by Congress to expressly permit states to rescind up until the ratification by three-fourths of the states have all failed.[25] Numerous states that have considered whether they can

20. Chandler v. Wise, 307 U.S. 474, 477–78 (1939); *Coleman*, 307 U.S. at 456; United States v. Sprague, 282 U.S. 716, 734 (1931); Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922); Leser v. Garnett, 258 U.S. 130, 137 (1922); Dillon v Gloss, 256 U.S. 368, 376 (1921); Hawke v. Smith, 253 U.S. 221, 231 (1920); Rhode Island v. Palmer (National Prohibition Cases), 253 U.S. 350, 388 (1920).

21. *Chandler*, 307 U.S. at 477–78; *Sprague*, 282 U.S. at 734; *Leser*, 258 U.S. at 137.

22. *Coleman*, 307 U.S. at 450.

23. *Id.* at 456; *Chandler*, 307 U.S. at 477–78.

24. *See* discussion *infra* notes 95–113 and accompanying text.

25. KYVIG, *supra* note 11, at 251–53; *see also* George Stewart Brown, *The "New Bill of Rights" Amendment*, 9 VA. L. REV. 14, 14–24 (1922).

rescind have concluded that rescission is ineffective.[26] The Office of Legal Counsel (OLC) determined that rescissions are ineffective,[27] and scholars agree that rescissions have never been legally effective.[28] Nevertheless, Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979) attempted to rescind their ratifications of the ERA and, unless five other states ratify in short order, the constitutionality of state rescissions will need to be resolved before the ERA is recognized as the Twenty-Eighth Amendment.[29] In this article, I explore the complex process underlying the rescission question and the evidence a court is likely to examine in its effort to settle this intriguing question. But first, we must descend into the rabbit hole that is Article V.

II. INTO THE RABBIT HOLE: THE STATES' RATIFICATION FUNCTION UNDER ARTICLE V

The amendment process outlined in Article V of the Constitution gives the states sole authority to ratify a proposed amendment. The text states that an amendment becomes 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 . . . ."[30] The only legally-operative act through which the states exercise power under Article V is to ratify. Once states have ratified, their Constitutional role has arguably ended.[31] Though it might be tempting to conclude that if the ratification power resides solely in the states, they should also have the power to rescind, that conclusion is problematic on many levels. It is inconsistent with both the amendment process and the drafters'

---

26. *See* THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 171 (1922) ("In 1919 the Supreme Judicial Court of Maine, in answer to a question propounded by the Governor, declared that the legislature could not rescind its ratification of the Eighteenth Amendment, establishing prohibition."); *see also* Memorandum from Gov. Marcus L. Ward to the Senate of the State of New Jersey (Feb. 25, 1868) ("When such proposal is accepted and approved, the amendment ratified and returned to the General Government by which it was submitted, the transaction is completed, the decision of the State has been rendered, and the power of the Legislature over the subject is spent. No further action can be taken . . . .").

27. Memorandum from John M. Harmon, Assistant Attorney General, to the Honorable Robert J. Lipshutz, Counsel to the President (Oct. 31, 1977); *see also* H.R REP. NO. 95-1405, at 12–16 (1978); Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 15 (1977).

28. *See* discussion of scholarship *infra* at notes 170–183 and accompanying text.

29. John Carrol, *Constitutional Amendment; Rescission of Ratification; Extension of Ratification Period,* State of Idaho v. Freeman, 16 AKRON L. REV. 151, 153 n.16 (1983).

30. U.S. CONST. art. V.

31. *See* 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 1310–11 (1910).

intent, as it would deviate from prior precedent and the general consensus of scholars, judges, and members of Congress, and, most importantly, it would impose an element of uncertainty that would be destabilizing to the constitution-making process.[32] For we must begin any analysis of Article V procedures sensitive to the fact that ratifying the Constitution in 1789, and amending it through the finely-wrought process set out in Article V, are acts of constitution-making that can, and have, profoundly affected the legitimacy of our constitutional republic and the rule of law.

Perhaps the foremost principle in this constitution-making process is the fact that Article V establishes a procedure in which states, *qua* states, are the key participants in the project. States, through their elected conventions, ratified the constitution in 1789, and their legislatures ratified every subsequent amendment except the Twenty-First. The framers were clear that the drafting of the constitution, and any amendments, was a process to be driven by the states.[33] The original draft of the constitution had no role for Congress in the amendment process; the power to propose amendments along with the states was added only after Alexander Hamilton argued that the national government would be more attuned to any defects in its organic document than the states.[34] But the framers were quite clear that the states were both necessary and sufficient participants in the amendment process, as they could call a convention to propose amendments, and they have the sole ratification power. The states, as legal actors, have the power to amend the constitution when they deem it necessary, regardless of the wishes of Congress, as they did when they ratified the new constitution in 1789.

It does not help matters, however, that the Article V process for ratifying is assigned to state legislatures with no guidance as to what bodies constitute a legislature[35] or what process a state

32. RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 254 (1st ed. 1993) ("Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification . . . . To permit rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning."); *see also* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 421–27 (1983); SAMUEL S. FREEDMAN & PAMELA J. NAUGHTON, ERA: MAY A STATE CHANGE ITS VOTE? (1978).

33. The framers expressly rejected a provision that would require Congressional approval of constitutional amendments, and only added Congress' power to propose as an afterthought. KYVIG, *supra* note 11, at 56–57.

34. *Id.*

35. The Supreme Court rejected the argument that the term legislature in Article V referred to the general public in which all legislative powers ultimately lie in *Hawke v. Smith*, 253 U.S. 221, 228–29 (1920).

legislature must follow when engaging in their constitutional role.[36] James Madison insisted that such "difficulties . . . as to the form, the quorum, &c. . . . in Constitutional regulations ought to be as much as possible avoided."[37] As a result of this lack of detail, some legislatures have established clear guidance, such as a supermajority of both houses of its legislature;[38] others have not.[39] Some require only a simple majority; others treat ratification like a regular bill and perhaps require gubernatorial approval.[40] Some have required an intervening election of at least one house before a constitutional amendment proposal may be ratified, although that requirement has been held to be unconstitutional.[41] Some treat the process as similar to bill passage while others treat it as a resolution.[42] Some require amendments be ratified by the same margin as a state constitutional amendment.[43] A few states even have different rules for their house and their senate.[44] And what is worse,

36. This makes some sense as the states were sovereign entities and could be assumed to have a process in place for making decisions that would bind the states qua states. For a discussion of the relationship between the people and the states, *see generally* Andrew G.I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061 (2014).

37. BERNSTEIN WITH AGEL, *supra* note 32, at 21.

38. *See* SUSAN W. KANNARR, RULES OF THE KAN. H. OF REPS., 2019–2020 SESS., at § 2707 (2019) (requiring a two-thirds majority of all elected members to ratify a *constitutional* amendment); S. Res. 17(f)(4) (Colo. 2019); H.R. Res. 26(b) (Colo. 2019) (requiring a two-thirds majority of all elected members to ratify a constitutional amendment); *see also* ILL. CONST. art. XIV, § 4 (requiring a three-fifths vote of all elected members of each house, as well as an intervening election); DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 2 n.4 (1997) (stating that Delaware, Georgia, Idaho, and Alabama also require supermajorities of all elected members). *But see* Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (holding the Illinois Constitution's three-fifths majority was non-binding, despite Illinois's legislative rules also calling for a three-fifths majority vote).

39. Florida has no rules on whether ratification follows regular bill procedures or resolution procedures, and the Florida Constitution requires an intervening election, which has been held to be unconstitutional. *See* FLA. CONST. art. X, § 1; Trombetta v. Florida, 353 F. Supp. 575, 578 (M.D. Fla. 1973).

40. Interim Governor of Kentucky, Thelma Stovall vetoed the resolution rescinding the ERA as did Governor Ward of New Jersey in 1868. Livingston Taylor, *ERA Rescission Vetoed in Kentucky*, WASH. POST (Mar. 21, 1978), https://www.washingtonpost.com/archive/politics/1978/03/21/era-rescission-vetoed-in-kentucky/b6a72232-f433-40b5-b2be-ddd23914e204/; Ward, *supra* note 26.

41. Tennessee and Florida both have provisions in their constitutions requiring an intervening election, but they have been held to be unconstitutional in *Walker v. Dunn*, 498 S.W.2d 102, 106 (Tenn. 1972) and *Trombetta*, 353 F. Supp. at 578.

42. Seventeen states appear to require a simple majority, the same as is required for bill passage, while a handful (three) require different majorities between their two houses. *See Dyer*, 390 F. Supp. at 1305 n.34.

43. Twenty-four states require a constitutional majority. *Id.*

44. *See id.*

the rules are usually located deep within their legislative rulebooks, are difficult to locate, and may change with every session.[45]

This diversity in procedure means that the validity of ratification, and its justiciability, can be quite complicated questions. Consider a few situations. A state legislature could, after ratifying a constitutional amendment by a simple majority, in violation of its own rules requiring a super-majority, send a certificate of ratification to the Secretary of State.[46] Would it be in violation of Article V? Since many states permit ratification by a simple majority, why would the federal courts intervene to uphold a state rule that the state has chosen to ignore? What benefit would the federal courts see in enforcing a more stringent standard, even if that is the law of the state? On the other hand, if a state submitted a certificate of ratification after the proposal failed to receive even a majority of legislative votes, one would hope that the federal courts would strike that certificate. But on what basis should we draw such a distinction other than on some implied Article V baseline? Assuming there is some procedural requirement that legislative ratification requires, at minimum, a majority vote of a state legislature, does that mean a majority of the elected members, or just a majority of those present, or a majority of a quorum? Could ten legislators vote in the dead of night?

Robert Hajdu and Bruce Rosenblum suggest that in questionable cases "the propriety of state efforts should depend upon whether these efforts interfere with the constitutionally protected role of the legislatures."[47] In other words, where states establish rules that create impediments to the ratification process, courts should be skeptical and strike them down, as with an intervening election or requirement of a popular referendum, and where the state rules attempt to dictate the substantive outcome of legislative participation under Article V, the courts also should intervene. But where state rules simply facilitate the ratification process, they should be judged deferentially.

