Are Recent “Rescissions” of Article V Applications Valid?

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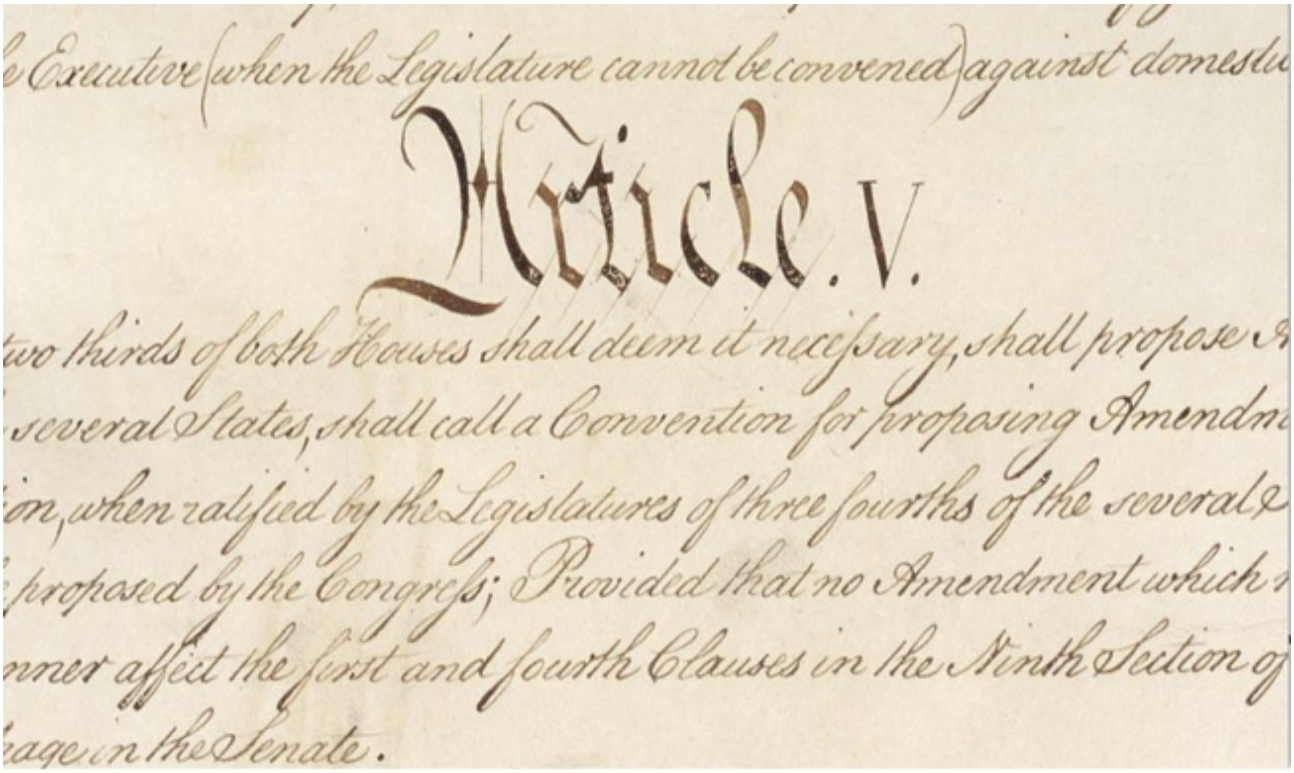

Many recent state legislative Article V rescissions suffer from defects the courts call “material mistakes.” A material mistake can void some legal documents.

Article V of the Constitution says that if two thirds of state legislatures (34) pass applications requesting a convention for proposing amendments, Congress must call the convention. A *rescission* is a state legislative resolution repealing an application.

Records at the Article V Library show that nearly 30 states have applied for a convention since 2001. The records also show 17 rescissions during that time, but eight rescissions have been superseded by new applications. So at this point, nine rescissions remain in effect—possibly.

Each of these nine has a preamble—a “Whereas” clause—explaining the assumptions of law and fact undergirding the decision to rescind. This is useful information: The famous 17th century English legal scholar Edward Coke said a preamble is a “key to open the minds of the makers.” The preamble tells you what lawmakers were thinking and assuming when they passed the resolution. A preamble that shows a resolution was based on clear errors of fact (perhaps even fraud) tends to undercut that resolution.

And the preambles of seven of the nine show they were based on material mistakes of law and fact.

