

Ratification of the Equal Rights Amendment: Lessons From Special Elections to The House of Representatives in 1837

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In 1837 the House of Representatives considered a governor's attempt to include a limitation in a writ issued to fill a vacancy in representation pursuant to Article I, Section 2 of the Constitution. The Representatives agreed almost unanimously that the limitation was unconstitutional and should be disregarded as mere surplusage rather than invalidating the writ and the election.

This Article suggests that the similar Article V gives Congress only the power to propose amendments, without any limitation, and States the power to ratify amendments or not, without any power to rescind. Consequently, the time limit that Congress purported to impose on ratification of the Equal Rights Amendment is unconstitutional surplusage, and state rescissions are ineffective. Virginia's ratification on January 15, 2020 pushed the Amendment past the three-quarters threshold, making it a valid part of the Constitution. The Article also considers lessons from the subsequent 1837 general elections and suggests that the Supreme Court — rather than Congress — should and likely will ultimately adjudicate the validity of the Amendment's ratification.

INTRODUCTION

On January 15, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment, pushing it over the three-quarters threshold for inclusion in the Constitution.¹ Critics object that Virginia's action had no legal effect because the time limit that Congress purported to impose for ratification has passed and because five states have purported to rescind their ratifications.²

This Article applies lessons from the Twenty-Fifth Congress involving special elections in Arkansas and Mississippi to evaluate those objections and to suggest that the time limit and rescissions are ineffective. In 1837, the House of Representatives determined almost unanimously that a governor's attempt to include a limitation in a writ to fill House vacancies under Article I, Section 2 of the Constitution was unconstitutional and to be disregarded as surplusage. Read consistently, Article V only allows Congress to propose amendments outright, without any limitations, and

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1. See Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html> [<https://perma.cc/PKC3-ZJM2>].

2. See, e.g., Mike Rappaport, *The Controversy About the ERA Amendment Process*, ORIGINALISM BLOG (Jan. 6, 2020) (five states have rescinded; Congressional time limit has expired; and if the time limit is unconstitutional, its inclusion might invalidate the entire proposal), <https://originalismblog.typepad.com/the-originalism-blog/2020/01/the-controversy-about-the-era-amendment-processmike-rappaport.html> [<https://perma.cc/YEE9-JFZD>].

states to ratify proposals or not, without any power to rescind. This Article also applies lessons from the special elections to the question whether Congress or the Supreme Court will finally adjudicate the amendment's validity.³ It suggests that the Court likely will.

I. SPECIAL HOUSE OF REPRESENTATIVES ELECTIONS IN 1837

A. Background and Elections

Martin Van Buren took office as President on March 4, 1837, shortly before the Panic of 1837 shattered the U.S. economy.⁴ On May 15, he called a special session of Congress to deal with the crisis, to convene on September 4.⁵ Arkansas and Mississippi had not yet elected members to the House of Representatives and would not do so until their regularly scheduled elections in November. Without extraordinary action, they would lack representation in the House in what would likely be the most important session of the Twenty-Fifth Congress.⁶

The governors of the two states found a clever solution.⁷ They determined that the House seats were vacant and called for special elections under Article I, Section 2 of the Constitution: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." The governors issued writs for special elections whose winners would serve until succeeded by the winners of the November elections.⁸ Arkansas elected Archibald Yell, and Mississippi elected John F. H. Claiborne and Samuel J. Gholson.⁹

3. See, e.g., Robinson Woodward-Burns, *The Equal Rights Amendment Is One State From Ratification. Now What?*, WASH. POST (June 20, 2018) (some believe that the Supreme Court will defer to Congress), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/20/the-equal-rights-amendment-is-one-state-from-ratification-now-what/> [<https://perma.cc/T68W-BULE>].

4. See, e.g., EDWARD M. SHEPARD, MARTIN VAN BUREN 282 (1899), <https://hdl.handle.net/2027/uc2.ark:/13960/t1kh0f256?urlappend=%3Bseq=298> [<https://perma.cc/U5K2-J6UB>].

5. See *id.* at 321; see also U.S. Senate, *Extraordinary Sessions of Congress*, https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_Extraordinarysession.htm [<https://perma.cc/N94E-CWNL>].

6. See 14 Gales & Seaton, Register of Debates in Congress 1178, 1198 (1837) (Representatives Legaré and Howard) [hereinafter "Register"]; 6 The Congressional Globe 56–57 (1838) (Pope) [hereinafter "Globe"].

7. See Register, *supra* note 6, at 1199 (Representative Howard on Mississippi); Globe, *supra* note 6, at 56 (Representative Bell on same circumstances in Arkansas).

8. See Register, *supra* note 6, at App. 168 (Representative Buchanan on Mississippi); Globe, *supra* note 6, at 56 (Representative Bell on same circumstances in Arkansas).