Thus, if a state legislature violated its own procedure it would seem to be an appropriate issue for state courts, although what kind of remedy would be available from a state court against a legislature engaging in a federal constitutional function is another

45. *See* DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 5 (1997). Legislative rules are usually voted upon at the beginning of each session of a state's legislature.

46. Certain members of the Illinois legislature attempted to do precisely this, but the decision in *Dyer*, 390 F. Supp. at 1308–09, upheld the super-majority requirement.

47. Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 116 (1979).

interesting question.[48] But back to the simple question at hand. If a state has a rule requiring a super-majority and a legislature ratifies with a simple majority, it would have violated its own rules but not necessarily Article V. But if it ratified on less than a majority, presumably that would fall below the basic constitutional threshold and violate Article V in a determination that should be made by the federal courts. Similarly, if the governor simply sent an executive order ratifying an amendment, it should be rejected, but if the lieutenant governor voted to break a tie in the state senate,[49] there would be no constitutional infirmity since state law permits executive officials to have some limited legislative functions. Whether these are substantive/procedural distinctions or not is unclear. But the questions force us to think about the basic framework of Article V, which requires state legislatures to exercise the constitution-making function within some range of acceptable standards appropriate to a representative body but with absolutely no guidance from Congress or Article V.

An interesting version of this issue arose when the Illinois legislature voted to ratify the ERA, but it could only muster a simple majority, and not the three-fifths required by their legislative rules and by the Illinois Constitution. Judge John Paul Stevens, prior to his stint on the Supreme Court, ruled in *Dyer v. Blair* that the super-majority legislative rule was permissible, but that the Constitutional super-majority rule was not, which seems puzzling at first glance.[50] In analyzing the ratification function articulated in Article V, Judge Stevens reasoned:

> [w]e may take it as decided, therefore, that an extraordinary majority is not *required* by federal law. There is, moreover, some evidence that when article V was drafted the framers assumed that state legislatures would act by majority vote. That evidence, like the text of article V itself, is equally consistent with the view that a majority of a quorum would be sufficient,

48. There are real questions about what remedy a state court can give if a state legislator claims that its body failed to comply with its own rules. Could an injunction issue against the National Archivist to return the certificate? Could an injunction issue against the governor to request return of the certificate? Would the Archivist be compelled to return the certificate if the governor asked for it back? These issues were dodged in *Chandler v. Wise*, 307 U.S. 474 (1939), but have arisen in the context of the ERA as litigants wonder what remedy is appropriate and who the proper defendant should be. *See also* Chase v. Billings, 170 A. 903, 905 (Vt. 1934) (grappling with this very issue).

49. This was alleged to be one of the infirmities in *Coleman v. Miller*, 307 U.S. 433, 446–47 (1939), for which the Court failed to muster a majority to determine whether the tie-breaking vote was a violation of the state's ratification procedure.

50. *Dyer*, 390 F. Supp. at 1307.

> or with a view that a majority of the elected legislators would be required. And, of course, it is also consistent with the view that the framers did not intend to impose either of those alternatives upon the state legislators, but, instead, intended to leave that choice to the ratifying assemblies. . . . If the framers had intended to require the state legislatures to act by simple majority, we think they would have said so explicitly. . . . We think the omission more reasonably indicates that the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself.[51]

Judge Stevens concluded that Article V neither requires nor prohibits either a simple majority or a super-majority, and that each state legislature may decide for itself what constitutes ratification of a constitutional amendment.[52] Assuming Article V did not establish a standard, Stevens then concluded that the legislature may set a three-fifths requirement in its rules, and that requirement would be binding.[53] But the people of Illinois do not have the constitutional right to determine the legislative standard, and therefore the Illinois Constitution's requirement was void under Article V.[54] Stevens therefore concluded that Illinois had not ratified the ERA even though the resolution had received a positive majority vote, which was all that Article V required or that the framers likely intended, because the Illinois legislature had chosen a higher standard.

While this decision is not inconsistent with the spare language of Article V, it leaves us with little guidance on what would happen if Illinois, in violation of its own rules, had submitted the certificate of ratification to the Secretary of State[55] or had set a rule that was perhaps too stringent, like requiring a unanimous vote of both houses. Hajdu and Rosenblum's functionalist rules may allow states some latitude when they are not attempting to make the ratification process too cumbersome, but the proverbial devil is in the details. Consider the role of public opinion in legislation. What if the populace of a state opposed a proposed amendment and voted a

---

51. *Id.* at 1305–06 (emphasis added).
52. *Id.* at 1307.
53. *Id.* at 1308.
54. *Id.*
55. In *Chandler v. Wise*, it was alleged that the Kentucky legislature's ratification of the Child Labor Amendment was unconstitutional because Kentucky had previously rejected the amendment. The Kentucky Supreme Court agreed that the legislative ratification was *ultra vires*, but the Supreme Court held that the certificate of ratification sent by the governor was conclusive, thereby declining to intervene in the state's procedural spat. 307 U.S. 474 (1939).

state constitutional amendment to prohibit its legislature from ratifying the proposal? If the legislature ratified anyway, would that ratification be valid? What if the legislature did not ratify but would have done so except for the state constitutional bar? Should a court strike the state constitutional amendment as a barrier to a federal constitutional process? What if the legislature opposed an amendment, but the public voted to amend the state constitution to require the legislature vote to ratify despite its opposition? Could the popular will be expressed through legislative referenda, as in California, if it expressly sought to ratify an amendment proposal? If a popular vote can result in legislation pursuant to state law, why could a popular referendum not result in a constitutional amendment ratification if the state's law provides that constitutional amendments are ratified through the same process as bill passage?[56]

Although these questions may seem like a riff on law school exams, they are not entirely farfetched. Ohio had a law requiring a public referendum following a state legislative vote to ratify any amendment, to ensure that the legislature's ratification reflected the popular will. It was stricken by the Supreme Court in *Hawke v. Smith*[57] on the grounds that the framers intended the term *legislature*, in Article V, in its common-sense meaning as the representative body of the state. But if the people can pass legislation through referenda, then why could they also not act in a legislative capacity and vote to ratify an amendment legislatively? This is a particularly relevant question in the context of the ERA, which has the support of more than eighty percent of the public, but could be blocked by a bare majority of the elected members of the smallest of thirteen state legislative houses.[58] If a state legislature is badly gerrymandered, and a majority of the people of the state want a constitutional amendment that, for instance, limits

56. *See* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

57. 253 U.S. 221, 230 (1920).

58. *ABA 2020 Survey of Civic Literacy*, AMERICAN BAR ASSN., https://www.americanbar.org/content/dam/aba/administrative/public_education/2020-survey-civ-lit-full-report.pdf (last visited Jan. 23, 2020). If the smaller legislative house of the thirteen least populous states (Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, Montana, Maine, New Hampshire, Hawaii, West Virginia, and Idaho) blocked a popular amendment, then a bare majority of representatives of roughly 14.5 million people could thwart the wishes of the other 315 million people. Of course, this was a concern during debates over Article V and is endemic to our constitutional structure which gives the smaller states more power.

gerrymandering, should they not be able to either force their legislature to ratify, or ratify the amendment themselves?[59]

These questions are unanswered by the sparse text of Article V, and the problems become even murkier as we explore the gray areas between legislative and constitutional decision-making. As Hajdu and Rosenblum note, expressions of popular will that may be objectionable if they determine the outcome, but not if they are merely advisory, can be difficult to distinguish when we consider that political pressures and responsiveness to one's constituents is the hallmark of representative democracy.[60] During the intense debates before and after adoption of the Eighteenth Amendment, there were numerous lawsuits brought over state referendum procedures where opponents of the amendment sought to get on the ballot a bill opposing Prohibition and mandating that the state legislatures rescind.[61] Some were couched as advisory opinions. But in a similar case involving the ERA in 1978, the opponents to the referendum cogently argued that a referendum would upset the Article V process by making proponents engage in lobbying for general support throughout the state and not just with legislators, fundamentally changing the nature of amendment ratifications.[62] For if a legislator voted against the "advisory opinion," that vote would surely be used against him or her in the next election.

The framers may have envisioned state legislatures as bulwarks against populist pressures, but today they can be bellwethers of popular consensus or be captured by special interests and act counter to the popular will. If the framers chose legislatures as the ratifying bodies because they had some particular characteristic that was crucial to the ratification process, then it is not at all clear that they have those same characteristics today. But it is clear that the political lobbying efforts will be very different if the audience is the state legislature only, or the population generally.

A further unknown is whether Congress could mandate a particular state legislative procedure. Scholars have suggested that it is unlikely that Congress could constitutionally legislate a particular

---

59. This is particularly salient in a state like Florida with its constitutional referendum procedure and a heavily gerrymandered legislature that has not ratified the Sixteenth, the Seventeenth, the Twenty-Third, or the Twenty-Sixth Amendment, nor has it ratified the ERA.

60. Hajdu & Rosenblum, *supra* note 47, at 115 n.28.

61. *See generally* Barlotti v. Lyons, 189 P. 282 (Cal. 1920); Prior v. Noland, 188 P. 729 (Colo. 1920); Decher v. Sec'y of State, 177 N.W. 388 (Mich. 1920); Carson v. Sullivan, 223 S.W. 571 (Mo. 1920); State *ex rel.* Gill v. Morris, 191 P. 364 (Okla. 1920).

62. Kimble v. Swackhamer, 584 P.2d 161, 163–64 (Nev. 1978) (Gunderson, J., dissenting).

procedure, and previous Congressional efforts to require certain procedures, such as a popular referendum, an intervening election, or when the state legislatures must take up a proposal, have all failed.[63] One bill went so far as to dictate what days a state legislature must take up an amendment proposal after its submission to the state.[64] So far, Congress has been circumspect and the only legislation it has passed dealing with Article V is the very simple provision requiring the National Archivist, and before that the Secretary of State, to publish an amendment once the requisite number of state ratification certificates were received.[65] To the extent Article V places the ratification power solely in the states, Congressional legislation that defines how that ratification power shall be exercised (by a super-majority, for instance), when it shall be exercised (within a specific period of time), or what counts as ratification (conditional or not) would profoundly change the balance of power between the states. Congress could certainly propose a constitutional amendment to the Article V process clearing up many of these uncertainties, but simple legislation cannot override the process detailed in the Constitution, even if it is vague and porous. And although I personally try to embrace indeterminacy and ambiguity, as they make life a bit more interesting,[66] I am not enamored of them in the procedural details of amending a constitution.