The states with applications flawed by erroneous assumptions are Delaware, Maryland, Montana, Nevada, New Hampshire, North Dakota, and Virginia. The states with clean rescissions are Texas (whose rescission is only partial) and New Mexico.

Here are the principal errors in the "dirty seven:"

Error #1: The preambles of the Delaware, Maryland, Montana, Nevada, New Hampshire, and North Dakota rescissions show they were passed under the belief they were necessary to prevent a "constitutional convention." But this belief was entirely mistaken. No application counts toward a constitutional convention. The Constitution states explicitly that a legislature may apply only for a "Convention for proposing Amendments," not a constitutional convention. A convention for proposing amendments is, as the name says, an assembly that recommends one or more amendments—something Congress can do any day of the week. But neither Congress nor the convention has power to legally propose an entirely new constitution.

Here is a legal treatise explaining the application-and-convention process: *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* (4th ed, 2016)

Error #2: The resolutions of Montana, Nevada, New Hampshire, and North Dakota all claim or assume the convention can unilaterally impose changes on the country. But the assembly's official name is "convention for *proposing* amendments," not "convention for *dictating* amendments." Article V of the Constitution explicitly says ratification by three fourths of the states (38) is necessary for any proposal to become an amendment.

So this major assumption underlying the Montana, Nevada, New Hampshire, and North Dakota rescissions also turns out to be totally false. See the following research materials:

State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters (4th ed, 2016)

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013).

Error #3: The resolutions of Maryland and Nevada claim the 1787 Constitutional Convention exceeded the scope of its power. This is an old myth, but it has been thoroughly debunked. See the following research materials:

Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention, 40 Harvard J. L. & Public Pol. 61 (2017)

Yes, the Constitution Was Adopted Legally, Article V Information Center

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013)

Who Called the Constitutional Convention? Answer: The Commonwealth of Virginia, Article V Information Center

The Constitutional Convention Did Not Exceed Its Power and the Constitution is not "Unconstitutional", Article V Information Center

Error #4: The Maryland rescission claims the 1787 Constitutional Convention was the only constitutional convention in American history. This assumption also is false: there have been at least two. And if you define "constitution convention" the erroneous way the Maryland rescission uses the term (to include any convention that proposes amendments) then there were other "constitutional conventions" in 1754, 1780, 1786, 1814, and two in 1861. See the following research material:

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013)

The Montgomery Convention of 1861, Article V Information Center

List of Conventions of States and Colonies in American History, Article V Information Center

The Story of Conventions of States in American History, Article V Information Center

It's Been Done Before: A Convention of the States to Propose Constitutional Amendments, Article V Research Center

Error #5: The Virginia rescission is based explicitly on the premise that the convention's composition and protocols are unknown. This premise is entirely false. According to both the U.S. Supreme Court and many founding-era records, the gathering is a "convention of the states." Conventions of the states have been held frequently in U.S. history—most recently in 2017—and their protocols are well understood. See the following research materials:

Why The Constitution's "Convention for Proposing Amendments" is a Convention of the States (Heartland Institute, 2017)

State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters (4th ed, 2016)

Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693 (2011)

Proposing Constitutional Amendments By a Convention of the States: Article V Handbook for State Lawmakers (American Legislative Exchange Council, 3d ed., 2016)

Newly Rediscovered: The 1889 St. Louis Convention of States, Article V Information Center

Error # 6: The resolutions of Montana, Nevada, New Hampshire, and North Dakota all claim the subject matter of the convention cannot be controlled. As noted above, however, the Supreme Court says an Article V convention is a convention of states. The agenda of a convention of the states is routinely limited by the scope of the call, by instructions states give to the commissioners who represent them, and by the law of agency. So another premise undergirding state rescissions turns out to be faulty. See the following research materials:

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013)

May state legislative applications limit an Article V convention? Subject, yes; specific language, probably not, Article V Information Center

A Response to the Runaway Scenario, Article V Information Center

Where Chief Justice Burger Likely Got His Anti-Amendment Convention Views, Article V Information Center

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So what now? If lawmakers considering these rescissions had been told the truth rather than given disinformation, these rescissions might never have been passed. Initially, at least, this is an issue for Congress because the Constitution gives the initial responsibility for counting applications and rescissions to Congress. When counting applications and rescissions, therefore, Congress will have to weigh whether or not to count purported rescissions flawed by material mistakes.

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