9. See Globe, *supra* note 6, at 56 (Yell); Register, *supra* note 6, at App. 168 (Claiborne and Gholson).

B. House Debate Over Seating Claiborne and Gholson

Representative Maury challenged Claiborne and Gholson's credentials.¹⁰ The House considered three issues. First, had vacancies happened in Mississippi's representation within the meaning of Article I, Section 2?¹¹ Second, was the writ's purported time limit constitutional?¹² Third, if the time limit was not constitutional, did its inclusion invalidate the writ and the election, or was it to be disregarded as mere surplusage?¹³

A majority of the members of the House Committee of Elections found that vacancies had happened within the meaning of Article I, Section 2.¹⁴ The service of the previously elected Representatives had terminated at the close of the prior Congress, and new Representatives had not yet been elected.¹⁵ "Happen" should be read broadly to ensure continuing representation of each state in Congress.¹⁶ A minority opposed that interpretation, arguing that "happen" should be restricted to death, resignation or similar fortuitous events.¹⁷

All but one member of the committee agreed that the purported time limit transcended the governor's powers under the Constitution.¹⁸ The committee concluded almost unanimously that the purported limit should be disregarded as surplusage rather than invalidate the writ and the election.¹⁹

The full House agreed with the committee majority. The Representatives agreed almost unanimously that the purported limit was unconstitutional,²⁰ on separate grounds of text and structure. First, as Representative Legaré explained, the text of the Constitution gives the governor the power only "to issue a writ to fill a vacancy, without any limitation or condition."²¹ Second, the Constitution fixes the term of Representatives at two years, so the governor cannot have the power to include the specific limitation that he did in the writ.²²

Almost all of the Representatives agreed that if the purported limitation were unconstitutional it should be disregarded as surplusage.²³ Representative Legaré

10. See Register, *supra* note 6, at 1175. Maury withdrew his challenge, but Claiborne and Gholson asked the House to consider it anyway. See *id.* at 1175 and App. 168.

11. See *id.* at App. 168.

12. See *id.*

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.* at 1176 (Representative Buchanan states that every member who has spoken agrees).

21. See *id.* at 1189.

22. See, e.g., *id.* at 1196 (Howard). Representative Slade argued that Claiborne and Gholson should be seated only for the special session. See *id.* at 1194.

23. See *id.* at 1199 (Representative Howard: all of the minority appears to have acquiesced in this conclusion). Representative John Quincy Adams notably dissented, largely because omitting the limit would allow the governor to annul by proclamation the statutory election date and the legislature's power under state and federal law to fix the time of elections. Adams

explained that “every analogy of law” and “every presumption of common sense” commands that the constitutionally issued writ should be respected and the limitation disregarded.²⁴ He noted that South Carolina’s highest tribunal had repeatedly remitted officers to the full terms that the state constitution provided for their offices despite having received commissions for shorter periods.²⁵ Representative Haynes considered it a “waste of words”²⁶ even to discuss the issue because the governor’s unconstitutional attempt to limit the time period could not override “the full and free expression of the public will of the State of Mississippi.”²⁷

Despite the strong minority view that vacancies had not happened, the House voted 118–101 on October 3, 1837 to seat Claiborne and Gholson for the entire Twenty-Fifth Congress.²⁸

II. LESSONS FOR THE RATIFICATION OF THE ERA

A. Purported Time Limit

Article I, Section 2 provides that “the Executive . . . shall issue Writs of Election.” Article V provides that “Congress . . . shall propose Amendments.” Reading the provisions consistently, the Constitution’s text gives Congress only the power to propose amendments, without any limitation or conditions. It provides that Congress shall propose amendments, not propose them with limitations. It provides that amendments are effective when ratified by three fourths of the states, not when ratified by three fourths of states that also satisfy other conditions. It gives Congress the power to bind states to one of two methods of ratification,²⁹ but by the principle *expressio unius est exclusio alterius* not to bind the states in any other way.

Consequently, Congress cannot limit the time in which states can fully and freely consider proposed amendments. The constitutional proposal must be respected, and the unconstitutional time limit disregarded as surplusage.³⁰ This is true even though

protested that he did not hold strongly “to the disorganizing doctrine of State rights,” but in this circumstance he had to bow to the legislature’s right to set a November election and therefore reject the writ as entirely invalid. *See id.* at 1212–14. *Cf.* U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

24. *See Register, supra* note 6, at 1189–90; *see also Globe, supra* note 6, at App. 125 (Representative Bronson explaining in a later debate that the limit “is surplusage because the law and constitution had fixed the term of service, and the ‘ipse dixit’ of the Governor cannot alter or abridge it; his remark on that subject is totally irrelevant, and is surplusage, and may be rejected as not relevant to the case.”) and App. 69 (Representative Haynes explaining in a later debate that a well-established principle applies: “a judgment upon a matter within the jurisdiction of . . . a tribunal shall not be vitiated by its going farther, and attempting to adjudicate another question foreign to, and beyond, its jurisdiction.”).