Furthermore, in case the lack of express guidance in Article V and Congress' inaction is not enough indeterminacy, the Supreme Court has avoided most legal challenges to the sufficiency of state ratifications, instead ruling that a ratification certificate is conclusive that the state followed its own procedures.[67] Or the Court has sidestepped the issue, as in *Coleman v. Miller*, when it refused to decide whether Kansas had properly ratified the Child Labor Amendment when the Lieutenant Governor broke a tie in the state

63. Lester Orfield, in his 1942 treatise, argued that Congress does not have this power. LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 64–65 (1942); *see* Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 15 (1977) (stating that Congress cannot give to the States a right to rescind by any means short of amending Article V of the Constitution.).

64. In 1869, a resolution was introduced to require that state legislatures discuss proposed constitutional amendments on the sixth day of their next legislative session and continue to discuss it until a final decision is made. CONG. GLOBE, 41st Cong., 1st Sess. 75, 102, 334 (1869). *See also* Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 208 (1951) ("Whether such a measure is within the power of Congress incident to the submission of amendments is doubtful.").

65. 1 U.S.C. § 106(b).

66. I live by Marc Poirier's wonderful article, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

67. Chandler v. Wise, 307 U.S. 474, 477 (1939); Leser v. Garnett, 258 U.S. 130, 137 (1922).

Senate.[68] In *Chandler v. Wise*[69] the Court dismissed a challenge to a post-rejection ratification as moot, and in *Fairchild v. Hughes*[70] it dismissed a challenge to state ratifications of the Nineteenth Amendment for lack of standing. The only Article V cases questioning the validity of state ratifications that the Supreme Court has decided on the merits were the rejection of Ohio's requirement of a public referendum in *Hawke v. Smith* and the dismissal of challenges to the Nineteenth Amendment on the grounds that women's suffrage conflicted with state constitutional requirements in *Leser v. Garnett*.[71] All five of these decisions resulted in affirmance of the state legislative ratifications, despite allegations of impropriety in the ratification process, although three were not even on the merits.[72]

Lest we shrug off the indeterminacy as mere matters of detail that raise concerns only in rare and exceptional cases, the experience of history speaks otherwise. When opponents of the Fourteenth Amendment in the Tennessee legislature decided to skip town to defeat a quorum, they were located, held under arrest, and counted for quorum purposes even though they were not allowed to vote.[73] The case of Texas Democratic legislators leaving the state to prevent voting on redistricting legislation in 2003 and Oregon Republican legislators leaving to prevent a vote on climate change reminds us that not that much has changed in state politics since 1867 and the Tennessee experience is sadly not as exceptional as one might hope.[74] With the Trump administration's severe testing of constitutional standards and norms in so many areas, the

68. 307 U.S. 433, 456 (1939).

69. 307 U.S. at 477.

70. 258 U.S. 126 (1922).

71. 258 U.S. at 130; Hawke v. Smith, 253 U.S. 221 (1920).

72. The Court has only decided nine Article V cases, the other four being irrelevant: United States v. Sprague, 282 U.S. 716 (1931) (holding that there was no distinction in Article V that would preclude certain types of amendments that were ratified by legislatures rather than conventions); Dillon v. Gloss, 256 U.S. 368 (1921) (holding that amendments are self-executing upon ratification by the last state, and that validly-ratified amendments containing Congressional deadlines are not ipso facto void); Rhode Island v. Palmer (National Prohibition Cases), 253 U.S. 350 (1920) (holding that there were no substantive limits on the types of amendments that could be ratified under Article V); Hollingsworth v. Virginia, 3 U.S. 378 (1798) (holding that the Presidential signature is not required in Article V amendments).

73. KYVIG, *supra* note 11, at 170.

74. Ed Lavandera, *Texas House Paralyzed by Democratic Walkout*, CNN (May 19, 2003, 12:12 PM), https://www.cnn.com/2003/ALLPOLITICS/05/13/texas.legislature/; *see also* Chip Brownlee, *Oregon's Legislative Chaos Has Senators Fleeing to Idaho and a Militia Threatening the Capitol*, SLATE (June 24, 2019, 6:30 PM), https://slate.com/news-and-politics/2019/06/oregon-legislature-climate-change-bill-chaos.html.

indeterminacy of Article V could leave open a relatively easy path toward repeal of the Twenty-Second Amendment.

III. WHO SHOULD DECIDE IF A STATE RATIFICATION IS VALID?

Just because we have little guidance on how to determine if a state's ratification or rescission is valid does not mean we are completely lost if we could feel comfortable knowing that there was a competent body to settle any disputes based on a commitment of creating clear, universal standards. But sadly, we do not have even that shaky ground to stand on. Should the state courts decide because ratification procedures are creatures of state law, or should the federal courts decide since ratification is a federal constitutional function? Should Congress decide because these are non-justiciable political questions, or should the National Archivist decide as the executive agent charged with publishing an amendment? As one can see, if we do not have clear rules on what constitutes ratification and what body (the state courts, federal courts, Congress, the Archivist) can confirm compliance, there is virtually no guidance on the very real and present question of whether states can rescind their ratifications of the ERA. For instance, if rescissions are permissible, how do we know if rescissions have to be by the same process as ratification, for Idaho attempted to rescind the ERA through a simple majority vote, even though Idaho legislative rules required a super-majority to ratify.[75] And the acting Kentucky governor vetoed Kentucky's rescission even though governors usually do not play a role in amendment ratifications.[76] Unlike the hypotheticals explored in the discussion above, like the popular mandate or the governor's executive order, states have attempted to rescind their ratifications after submitting certificates of ratification to the Secretary of State, and they have ratified after rejecting an amendment. And although the courts have addressed the latter,[77] they have so far dodged the question on rescissions, even though the first rescission arguably occurred over a century and a half ago.

---

75. When Idaho decided to rescind its ratification of the ERA, Senator Edith Miller Klein, chair of the Senate Judiciary and Rules Committee, determined that rescission would require a two-thirds vote. But that decision was overruled by the full Senate, which ultimately voted to rescind on an 18-17 vote. *See* Betsy Z. Russel, *Idaho's Role in the Equal Rights Amendment Ratification Saga*, KTVB (Dec. 17, 2019, 11:11 AM), https://www.ktvb.com/article/news/politics/idaho-equal-rights-amendment-history/277-99a830f9-fc5f-4697-b7c4-c2632af2e8ab; *see also* Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981).

76. *See* Taylor, *supra* note 40.

77. As discussed below, the Court has held that ratification after rejection is valid. *See* discussion *infra* notes 126–127 and accompanying text.

Eventually someone will need to decide if rescissions are effective, and the ERA is directly posing that issue.

The vagueness of the constitutional process and the importance of the outcome make it highly inappropriate for the National Archivist to rule on the legal sufficiency of any state's ratification.[78] If anything, it would seem that determining the legal sufficiency of a state's ratification should fall either to the state's own judiciary or the federal courts.[79] Yet because state legislatures are engaging in a federal constitutional function when they ratify an amendment, the federal courts would seem to be the most logical body to determine if a state's ratification complies with Article V.[80] But given that the constitution grants to the state legislatures the power to ratify, and presumably the power to determine the process for ratification, it truly is an open question whether ratification challenges should be decided by the state or the federal courts.

For reasons discussed much more thoroughly in other scholarship, Congress is also a problematic option.[81] It would be like putting the fox to guard the henhouse to give Congress the power to determine the boundaries between Congressional and State-granted functions under Article V, as would be the case with the seven-year deadline. But even in the matter of balancing the power of the states vis-à-vis each other, Congress is a political body, and the ratification function arguably should be standardized. Judge

---

78. United States v. Sitka, 845 F.2d 43 (2d Cir. 1988); United States v. Stahl, 792 F.2d 1438 (9th Cir. 1986); U.S. *ex rel.* Widenmann v. Colby, 265 F. 998, 999 (D.C. Cir. 1920); *see also* Congressional Pay Amendment, 16 Op. O.L.C. 85 (1992).

79. However, in at least one instance, the Supreme Court refused to defer to the state's highest court when it had ruled that a post-ratification public referendum was valid, and in another the Court declined to intervene and instead held the certificate to be conclusive despite a state court determination that the ratification was invalid. In *Chandler v. Wise*, the Court accepted the state's ratification certificate as conclusive, as it did in *Leser v. Garnett*. 307 U.S. 474, 477 (1939); 258 U.S. 130 (1922). In *Chandler v. Wise* the Court did not engage the substantive issue of post-rejection ratification on the merits, as had the Kentucky Court of Appeals, but instead dismissed the grant of *certiorari* on the grounds that the governor had already submitted the certificate of ratification to the Secretary of State and the issue was therefore moot. *Chandler*, 307 U.S. at 474. But in *Hawke v. Smith*, the Court did not defer to the Ohio Supreme Court's determination that a public referendum did not violate Article V procedures. 126 N.E. 400 (Ohio 1919), *rev'd*, 253 U.S. 221 (1920).

80. Numerous courts have held that states are engaging in a federal function when they ratify an amendment proposal. *See Hawke*, 253 U.S. at 230; *Leser*, 258 U.S. at 136–37; Dyer v. Blair, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975); Trombetta v. Florida, 353 F. Supp. 575, 578 (M.D. Fla. 1973).

81. *See, e.g.*, Dellinger, *supra* note 32, at 411–17; William L. Dunker, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93 (1973); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63, 90 (1978); Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?*, 42 WAYNE L. REV. 1685 (1996); Hajdu & Rosenblum, *supra* note 47, at 144–59; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 706–21 (1993).

