Other States' Attempts at Rescission Are Unlikely to Succeed and Affect Passage of the ERA[1]

Under Article V of the United States Constitution, once three-fourths of the states ratify an amendment, it becomes a part of the Constitution.[2] When Arizona votes to ratify the ERA, it will be the 38th state necessary for ratification.[3] This is true despite attempts by other states to rescind prior ratifying votes.[4]

The Constitution does not grant the states the power to rescind a prior vote to ratify a constitutional amendment. Purported rescissions of other amendments have historically failed and the Supreme Court has never found a rescission to be valid.

A. There Is No Textual Support in the Constitution for Rescission of a Prior Vote to Ratify

Article V of the Constitution is silent regarding rescission of a state's vote to ratify a constitutional amendment, and such a power cannot be granted by implication. Congress has consistently read Article V to grant state legislatures only a ratification power.[5] Once a state legislative body has ratified an amendment pursuant to Article V, its constitutional role is complete.[6] This interpretation avoids the confusion and lack of confidence in the amendment process that would result by reading Article V as granting the power to ratify with the caveat "but we might revoke this ratification at any time."[7]

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[1] These materials are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

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

[3] Robinson Woodward-Burns, *The Equal Rights Amendment is One State From Ratification. Now What?*, WASH. POST, https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/20/the-equal-rights-amendment-is-one-state-from-ratification-now-what/?noredirect=on&utm_term=.049c22cbdd1a (June 20, 2018).

[4] The five states that have attempted to rescind are Nebraska in 1973, Tennessee in 1974, Idaho in 1977, Kentucky in 1978, and South Dakota in 1979. *Id.* It is not clear whether these states would continue to support these rescission attempts.

[5] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 HARV. L. REV. 386, 419-20 (1983).

[6] *Id.*

[7] *See* Dodd, *supra* note 6.

Moreover, because the Supreme Court has confirmed that the power to ratify constitutional amendments "is the exercise of a national power specifically granted by the Constitution" and because the Constitution does not specifically also grant the power to rescind, states cannot exercise their own authority to do so.[8]

Some have suggested that because Article V does not explicitly prohibit rescission, the framers of the Constitution must have intended to grant rescission powers through implication. But the Supreme Court has stated that the power to ratify is granted by the Constitution and limited to Article V. Reading an implied power of rescission into Article V would significantly alter a power explicitly granted by the Constitution.[9]

B. Historic Attempts at Rescission Relating to Other Amendments Have Failed

Historically, attempts at rescission have been deemed ineffective. For example, in 1868, Ohio and New Jersey attempted to rescind their ratifications of the Fourteenth Amendment. Both states were needed to add up to the required total for the Fourteenth Amendment to become a part of the Constitution. Congress and the Secretary of State ignored Ohio's and New Jersey's attempts to rescind and "affirmed the amendment's passage."[10]

Similarly, in 1869, New York attempted to rescind its ratification of the Fifteenth Amendment.[11] In response, then-Secretary of State Hamilton Fish issued a proclamation certifying that the Amendment had been ratified by the requisite three-fourths of the states and listing the states.[12] The list included New York—the state "claiming to withdraw the said ratifications."[13]

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[8] 253 U.S. 221, 229–30 (1920) (determining the lower court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802, 115 S. Ct. 1842, 1854 (1995) (holding that states may not impose qualifications for offices of the United States representative or United States senator in addition to those set forth by the Constitution).

[9] *See Hawke v. Smith*, 253 U.S. 221, 229–30 (1920) (finding that "determination of the method of ratification is the exercise of a national power specifically granted by the Constitution").

[10] W. F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 346 (1921).

[11] *Id.*

[12] *Id.*

[13] Hamilton Fish, U.S. Sec'y of State, Announcement of Fifteenth Amendment Ratification (March 30, 1870), https://millercenter.org/the-presidency/presidential-speeches/march-30-1870-announcement-fifteenth-amendment-ratification.

In another failed attempt at rescission, West Virginia purported to rescind its ratification of the Nineteenth Amendment in 1920. The Secretary of State ignored the rescission and certified the Amendment.[14]

Summarizing past rescission attempts of other amendments, legal scholar Leo Kanowitz comments:

> Whether a state, having first ratified a proposed constitutional amendment, can rescind that ratification, is not entirely an undecided question in American constitutional law. With respect to three present amendments to the federal Constitution—the fourteenth, fifteenth, and nineteenth—either Congress itself or the secretary of state, in promulgating the amendments included within the requisite number of ratifying states one or more states that had first ratified and then purported to rescind. In other words, in each instance efforts to rescind were regarded as void and without effect.[15]

In short, efforts to rescind have historically failed. There is every reason to believe that the same would be true with respect to any attempts to rescind ratification of the ERA.

C. The Supreme Court Has Never Found a Rescission to be Valid

The Supreme Court has refrained from addressing a state's power to rescind a prior ratification of a constitutional amendment. In *Coleman v. Miller*,[16] the Court described the history of the Fourteenth Amendment (including attempts at rescission) and concluded that questions about the validity of ratifications are political questions, not to be resolved in court.

In *National Organization of Women v. Idaho*, a lower court decision evaluating such a rescission was before the Supreme Court, but the Supreme Court did not reach the issue as it dismissed the case as moot once the congressional deadline for ratifications had passed.[17]

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[14] *Constitutional Amendment Process*, FEDERAL REGISTER, https://www.archives.gov/federal-register/constitution (last updated Aug. 15 2016).

[15] Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 999–1000 (1977)

[16] 307 U.S. 433 (1939).

[17] *National Organization for Women v. Idaho*, 459 U.S. 809, 809 (1982) (declining to affirm the District Court's decision in *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho, 1981)); *see also* Scott Bomboy, *Can a Dormant Proposed Constitutional Amendment Come Back to Life?*, CONSTITUTION DAILY, https://constitutioncenter.org/blog/can-a-dormant-proposed-constitutional-amendment-come-back-to-life (May 31, 2018).