25. *See Register, supra* note 6, at 1190.

26. *See id.* at 1194.

27. *See id.*

28. *See id.* at 1216.

29. *See* U.S. CONST. art. V (by legislatures or conventions).

30. If the time limit is unconstitutional, and if that invalidates the entire proposal, then all prior amendments that included time limits would also be invalid. To validate proposals

one ground for the House's decision was that the governor lacked the authority to impose the specific term limit that he did. The Supreme Court has ruled that the states cannot set longer term limits either.³¹ The Constitution fixes the conditions for electing Representatives and for proposing and ratifying amendments, and neither Congress nor the states can fix any others.³² If Congress proposed that an amendment would become valid upon ratification by three quarters of the states, so long as those included the five most populous states, the amendment would still be adopted upon ratification by any three quarters of the states. Congress cannot arrogate the power to tighten the Constitution's requirements for ratification.

Consequently, Congress cannot rescind proposals, whether later in the same term, in a subsequent Congress, or by including a sunset provision in the proposal. This is not a matter of equity or reliance. Congress cannot grant itself the power to rescind even by including a clause in the original proposal claiming the right to rescind. As a Brexiteer would say, "propose means propose." There are no takebacks.

B. Purported Rescissions

Under the same reading, the purported state rescissions have no force or effect. The Constitution provides that amendments are effective "when ratified by . . . three fourths of the several States," not "when ratified and not rescinded by three fourths of the several States." The Constitution's text gives states only the power to ratify, without any limitation or conditions. A state can no more rescind its ratification than impose conditions on it, such as conditioning it on other states ratifying within a specified time period.

Congress has long recognized that rescissions are ineffective.³³ The alternative "would lead to great confusion in determining when an amendment has in fact been adopted."³⁴ As a Brexiteer would also say, "ratified means ratified." There are no takebacks.

ratified within an unconstitutional limit but invalidate those ratified outside of it would be to give Congress the very power that the Constitution forbids.

31. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

32. See, e.g., Testimony of Kathleen M. Sullivan, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Hearing on the Equal Rights Amendment 8 (Apr. 30, 2019) (explaining "that the States may ratify the ERA at the time of their choosing rather than under any artificial deadline imposed by Congress.") (relying in part on *Thornton*, 514 U.S. 779), <https://docs.house.gov/meetings/JU/JU10/20190430/109330/HHRG-116-JU10-Wstate-SullivanK-20190430.pdf> [<https://perma.cc/TX4F-Y8FA>].

33. See, e.g., CHARLES K. BURDICK THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 44 (1922), <https://hdl.handle.net/2027/uc2.ark:/13960/t78s4mw4p?urlappend=%3Bseq=68> [<https://perma.cc/8SBH-KZ65>]; see also 1–4 U.S. SENATE, SENATE REPORTS, 93RD CONG., FIRST SESS. 19–20 and 20 n.1 (1973), <https://hdl.handle.net/2027/uc1.a0012134805?urlappend=%3Bseq=1131> [<https://perma.cc/R8XT-ATGG>].

34. BURDICK, *supra* note 33, at 44.

III. SUBSEQUENT ELECTIONS

Despite the House decision to seat Yell, Claiborne and Gholson for the full term of the Twenty-Fifth Congress, Arkansas and Mississippi held their regularly scheduled House elections in November of 1837. Yell decided to stand for election despite having been seated for the full term, publicly committing that he would resign his seat if he lost.³⁵ He was reelected, and the House records show him as a member from his original election.³⁶

Claiborne and Gholson relied on the House's decision and did not run, in part because there was not enough time between the end of the special session and the election for them to mount a full campaign.³⁷ Seargent S. Prentiss and Thomas J. Word from the opposing Whig party ran and won.³⁸ They appeared at the House and demanded to be seated.³⁹

The Committee of Elections declined to opine on the dispute; its report merely recited the facts of the case.⁴⁰ Members of the full House offered multiple views of how to deal with the conflicting claims of Claiborne, Gholson, Prentiss and Word. One was that the October decision was a judicial decision under the House's exclusive constitutional power to judge the qualifications of its members.⁴¹ Regardless of whether the decision was correct, the matter was *res judicata* and could not be reversed absent fraud or misrepresentation by Claiborne and Gholson.⁴² Another view was that the October decision was not binding because it was *ex parte*.⁴³ No one in the position of Prentiss and Word had been present in October to argue against Claiborne and Gholson.