Stevens rejected the political question doctrine in *Dyer v. Blair*, stating that "[w]e are persuaded that the word 'ratification['] as used in article V of the federal Constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making."[82] With his inimitable optimism, he offers some hope for those seeking an escape from the Article V morass. He reminds us that "[t]he mere fact that a court has little or nothing but the language of the Constitution as a guide to its interpretation does not mean that the task of construction is judicially unmanageable."[83]

So even though federal precedent is vague and indeterminate, we should examine the arguments a court would likely use to determine if a state may rescind its ratification under Article V. And that means that we should look to the function of ratification as a process of constitution-making to guide us, remembering that the constitution establishes a federation of states as independent sovereignties. As Hajdu and Rosenblum explain, Article V's delegation of the ratification function to the *several* states implies that each should operate independently of the others:

> While article V implicitly denies a state legislature any power to interfere with the overall process of ratification, it also assigns to that body a specific constitutional function—the act of ratification. The extent to which this assignment to the state legislature is exclusive—prohibiting interference either by Congress or by the state itself—remains unclear. An analysis of the state's role in the amending process indicates, however, that the balance between state and federal powers in the amending process, the "federal function" of the state legislatures, and the role of the legislatures as the voices of the states can best be effectuated if Congress has no power to control the act of ratification, and if the power of the states is limited to matters of procedure rather than matters of substance.[84]

Now that we have a better understanding of the complexity inherent in the question of who gets to decide the legal sufficiency of state ratifications, and on what criteria, we can finally consider the validity of state rescissions. In order to guide us toward a rational determination of whether Article V allows states to rescind, we should examine the original understanding of the ratification

82. 390 F. Supp. at 1303.
83. *Id.* at 1302.
84. Hajdu & Rosenblum, *supra* note 47, at 113.

process and prior precedents in light of the essential function of ratification intrinsic to the making of a constitution.

IV. SHOULD STATES BE ABLE TO CHANGE THEIR MINDS IN THE RATIFICATION PROCESS?

It is tempting to view changes to state ratifications as equivalent, so that a post-rejection ratification is equivalent to a post-ratification rescission, but that symmetry is problematic for many reasons. It is problematic because ratification is a process of transition from operating under no legal duty to accepting a legally binding obligation. If one is not legally bound to protect equal rights, then rejecting the obligation is merely a continuation of one's original position. Choosing to be bound by the legal obligation is the act that changes the status quo. Rejecting the change has no legal significance. The same is true with constitutional amendments, as we saw with Prohibition, which required a second amendment to void the effects of the first bad decision. The very existence of the amendment power, which creates a process for fixing bad decisions, is evidence that the process must be started all over again if the first is to be undone.[85] Lessons can be learned from the Eighteenth Amendment, in which there were unsuccessful legal challenges, attempts to simply ignore the Amendment's requirements, and legislative efforts to undermine it that were all unsuccessful, leading to a push for repeal through another amendment.[86]

A. Evidence from Original Intent

When the drafters discussed whether the Constitution would include a provision for amendments, they were clear that the unanimity requirement for amendment under the Articles of Confederation was the single greatest hurdle to success of the new republic.[87] Thus, Article V was drafted to require only a two-thirds majority of Congress to make proposals, with a three-fourths majority of the states needed to ratify.[88] This ensured that constitutional changes

85. The Twenty-First Amendment repealed the Eighteenth Amendment after much discussion and litigation over the best way to minimize the effects of Prohibition. *See* KYVIG, *supra* note 11, at 275–88.

86. See *id.* at 249–51, 295.

87. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996) ("Article V was a reaction to the rigid unanimity requirement of Article XIII of the Articles of Confederation. In Madison's language, Article XIII resulted in 'the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth' . . . .").

88. U.S. CONST. art V.

were supported by significant majorities of law-makers and the public, but that ratifying an amendment was not a virtual impossibility and would not force us toward revolution.

During the drafting, James Madison made it clear that states could not condition their ratification of the Constitution on the actions of other states or retain the power to withdraw their ratification. In discussing whether New York could conditionally ratify the new constitution, he explained:

> [m]y opinion is that a reservation of a right to withdraw if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification, that it does not make N. York a member of the New Union, and consequently that she could not be received on that plan. Compacts must be reciprocal, this principle would not in such a case be preserved. The Constitution requires an adoption *in toto*, and *for ever* [sic]. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only.[89]

To get the new constitution ratified, Madison realized it was fundamentally important that states not be given the power to condition their ratifications on the actions of other states or on inclusion of a bill of rights; ratification needed to provide certainty for subsequent states engaging in the deeply consequential process of adopting a new constitution. Because ratification is the only legally effective act recognized in Article V, implying a power to rescind would seem to go against the principles of constitutionalism by undermining the methodical step-by-step process of achieving consensus. The framers viewed ratification of the Constitution as a simple, unconditional acceptance with no take-backs, and there is no evidence that they wanted to treat amendments differently.

This need for certainty is perhaps even more important today than it was in 1787, as the number of states and their populations and political views are more diverse. With greater political, economic, social, and cultural pressures facing state legislatures, they need to feel confident about the status of an amendment proposal before they expend the political capital and scarce legislative time to consider ratifying a proposed amendment. If a state legislature believes that its ratification effort will put an amendment over the line, it would be intolerable if an earlier ratifying state could rescind

89. Letter from James Madison to Alexander Hamilton (July 20, 1788) (on file with the National Historical Publications and Records Commission).

just as another state's legislature is involved in the complex politics of ratifying. For what state legislature would expend the political resources to ratify if it could not rely on the stability of earlier ratifications? And what state would ratify a constitution containing an amendment procedure that would allow for ever-fluctuating positions on constitutional structures and procedures?

Richard Bernstein and Jerome Agel explain:

> the prevailing view is that the amending process may be understood as working in only one direction. Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification. Why should this be the case? A state's decision to adopt an amendment forms the basis for later states' decisions to adopt or to reject. To permit rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning. By contrast, if a state reconsiders its rejection of an amendment, its action does not undercut the basis for later states' decisions. A state should be free to change its mind about rejecting an amendment if other states' actions demonstrate that the amendment has general popular support.[90]

Like the conditional ratifications of the Constitution that the framers expressly rejected, rescissions undermine the amendment process by breeding greater uncertainty and making the process more susceptible to changing political winds. It would also make amendments more difficult. Members of Congress know that sanctioning rescissions destabilizes the amendment process.[91] Consequently, legislative efforts to recognize rescissions have been offered only by Congressmen who opposed particular amendments; allowing rescissions has never been supported by amendment proponents.

---

90. BERNSTEIN WITH AGEL, *supra* note 32, at 254.

91. One obvious reason for the rejection by Congress of efforts to permit rescission by the states is the uncertainty that it would inject into an otherwise relatively straight-forward process. Congressmen quickly criticized the Wadsworth-Garrett resolution to allow rescissions as creating additional uncertainty, "because any intervening election or new political and social conditions could cause the legislature to retract its vote either to ratify or reject an amendment proposal." RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 122 (2019); *see also* Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 10 MINN. L. REV. 185 (1926) (exploring the history and implications of the Wadsworth-Garrett proposal, noting that it would make amendment much more difficult for many of the reasons stated here).

As with legislation that, in hindsight, proves unworkable, constitutional amendments too are not etched in stone. When the great Prohibition experiment proved a failure, the Twenty-First Amendment solved the problem, being one of the quickest to be ratified, in under ten months. Because there is a viable process for when states change their minds, and because allowing rescissions can destabilize the amendment process, there seems to be no clear justification for implying a power to rescind in Article V.

B. Prior Precedents Have Consistently Rejected Rescissions

Numerous times Congress has faced attempted rescissions by states, and it has introduced legislative proposals to give legal effect to rescissions, and all have been rejected. States purported to rescind their ratifications of the Fourteenth, the Fifteenth, and the Nineteenth Amendments and all were rejected by Congress.[92] Although acceptance by Congress is not relevant under the Article V process,[93] and ultimately enough states ratified all three amendments that counting the rescinding states was unnecessary, the precedent is instructive. The fact that the Secretary of State counted the rescinding states in the number of ratifying states, and then Congress subsequently rejected legislation and amendment proposals to recognize rescissions, shows that the prevailing Congressional consensus over a century and a half is that rescissions are ineffective.[94]

When the Fourteenth Amendment was close to ratification, New Jersey and Ohio ratified the amendment and later passed resolutions attempting to rescind their approval of the amendment.[95] Nonetheless, the Fourteenth Amendment was certified by the Secretary of State as valid, including Ohio and New Jersey as ratifying states, essentially ignoring their rescissions. Congress later affirmed by joint resolution the adoption of the Fourteenth Amendment and included in its resolution that Ohio and New Jersey had ratified.[96] As David Kyvig concluded, Congress took the position that "[c]onstitutional amendment was a specific procedure, not an ordinary legislative process, and therefore conventional practices of

92. And unfortunately, the issues were not litigated because they ultimately became moot when additional states ratified all of these amendments. Harmon, *supra* note 27.

93. *See* Congressional Pay Amendment, *supra* note 78.

94. Hajdu & Rosenblum, *supra* note 47, at 119.

95. KYVIG, *supra* note 11, at 174–75.

96. *Id.* at 175. Although additional states ratified before Congress passed its resolution, making the issue moot, Congress still listed the rescinding states as ratifying states of the Fourteenth Amendment.

reconsideration did not apply."[97] Congress's actions during the ratification of the Fourteenth Amendment are consistent with the Department of Justice's point of view, expressed in testimony on the ERA extension, that ratification is the only action a state can take on a constitutional amendment.[98]

When New York attempted to rescind its ratification of the Fifteenth Amendment, Congress again refused to recognize the rescission and New York was listed as a ratifying state.[99] Although Congress did not formally recognize passage of the Fifteenth Amendment, as it was proclaimed effective by the Secretary of State before Congress could act, New York was included in the list of ratifying states in a joint resolution drafted to declare its passage.[100] Similarly, Tennessee attempted to rescind the Nineteenth Amendment but Secretary of State Colby promulgated it with no question directed to Congress as to the validity of Tennessee's ratification, and the list of ratifying states included Tennessee.[101] Judge Jameson, in 1887, explained the prevailing view:

> The power of a State legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in the Constitution. . . . So, when the State legislature has done the act or thing which the power contemplated and authorized—when the power [to ratify] has been exercised—it, *ipso facto*, ceases to exist . . . .[102]

Congress has consistently and uniformly viewed the right of states to rescind as unavailing, which is remarkable given Congress' political character and shifting interests. Senator Roscoe Conkling in 1870 opined that rescissions after ratification were impermissible.[103] A century later, discussing the DC Representation Amendment, so too did Representative Harold Volkmer.[104] That

---

97. *Id.*

98. *See* H.R REP. NO. 95-1405, at 12–16 (1978); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 939 n.122 (1979) (citing *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 121–57 (1977)).

99. H.R REP. NO. 95-1405, at 21 (1978).

100. Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979, 999 n.116 (1977); Notice by the Secretary of State Regarding Constitutional Amendment, Pub. L. No. 15-346, 16 Stat. 1131.

101. 16 Stat. 1131; Notice by the Secretary of State Regarding Constitutional Amendment, 41 Stat. 1823.

102. JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 631–32 (1887).

103. CONG. GLOBE, 41st Cong., 2d Sess. 1477 (1870).

104. 124 CONG. REC. 5270 (1978).

rescissions are quintessentially political statements intended to impress constituents rather than effect constitutional change can be seen in the case of Oregon. Oregon ratified the Fourteenth Amendment in September 1866, then it withdrew its ratification in October of 1868 after the Amendment had reached its constitutional majority.[105] Oregon clearly understood that once the Amendment had been declared ratified, its rescission could have no legal effect. Oregon then re-ratified in April of 1973. As scholars have noted, the symbolism of late ratifications of the Reconstruction and Suffrage Amendments is important, even if they have no legal significance.[106] Oregon's rescission after the amendment was ratified clearly functioned as symbolism, not constitutionalism.

The fact that rescissions have been consistently deemed ineffective does not mean that politicians from different political parties have not tried to encourage them or give them legal effect. However, all legislative and amendment efforts to permit state rescissions have also failed. When Senator James Wadsworth of New York and Representative Finis Garrett of Tennessee proposed an amendment to Article V in 1921 that would allow states to rescind, they did so as part of an effort to make constitutional amendments even more difficult during the constitutional panic of the early 1920s.[107] Their colleagues quickly saw that they were trying to impose greater barriers on amendments by allowing states to destabilize the ratification process through rescissions.[108] Congressman Garrett stated that "it is generally regarded to be—the law that a State . . . may not reconsider and change a ratification."[109] And a Senate Report of 1973 concluded that "Congress previously has taken the position that having once ratified an amendment, a State may not rescind."[110] Wadsworth and Garrett's bill failed.

In response to the ERA, Senator Sam Ervin, a staunch opponent, proposed legislation in Congress that would have allowed states to rescind; it too was rejected. Called "a thoroughly misconceived

---

105. GOV'T PUBL'G OFF., AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30 n.6 (1992), https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf.

106. *See* Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 37 (2008).

107. KYVIG, *supra* note 11, at 251–53. The Wadsworth-Garrett bill would have slowed ratification by requiring an intervening election of state legislators, that ratifications be subject to popular referendum, and that states could rescind until three-fourths of states had un-rescinded ratifications.

108. *Id.*

109. 66 CONG. REC. 2159 (1925) (remarks of Rep. Garrett).

110. S. REP. NO. 93-293, at 14 (1973).

piece of legislation,"[111] Ervin's bill included a provision that would allow a state to rescind, along with other barriers to amendment, such as an automatic seven-year deadline, and that Congress has the authority to adjudge the legal sufficiency of all ratifications that shall be binding on the courts.[112] And Ervin's was not the only bill introduced to allow rescissions during the ERA extension debates.[113] All ultimately failed, in part because adding barriers to an already difficult process was seen by members of Congress as destabilizing, and arguably unconstitutional.

Assuming the silence in Article V means the power to rescind was not granted to the states, legislation to permit rescissions would constitute an unauthorized amendment to the constitution, and legislation to prohibit them would be irrelevant and ineffective.[114] In either situation, Congressional legislation runs up against the stone wall that is Article V. Because the Article V procedures are self-executing—amendments become effective immediately upon ratification by the last state[115]—there is no need for enabling legislation and no role for Congress to proclaim or actualize an amendment. Unlike Dr. Frankenstein's creation, whose electric sparks gave him life, a constitutional amendment takes life gradually with each subsequent ratification. Congress may have the power to initiate a constitutional amendment, but it is the states that do the heavy lifting to give it life. Because the states are the most important actors in the Article V process, it makes sense that Congress can neither legislate Article V procedures, nor permit states to destabilize the constitutional functions of the other states by rescinding and throwing the amendment process into uncertainty. Furthermore, if states wish the power to rescind, they certainly

111. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 190 (1972).

112. S. 215, 92d Cong. (1971).

113. 124 CONG. REC. 26, 257–58 (1978) (rejection of Railsback Amendment); 124 CONG. REC. 33,174 (1978) (rejection of amendment No. 3674 allowing for a State legislature to rescind a ratification of the ERA); *see also* 124 CONG. REC. 33,366 (1978).

114. If one assumes that Article V currently permits rescissions, the same logic applies. Legislation cannot prohibit them as that would be superseding a Constitutional provision, and legislation permitting them would be ineffective. Noted scholars have also concluded that Congress has no authority to legislate such procedural matters around Article V. Lester Orfield, in 1942, admonished: "The constitutionality of Congressional regulation would seem exceedingly doubtful. The states cannot be coerced into adopting an amendment. . . . Congress has done its work when it proposes [the amendment and the mode of ratification], and the matter of adoption is for the states." ORFIELD, *supra* note 63, at 64–65; *see also* Corwin & Ramsey, *supra* note 64, at 208.

115. The Supreme Court in *Dillon v. Gloss* held that the Eighteenth Amendment became effective the day of the last required ratification and that, consequently, a statute passed pursuant to the Amendment was valid to convict the defendant. 256 U.S. 368, 376–77 (1921).

have a mechanism to attain that end: a constitutional amendment clarifying and/or adjusting Article V procedures.[116]

C. Judicial Precedent

Judicial precedent can also be instructive as we try to forge a path to a logical conclusion on state rescissions despite what little of it being irritatingly off point. In 1939, the Supreme Court handed down two Article V decisions in cases dealing with states that changed their minds, but these involved ratifications after rejections: *Coleman v. Miller* and *Chandler v. Wise.*[117] In 1981, the District Court for the District of Idaho ruled that Idaho could rescind its ratification of the ERA, but that decision was vacated by the Supreme Court.[118] State court opinions have opined that rescissions are ineffective, but of course they are not binding on the federal courts. And various attorneys general have expressed their views that rescissions are ineffective, but they are merely opinions based on the same handful of enigmatic cases. In all, the paucity of cases leaves us trying to find the best path forward on this important constitutional question with little guidance.

In both Supreme Court cases dealing with post-rejection ratifications, the Court upheld the states' ratifications against allegations of legal insufficiency, although only one decision included a discussion somewhat on the merits.[119] In *Coleman*, the Court upheld the Kansas post-rejection ratification of the Child Labor Amendment, but it could not agree and therefore failed to decide whether the lieutenant governor's vote broke either state or federal law. The Court in *Coleman* held that a state could change its mind and ratify after having rejected an amendment proposal and that ratification would be valid once a certificate of ratification was sent to Washington. The Kansas Supreme Court had upheld the post-rejection ratification on the grounds that the technical language of Article V speaks only of ratifications and that a rejection was not such an act

116. *See* Michael C. Hanlon, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J. L. & POL. 663 (2000).

117. Coleman v. Miller, 307 U.S. 433 (1939); Chandler v. Wise, 307 U.S. 474 (1939).

118. Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated sub nom.* Nat'l Org. for Women v. Idaho, 459 U.S. 809 (1982) (mem.).

119. In *Coleman v. Miller*, the lieutenant governor broke a tie vote in the Kansas Senate and the Kansas Supreme Court had ruled that the action did not nullify the ratification. 71 P.2d 518 (Kan. 1937), *rev'd*, 307 U.S. 433 (1939). In *Wise v. Chandler*, the Kentucky Court of Appeals had held that Kentucky was precluded from ratifying after it had previously rejected an amendment proposal, expressly adopting the theory that states could only vote once. 108 S.W.2d 1024 (Ky. Ct. App. 1937).

as to preclude future ratifications under Article V.[120] On appeal, the Supreme Court affirmed, but merely on the technical grounds that Kansas' ratification satisfied the clear language of Article V.[121] The Court did not endorse any particular theory of Article V, nor did it presage how it might rule if Congress were to legislate on the matter.[122] In the absence of any real controversy, the Court concluded that Kansas' ratification met the technical requirements of Article V, and it would not upset that technical compliance without some reason other than the fact that the Kansas legislators who brought suit were unhappy that they did not have the votes to block it.

In *Chandler v. Wise*, the Court reversed a Kentucky Court of Appeals decision striking its post-rejection ratification of the Child Labor Amendment.[123] That court determined that a state may only act once in response to an amendment proposal and could not change its mind, in either direction.[124] Based on the technical language of Article V and its prior decision in *Coleman*, the Supreme Court reversed and otherwise dismissed the case in *Chandler* on mootness grounds, stating that the Kentucky certification of ratification was conclusive on the courts.[125]

These two cases, standing together, resolved the split in the states as to whether states could ratify after rejecting, which the Court affirmed on the basis of a technical reading of the plain language of Article V that speaks only of ratification as a constitutional act. The decisions also affirmed decades of prior practice, from the Twelfth to the Twenty-Seventh Amendments.[126] In 1870, New York

120. *Coleman*, 71 P.2d at 518.

121. *Coleman*, 307 U.S. at 433.

122. "Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections." *Id.* at 450.

123. Wise v. Chandler, 108 S.W.2d 1024 (Ky. Ct. App. 1937), *rev'd*, Chandler v. Wise, 307 U.S. 474 (1939).

124. *Chandler*, 108 S.W.2d at 1033.

125. *Chandler*, 307 U.S. at 477.

126. Massachusetts ratified the Twelfth Amendment after having previously rejected it. New Jersey, Delaware, Kentucky, and Mississippi ratified the Thirteenth after having previously rejected it. North Carolina, Louisiana, South Carolina, Georgia, Virginia, Texas, Delaware, Maryland, and Kentucky ratified the Fourteenth after rejection. Ohio, New Jersey, Delaware, Oregon, California, Maryland, Kentucky, and Tennessee ratified the Fifteenth after rejection. Arkansas and New Hampshire ratified the Sixteenth after rejection. Delaware ratified the Seventeenth after rejection. Alabama, Virginia, Maryland, Delaware, Louisiana, Mississippi, Georgia, and South Carolina ratified the Nineteenth after rejection. And New Hampshire, New Jersey, and Rhode Island ratified the Twenty-Seventh after rejection. Of course, many of these later ratifications were after the decision in *Coleman* affirming the power of states to ratify after rejection. A list of all state ratifications with their dates is available. *See* DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 5 (1997).

re-ratified the Fifteenth Amendment after having ratified and rescinded. All states that have ratified after rejection, whether before 1939 or after, are considered as ratifying states, regardless of their intervening attempts to rescind.[127] Although the Supreme Court has not expressly done so, it would seem that it has rejected the claim that states may not change their minds once they have taken a vote on an amendment proposal, even though the decision in *Chandler* was based on mootness and the decision in *Coleman* was based on some vague, ill-defined attempt to decide the case without actually setting a precedent.[128] But the precedents only support the power of the states to change their minds in one direction, to ratify after prior rejection, a position that aligns with a technical reading of Article V, and say nothing about the power of states to rescind after their ratification certificates have been sent to Washington.

One court did rule on the legality of a post-ratification rejection, however, but like so many Article V cases is problematic on numerous levels.[129] The opinion reeks of partisanship and uses a questionable reading of *Chandler* and *Coleman* to conclude that rescissions are permissible, despite over a century of historical rejection. Idaho, following its rescission of the ERA in 1977, brought suit in the District Court of Idaho seeking a declaratory judgment that its rescission was valid.[130] After a long and contested process, Judge Callister issued an opinion in 1981 upholding the rescission even though the issue was arguably unripe as the ERA had not otherwise been ratified by the requisite number of states.[131] On appeal, the Supreme Court vacated the decision when it granted *certiorari*, but then dismissed the case entirely on mootness grounds because the extended ERA deadline had passed with no additional ratifications.[132]

In his deliberations on the issue of rescission, Judge Callister concluded that the Supreme Court's acceptance of post-rejection ratifications in *Chandler* and *Coleman* implied that states could change

127. Oregon, Ohio, and New Jersey all re-ratified the Fourteenth Amendment after having purportedly rescinded.

128. The Court in *Coleman* was deeply divided. *See* Coleman v. Miller, 307 U.S. 433 (1939). Four justices voted to dismiss on the grounds that all Article V issues are non-justiciable political questions. *Id.* at 456. Two justices voted to address the issues on the merits and would have voided Kansas' ratification as being stale. *Id.* at 470. Three justices, including Chief Justice Hughes, voted to address the issues on the merits but upheld the Kansas ratification. *Id.* at 435. This meant there were five votes for justiciability and seven votes to uphold the ratification, but no majority on any theory for upholding the ratification.

129. Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981).

130. *Id.* at 1114.

131. *Id.* at 1154–55.

132. Nat'l Org. for Women v. Idaho, 459 U.S. 809 (1982) (mem.).

their minds and rescind after ratifying, despite the fact that neither precedent involved that issue.[133] Judge Callister concluded that the Supreme Court in *Chandler* and *Coleman* had rejected prior theories of Article V, either that states could only vote once, or could only vote one-way to ratify.[134] From that, he concluded that the Court must have, *sub silentio*, determined that states could change their minds to rescind as well as to ratify.[135]

This conclusion is problematic for a number of reasons. First, *Coleman* did not involve a rescission after ratification; thus, the direct question was not before the Court, so it was not argued or briefed. Second, the Court's purported rejection of the reasoning of the Kansas Supreme Court was not based on any discussion of the reasoning or discussion of any theory of Article V. Rather, the Court based its decision on different grounds, concluding that if Congress had not acted to resolve the uncertainty of whether states can change their minds, the Court would not legislate from the bench on the subject. The split on the Court also makes drawing conclusions difficult, as four justices voted to treat the issues as non-justiciable political questions, two voted to reach the merits and rule against the Kansas ratification, and three voted to reach the merits and uphold the ratification. One cannot conclude from this that the Court had implicitly adopted an interpretation of Article V that states can rescind when it was not discussed and was not an issue in either the lower decision or the final one.[136]

Judge Callister's reasoning from *Chandler v. Wise*[137] is even more problematic. In *Chandler*, the Court reversed Kentucky's finding that the post-rejection ratification was invalid on the same grounds as in *Coleman*, and then it dismissed the case as moot since Kentucky had already sent its certificate of ratification to Washington.[138] Judge Callister concluded, however, that the dismissal on

133. *Freeman*, 529 F. Supp. at 1146–50.

134. *Id.* at 1147.

135. *Id.* ("[T]hey found 'no reason for disturbing the decision of the Supreme Court of Kansas . . . its judgment is affirmed but upon the grounds stated in this opinion.' . . . Thus they rejected the approach of the Kansas court and chose to base their decision on other criteria.") (alteration in original) (citations omitted). That other criteria, however, was that Congress had failed to legislate on the subject. *See* Coleman v. Miller, 307 U.S. 433, 456 (1939). Holding that they would not intervene to establish a rule in the absence of Congressional action is a far cry from affirmatively rejecting any theory of Article V.

136. This is like the Court dismissing a breach of contract case on the lack of a contract, which means it does not have to get to the issue of whether a breach did or did not occur. Because the Court based its decision on different grounds, it did not expressly reject or accept the reasoning of the Kentucky Supreme Court.

137. 307 U.S. 474 (1939).

138. *Id.* at 477–78.

mootness grounds implied a rejection of the theory that states could not change their minds either way on ratification decisions.[139]

By a process of elimination, Judge Callister concluded that the Supreme Court must have implicitly adopted the position that states could rescind, despite over a century of prior history concluding that rescissions were ineffective.[140] Given that the Supreme Court has never addressed rescissions, that *Coleman* and *Chandler* stand only for the proposition that a technical reading of Article V allows states to ratify after rejection, and that the question was unripe in the context of the ERA, Callister's reasoning is quite perplexing. We do not know how the Court planned to respond to Judge Callister's conclusion that rescissions are suddenly permissible because, although the Court granted *certiorari*, it ultimately vacated the decision and then dismissed the appeal on mootness grounds.

While there is no clear federal judicial precedent on how to handle purported rescissions of a constitutional amendment, state precedents can be instructive.[141] Governor Ward of New Jersey vetoed the New Jersey rescission of the Fourteenth Amendment on the grounds that "New Jersey's initial 1867 endorsement had completed the amending process and bound the state to a federal contract."[142] The Supreme Judicial Court of Maine came to the same conclusion that rescissions are impermissible in an opinion issued responding to a question by the Governor in 1919 regarding the Eighteenth Amendment.[143] When Kentucky's legislature brought a resolution to rescind its prior ratification of the ERA, the Lieutenant Governor, Thelma Stovall, vetoed the resolution, stating the rescission was invalid because once a legislature has voted to ratify

---

139. *Freeman*, 529 F. Supp. at 1147.

140. *Id.* at 1149–50.

141. Ginsburg, *supra* note 98, at 939 n.122 (first citing H.R. REP. NO. 95-1405, at 12–16 (1978) (testifying that rescissions are impermissible); and then citing *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 121–57 (1977) (Harmon Memo and Testimony)).

142. KYVIG, *supra* note 11, at 174.

143. In re Op. of the Justices, 107 A. 673, 674 (Me. 1919) ("Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly.").

an amendment, its constitutional act is final.[144] The Kentucky decision follows the longstanding precedent set when, a century earlier, the Kentucky Governor had also determined that rescissions were impermissible.[145] Later, the Kentucky Court of Appeals and the Supreme Court of Kansas also implicitly rejected the validity of rescission after ratification.[146] Moreover, the Department of Justice recognized that ratification is "an act that cannot be accompanied by strings or conditions, a final act that cannot be withdrawn."[147]

Furthermore, it is notable that there are other situations in which states have not been allowed to rescind after they have agreed to participate in other multi-state activities, as in multi-state compacts. For instance, in *West Virginia ex rel. Dyer v. Sims*, West Virginia was not allowed to withdraw from a pollution control contract for the Ohio River.[148] The Court held that since Congress must agree to all interstate compacts, and they are justiciable in the federal courts, provisions in West Virginia's Constitution prohibiting the compact were superseded.[149] A similar outcome occurred in *Nebraska v. Iowa*, with the Supreme Court retaining jurisdiction to determine the validity of interstate compacts, and nullifying state law conflicts.[150] Similarly, in the context of Indian affairs, where the federal government has superior authority, the courts have held that actions by states are final, even if they contain irregularities, and that the states cannot change their minds.[151] As one commentator noted:

> [t]he compact and state resolution situations indicate that withdrawal by a state from a previous commitment has often been denied by the courts. The amending of the United States Constitution is a function in which the federal government exercises more control over the states than either the compact or resolution situations and, therefore, state procedural

144. Taylor, *supra* note 40.

145. *See* JAMESON, *supra* note 102, at 630 (quoting the message of Governor Bramlette).

146. Wise v. Chandler, 108 S.W.2d 1024, 1033 (Ky. Ct. App. 1937) ("[A] State can act but once . . . upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress."); Coleman v. Miller, 71 P.2d 518, 524 (Kan. 1937) ("[A] ratification once given cannot be withdrawn.").

147. Ginsburg, *supra* note 98, at 939; *See* Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 13–15 (1977).

148. 341 U.S. 22 (1951).

149. *Id.* at 30–32.

150. 406 U.S. 117 (1972).

151. *See* United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971); Omaha Tribe of Neb. v. Vill. of Walthill, 334 F. Supp. 823 (D. Neb. 1971).

> irregularities would seem even less of a reason to allow rescission in that area.[152]

In the end, however, there is no precedent stating that states may not rescind, Article V is silent on the issue, and although no state's rescission has ever been recognized, that fact did not matter because additional ratifications made up the difference. The courts dealing with the ERA's validation are likely to have to resolve this thorny question, as it is unlikely that an additional five states will ratify in the near future. If prior precedent is insufficient to convince a court of the invalidity of the rescissions, then we generally turn to policy and canons of construction to fill in the details that James Madison left in Article V.

V. OUT OF THE RABBIT HOLE: THEORIES OF RESCISSION AND RATIFICATION

In considering whether states should be allowed to rescind their prior ratifications of the ERA, it seems courts should focus on the function of ratification in our constitutional system and the relationship of states to each other. Like legislation, ratification is an affirmative decision by a representative body to adopt a rule that becomes legally binding once the requisite number of states have ratified. As with all legislation, the process takes time and each state's ratification can be seen as one step in a multi-step process. The ultimate question, therefore, is whether the Article V ratification process is a single ticket to ride, a one-way escalator, or thirty-eight separate elevators leading to a single destination.

Commentators analyzing the issue of post-rejection ratification and post-ratification rescission have identified three general theories for analyzing the ratification power.[153] The first is that states may only act once, either by rejection or by ratification and, once they have taken that step, their decision is binding and may not be revisited.[154] This is the *one-bite-at-the-apple* theory, which is based primarily on the convention mode rather than the legislative mode, for once a convention has been dismissed, it is not reassembled and is unable to revisit the matters for which it was assembled.[155] Ratification under this model would be like having one ticket to ride at Disneyland. You can use it to go up Space Mountain, or you can use

152. Raymond M. Planell, *The Equal Rights Amendment: Will States Be Allowed to Change Their Minds?*, 49 NOTRE DAME L. REV. 657, 661 (1974).
153. *See* Dunker, *supra* note 81, at 94–96; Hajdu & Rosenblum, *supra* note 47, at 119–22.
154. Dunker, *supra* note 81.
155. *See id.*

it to ride the teacups. But once a state has used its ticket, there are no more rides.

This theory has an attractive logic, but, upon closer analysis, we can see that rejection and ratification function in fundamentally different ways when it comes to the process of affirming a legislative bill or resolution. Although a legislature might choose to reject a proposed amendment by a majority vote, it might also ignore, table, or otherwise bury it. A proposal may fail for many substantive or procedural reasons that make it difficult to determine whether a state has firmly and officially rejected it or is simply kicking the can down the road. If it were tabled it could come back the following year. And if there are not enough votes to get the proposal out of committee one day, there might be enough votes another day. At what point in the process can one reasonably say that a legislature has reached finality? A vote to ratify, however, is not so indeterminate, and for that reason most commentators agree that ratification has a different legal meaning than rejection.[156] Because a formal vote of rejection is the functional equivalent of inaction, logically both have been treated as non-binding.[157]

The second theory recognizes the difficulty in determining whether inaction should count as rejection, and therefore counts ratification as final, but rejection and inaction as subject to revision.[158] This is the *one-way-street* theory. And although some are uncomfortable with its lack of symmetry, it is the more logical position given Article V's reference only to ratification, and the different

156. Because non-ratification reflects the status quo, it makes sense to treat ratification as the endgame. Until a legislature acts to ratify a proposal, it is in progress, and once accomplished, the process ends.

157. Chandler v. Wise, 307 U.S. 474 (1939); Coleman v. Miller, 307 U.S. 433 (1939). The same is true of legislation. Legislation that fails in one session can return over and over, with changes or without, and if it is eventually approved, then it becomes legally binding. And although legislatures could repeal legislation after it has gone into effect, doing so requires a majority vote to affirmatively reject the legislation. That affirmative vote is quite different from sequestering, tabling, or otherwise rejecting the legislation in the first place.

158. Dunker, *supra* note 81. There is an interesting, although perhaps academic, issue as to whether an amendment proposal can linger until it receives the appropriate number of ratifications, or whether it can be deemed terminally dead when one state legislature, more than one-quarter, officially rejects it. This question has arisen periodically, but there has been no satisfactory answer. If it takes thirty-eight states to ratify an amendment proposal, presumably thirteen can reject it. To date, however, no amendment proposal has been deemed to be completely rejected even when more than one-quarter of the states have voted to reject it. The Child Labor Amendment was rejected by fifteen states between 1924 and 1927 and yet it remained alive and well, and subject to a flurry of ratifications in the 1930s. In litigation as to whether a state can ratify after it has rejected, the topic was often discussed, with opponents of the ratification arguing that rejection is a firm and final act. However, the Supreme Court held otherwise in *Coleman v. Miller*, that states could ratify after rejecting, which should put to rest the one-bite argument that states may only act once on an amendment. The decision in Coleman was not conclusive on this issue.

effects of, and reliance of interests on, ratification and rejection. Ratification under this model is like asking all the states to get on a one-way escalator to the top floor. They may get off before reaching the top, as when one house of a state legislature rejects or tables an amendment proposal. But once the state has reached the top, it remains there with no way down. They can get on the escalator as many times as it takes, but once they get to the top, they are done. The one-way-street theory analogizes ratification to passing legislation where, upon affirmation by all the relevant parties, it becomes legally binding and the only way to reverse it would be to start at the bottom again and re-ascend the escalator.

The third position resurrects the symmetry of the one-bite theory but would allow states to reject or ratify at will, as many times as they like.[159] Under this theory, no amendment would be ratified until there were thirty-eight un-rescinded ratifications existing at a particular moment.[160] This can be termed the *contemporaneousness* theory, which requires a super-majority all being in relative synchronous agreement, regardless of the uncertainty that might produce throughout the ratification process as states changed their positions. Ratification under this model would be akin to thirty-eight separately-controlled elevators, all going up and down, but if at some point all thirty-eight are stopped on the top floor, then ratification would be deemed effective. Not surprisingly, this model increases the difficulty of ratification, potentially destabilizes the process, and can lengthen the time it takes for an amendment to be ratified. Consequently, opponents to particular constitutional amendments have offered up numerous legislative and amendment proposals to permit rescissions and to impose deadlines designed to prevent the elevators all reaching the top, thus making ratification significantly more difficult.

The current view, which has been accepted for the past century and a half, is the *one-way-street* theory.[161] But some who argue in favor of rescission advocate for the *contemporaneousness* theory,

---

159. Dunker, *supra* note 81.

160. It is also tempting to view the ratification process, as well as the amendment proposal process, as a straightforward legislative exercise where one legislature cannot bind a future one and subsequent legislatures can change their mind. But ratification clearly is not the same function as legislating. Constitutional proposals, once made, cannot be withdrawn by a later Congress, unlike simple legislation that can be amended or repealed. Similarly, ratifications by the states are constitutional functions. They have special meaning and require special rules. Lester Orfield explained that "[t]he legislature in ratifying an amendment is not exercising a legislative function, just as Congress, when it proposes, is not legislating." ORFIELD, *supra* note 63, at 62.

161. *See* Dunker, *supra* note 81.

while no one seems to advocate for the *one-bite* theory.[162] Although it is clear that Article V does not mandate a particular model for ratification, nor does it expressly reject a particular model, the current default seems more consistent with the framer's rejection of conditional ratifications, analogizes the ratification process to the legislative process, and protects states from the destabilizing acts of other states.

Contemporaneousness sounds like a good idea given our commitment to democratic decision-making, but there are concerns with it. For instance, how long do we leave a window open for states to achieve contemporaneousness? Is it fair to assume that a state that has not changed its mind still agrees? Should states have to assert their support for an amendment every few years, or every time a new state ratifies? More to the point, however, if there was always a risk of rescission, proponents of an amendment would need to seek approval of all fifty states in order to compensate for the possibility of states rescinding, thus increasing the numbers needed for ratification to more than the already significant three-fourths and moving the process closer to the unanimity requirement of the unwieldy Articles of Confederation. If the five state rescissions of the ERA are deemed valid, amendment proponents must seek five additional ratifications, bringing the total to forty-three, or eighty-six percent of states, far more than is required by the already onerous three-fourths of Article V.

And I would argue that the destabilizing effects are the most important. As the Supreme Court held in *M'Culloch v. Maryland*, all the people joined the federal alliance, but they did not intend to give up to the people of one state the power to negatively affect the national interests or the sovereignty of other states.[163] That same reasoning applies even more to the process of ratifying constitutional amendments than to taxing a national bank. As Chief Justice Marshall expounded:

> [i]f any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers

162. *See* Paulsen, *supra* note 81, at 721–23 (advocating for the contemporaneousness theory); *see also* Dunker, *supra* note 81 (stating that the predominant theory is the one-way-street theory). *But see* Wise v. Chandler, 108 S.W.2d 1024 (Ky. Ct. App. 1937) (adopting the one-bite theory).

163. 17 U.S. 316 (1819).

> are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them.[164]
>
> Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.[165]
>
> The people of all the states have created the general government, and have conferred upon it the general power of taxation. . . . But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.[166]

Although *M'Culloch* was about a state exercising sovereignty over the national bank created by Congress, the underlying principle is that the constitution establishes national supremacy within certain bounds, and that individual states may not exercise sovereignty over the national interest, or the interests of other states. For "no state is willing to allow others to control them."[167] This principle, embedded in our constitutional agreement, provides for the furtherance of national interests and prevents states from asserting their sovereignty at the expense of other states. This

164. *Id.* at 405.
165. *Id.* at 431.
166. *Id.* at 435–36.
167. *Id.* at 405.

principle is subverted by rescissions when states can destabilize the amendment process and undercut the sovereign acts of other states. The founders' rejection of conditional ratification of the constitution is consistent with Chief Justice Marshall's assertion that a single state may not upset the balance of power between different sovereign states.

A. Nice Sharp Quillets of Law

Given the lean language of Article V, and the lack of relevant judicial precedent, other relevant sources are the writings of scholars and commentators who have been studying the process of rescissions since those involving the Fourteenth Amendment. Yet unlike the opinion of the lawyers for the Kentucky legislators in *Chandler v. Wise*,[168] I would argue that scholarly opinion is valuable when there is no better source. In his brief in *Chandler*, attorney Lafon Allen opined:

> [a] great deal of nonsense has been written on this subject, as was perhaps to be expected from commentators who, having no clear precedent to guide them and being free from that sobering sense of responsibility which affects the judgment of a court, are prone to seize upon faint analogies and other "nice sharp quillets of the law" to sustain their conjectures. All such catchpenny arguments we would put aside, in the very beginning, believing them to be unworthy of serious consideration. Great as is the respect due Judge Jameson's views on questions of constitutional law, it must be admitted, we think, that he is responsible for the currency of some of these frail analogues and precedents, which, through constant repetition, have come to have a sort of ritualistic importance in the eyes of his disciples.[169]

Whether they are sharp quillets of law and frail analogues or cogent rationales, scholarship may be the only guide out of this intellectual morass of constitutional indeterminacy that is Article V. Fortunately, despite attorney Allen's self-serving snipes, there seems to be no question that scholars concur on the point that rescissions are currently ineffective. Until the Fourteenth Amendment, there was no real discussion of state rescissions by treatise writers. After the civil war amendments, Judge Jameson's treatise

168. 307 U.S. 474 (1939).
169. Brief for Respondents at 2–3, Chandler v. Wise, 307 U.S. 474 (1939) (No. 14).

was the first to discuss rescission, and he flatly concluded that rescissions were unacceptable.[170] He reasoned that if the framers had intended to permit rescissions, Article V would read:

> that the amendment should be valid "when ratified by the legislatures of three-fourths of the States, each adhering to its vote until three-fourths of all the legislatures should have voted to ratify." It is enough to say that such is not the language of the Constitution; but that it shall be valid when ratified by the legislatures of three-fourths of the States.[171]

Jameson's final conclusion about allowing states to rescind could not be put better. "Such a mode of transacting business of so transcendent importance would be puerile."[172] David Watson, in 1910, echoed Jameson's view that rescissions were impermissible.[173]

The issue of rescissions did not again grip the scholarly consciousness until the early 1920s with passage of the Eighteenth and Nineteenth Amendments. When the Prohibition Amendment passed so quickly, despite strong popular opposition and procedural obstacles, a spate of law review articles discussed Congress' power to impose obstacles and the general concern over the changing character of amendments.[174] Some attention was paid to the Wadsworth-Garrett plan to issue a constitutional amendment proposal to permit state rescissions, with the opinion being that it was both a bad idea and an overreaction to the unprecedented number of amendments ratified in the early years of the twentieth century.[175]

Again, in the late 1930s and early 1940s, there was more attention paid to the issue of rescissions around the revival of the Child Labor Amendment and the Court's shift away from the *Lochner* era and, again, the consensus was that rescissions were impermissible.[176] Lester Orfield's treatise in 1942 clearly stated that

---

170. JAMESON, *supra* note 102, at 632.
171. *Id.*
172. *Id.*
173. 2 WATSON, *supra* note 31, at 1310.
174. *See* Herman V. Ames, *The Amending Provision of the Federal Constitution in Practice*, 63 PROC. OF THE AM. PHIL. SOC'Y 62 (1924) (discussing the issue of rescissions without expressing an opinion thereon, although he argues we should not make amendments too easy); W. F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321 (1921); William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223 (1919); Miller, *supra* note 91.
175. *See* Ames, *supra* note 174, at 70–73; Miller, *supra* note 91, at 190–91.
176. *See generally* ORFIELD, *supra* note 63; Corwin & Ramsey, *supra* note 64; Frank W. Grinnell, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A. J. 1164 (1959); Norman Stevens, Comment, *Constitutional Law—Ratification of Proposed Federal Amendment After Prior Rejection*, 11 S. CAL. L. REV. 472 (1938).

rescissions were invalid because the state legislatures were engaged in a special constitutional function when they ratified the constitution itself and when they ratified amendments.[177] Their power was granted through Article V and was not an incident of state sovereignty and therefore could not be exercised like normal legislation.[178]

With passage of the ERA proposal and then the subsequent rescissions, another flood of articles and books emerged discussing the rescission issue.[179] Most recited the history given here and concluded that rescissions are impermissible.[180] Some argued that rescissions should be allowed.[181] Yet all concurred that the issue was not firmly settled by any Supreme Court precedent either way. With the ratification of the Twenty-Seventh Amendment in 1992, another surge in law review articles and books hit the shelves, each rehashing much of the earlier history.[182] And others are arriving now in response to the final ratification of the ERA.[183]

With so many voices opining as to the logic of *Coleman* or the validity of the Congressional precedent of the Fourteenth Amendment rescissions, it can seem difficult to identify where there is consensus and where there is not. But the evidence is remarkably clear

---

177. ORFIELD, *supra* note 63, at 62.

178. *Id.*

179. *See generally* FREEDMAN & NAUGHTON, *supra* note 32; A. Diane Baker, Comment, *ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications*, 28 EMORY L.J. 71 (1979); Dunker, *supra* note 81; Elder, *supra* note 81; Lynn Andretta Fishel, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147 (1973); Ginsburg, *supra* note 98; Hajdu & Rosenblum, *supra* note 47; Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL'Y 19 (1979); J. William Heckman, Jr., *Ratification of a Constitutional Amendment: Can a State Change Its Mind?*, 6 CONN. L. REV. 28 (1973); Kanowitz & Klinger, *supra* note 100; Planell, *supra* note 152; Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980); Norman Vieira, *The Equal Rights Amendment: Rescission, Extension and Justiciability*, 6 S. ILL. U. L.J. 1 (1981).

180. *See* Hajdu & Rosenblum, *supra* note 47, at 119–22; Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 134 (1997); Kanowitz & Klinger, *supra* note 100, at 999–1005.

181. *See* Hatch, *supra* note 179, at 46–47; Rees, *supra* note 179, at 929–30.

182. *See generally* BERNSTEIN WITH AGEL, *supra* note 32; Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992); Steward Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994); Ishikawa, *supra* note 4; Paulsen, *supra* note 81; Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, 4 WOMEN'S RTS. L. REP. 209 (1978); Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494 (1978).

183. *See generally* Hanlon, *supra* note 116; Held et al., *supra* note 180; Wright, *supra* note 12; Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437 (1999).

in the scholarly record. Everyone admits that (1) no state rescission has ever been recognized, (2) that there is no federal judicial precedent allowing or disallowing state rescissions, (3) that there have been Congressional efforts in the past both to permit rescissions and to prohibit them, none of which have successfully passed, (4) that all state courts, state executives, and many Congressmen have concurred that rescissions are prohibited, and (5) that the uncertainty of whether or not a state may rescind remains and continues to overshadow the amendment process.

Scholars disagree, however, on how much weight should be given to the Congressional precedents of the Fourteenth, Fifteenth, and Nineteenth Amendment rescissions. Scholars also disagree on whether determining the validity of rescissions under Article V is justiciable or lies solely in the hands of Congress. They disagree as to whether Madison's stricture about unconditional ratifications should apply to amendments, and they disagree as to whether principles about conventions should apply to Congressionally-proposed and legislatively-ratified amendments. They even disagree whether Congress would have the power to legislate as to the validity of rescissions. And those who favor allowing rescissions generally do so on federalism grounds or parity, expressing dislike for the current asymmetric rule. Those who argue against allowing for rescissions usually do so on the grounds that rescissions inject uncertainty, they make amending more difficult, that ratification is a special constitutional function that is fundamentally different from legislation, and that precedent should be respected. In essence, they agree that the current rule is that ratification is a one-way street, but some advocate that the courts should adopt the contemporaneousness theory that would permit unlimited rejections and ratifications.

There is agreement on this, however:

> [t]his uncertainty [about the validity of rescissions] has already delayed the acknowledgment of several amendments well beyond their constitutional validity. These amendments—including the Twelfth, Fifteenth, and Nineteenth Amendments—received the requisite number of ratifications, but with at least one state attempting to rescind, languished in legitimacy limbo until an equal number of states as those rescinding had unequivocally ratified. This represents an impermissible encroachment of the central government on the prerogative of

states to alter the Constitution with a three-quarters concurrence.[184]

More to the point, Professor William Van Alstyne testified that allowing states to rescind would be "an atrocious way to run a constitution."[185] It seems to me that Van Alstyne was exactly right, as rescissions threaten the balance of power between the states in contravention of the founders' insistence that there should be no conditional ratifications and the careful balance of power between the separate sovereign states articulated throughout the constitution.

VI. CONCLUSION

At the end of the day, no amendment has ever been held by Congress or the Courts to be void if it has met the technical requirements of Article V, which is the potential fate of the ERA. It seems beyond a doubt that the irregularities of the rescissions are insufficient to set a precedent of this magnitude. Any interpretation of Article V's grant of the power to ratify must promote a reasonably defensible interpretation that does not undermine the power and the provision that is being exercised. Unreasonable interpretations are not constitutional if there are other interpretations that better align with the principles of constitutionalism and the rule of law.[186] Allowing states to rescind and throw the process into turmoil is not only unreasonable but untenable in the heady realm of constitution-making.

Of course, no state is required to ratify an amendment proposal. But once it does, it has given its quantum of the life force to the amendment, and states that come later should be able to rely on the consequences of prior state acts. If ratifications were not binding, then early ratifying states would have more power vis-à-vis later ratifying states—a situation hardly to have been acceptable to the

184. Ishikawa, *supra* note 4, at 570 (footnotes omitted). The Twelfth Amendment did not involve a rescission, but it did involve a claim of legal insufficiency. The New Hampshire legislature ratified the amendment with a simple majority, but the governor vetoed the resolution, and the legislature did not have the two-thirds majority to override the governor's veto. Although New Hampshire's ratification was most likely the final one needed, the Secretary of State did not certify and publish the amendment until after another state, Tennessee, ratified. *See* Idaho v. Freeman, 529 F. Supp 1107, 1149 (D. Idaho 1981).

185. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 138 (1977) (testimony of Prof. Van Alstyne).

186. *See* Cohens v. Virginia, 19 U.S. 264, 393 (1821) ("We must endeavour [sic] so to construe [Constitutional provisions] as to preserve the true intent and meaning of the instrument.").

thirteen states that understood at the founding that ratification of the constitution could not be conditional.

And for those involved in the difficult political process of garnering support, rescissions impose a significant hardship, requiring that they focus on ratifications in all fifty states because later states can never know if an earlier state will stick by its ratification. Prohibiting the destabilizing effects of rescissions from upsetting the reliance of other states, like prohibiting state taxation of the national bank, is a principle deeply rooted in our constitution. States must play fair and cannot have an undue influence in national politics.