Some Representatives continued to argue that the October decision was correct on the merits, others that it was incorrect on the merits.⁴⁴ Additional Representatives argued affirmatively that Claiborne and Gholson were elected only for the special session.⁴⁵ Some argued that the equities favored Claiborne and Gholson.⁴⁶ Representative Pope made the extraordinary admission that he considered the Arkansas and Mississippi writs to be unconstitutional but had voted to seat Yell, Claiborne and Gholson anyway to allow their states representation in the critical

35. See *Globe*, *supra* note 6, at 56, 155.

36. See U.S. HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, [hereinafter "Archives"], *YELL, Archibald*, [https://history.house.gov/People/Listing/Y/YELL,-Archibald-\(Y000017\)/](https://history.house.gov/People/Listing/Y/YELL,-Archibald-(Y000017)/) [<https://perma.cc/F2K3-BPHC>].

37. See *Globe*, *supra* note 6, at 106 (Representative Claiborne).

38. See *Archives*, *supra* note 36, at PRENTISS, Seargent Smith and WORD, Thomas Jefferson.

39. See *Globe*, *supra* note 6, at 56.

40. See *id.* at 97 (Representative Buchanan).

41. See *id.* at 127 (Representative Parker).

42. See *id.* at 126 (Representative Bronson).

43. See *id.* at 58 (Representative Bell).

44. See, e.g., *id.* (Representative Bell, incorrect) and 159 (Representative Martin, correct).

45. See, e.g., *id.* at 146 (Representatives Jenifer and Robertson).

46. See, e.g., *id.* at App. 94 (Representative Rhett).

special session.⁴⁷ In his view the House had elected those three, and now Prentiss and Word should be seated because the voters of Mississippi had elected them.⁴⁸

The conflicting views could not be reconciled on any theory of constitutional interpretation. The House could not seat Prentiss and Word without finding that the governor's limitation was constitutional or that Claiborne and Gholson's seating was void *ab initio*. But most were convinced that short terms were unconstitutional, and even the opponents were unwilling to void the seats *ab initio* because that might affect the validity of actions that the House had taken during the special session.⁴⁹

Ultimately, the House took actions that could not have been constitutional under any legal theory. Because of the conflicting views and doubts by vocal members, the House decided to throw the seats back to the voters of Mississippi by expelling Claiborne and Gholson without seating Prentiss and Word.⁵⁰ On February 5, 1838, it voted 121–113 to rescind the October decision without claiming that Claiborne and Gholson had withheld any material facts⁵¹ and without expunging their prior service. To this day, they remain on the House's roster of serving members for the period before the rescission.⁵² The House then voted 118–116 that Prentiss and Word were not entitled to the seats,⁵³ without any explanation but consistent with the view that the seats had been full in November. Finally, it voted to notify the governor that the seats were vacant.⁵⁴

Bitterness and disapprobation reigned. Representative Pope attempted to include Yell in the expulsions.⁵⁵ Representative Martin protested that such a rescission by a simple majority would violate all principles and do indirectly what the House cannot do directly: expel sitting members with less than a two-thirds vote.⁵⁶ He asked rhetorically:

[I]n what estimation will our acts be held by the community, when they see this House rescinding a most solemn resolution of a former session . . . in violation of every principle of the Constitution and laws of this land, in the absence of all precedent, and without any ground for impeaching

47. *See id.* at 56–57, 157.

48. *See id.* at 57.

49. *See id.* at App. 93 (Representative Rhett) and App. 128 (Representative Parker).

50. *See, e.g., id.* at 148 (Representative Mason's suggestion to return to the voters), 150 (Representative Howard citing doubts on the whole matter), and 153 (Representative Howard on rejecting all claims and sending election back to the voters).

51. *See id.* at 160 (vote), 150 (original proposal was to rescind because the October decision was made "without a knowledge of all the facts which were material to a correct decision of the question presented"), and App. 94 (final resolution lacked that clause).

52. *See Archives, supra* note 36, at CLAIBORNE, John Francis Hamtramck and GHOLSON, Samuel Jameson.

53. *See Globe, supra* note 6, at 160.

54. *See id.*

55. *See id.* at 153.

56. *See id.* at App 96. *Cf.* U.S. CONST. art. I, § 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."); *Cf. Globe, supra* note 6, at 159, App. 127 (Representatives Martin and Parker calling the decision to reverse a dangerous precedent).

that resolution. All must conclude, that rights which depend upon the unstable decisions of this House, are of but little value.⁵⁷

Representative Boon agreed: "Now sir, should this House reverse its own solemn decision thus pronounced, what confidence can then be placed by the American people in the decisions made by this House? I answer, none, sir; none whatever."⁵⁸

Bitterness continued even after the February decision. Whig Representative Adams objected to the House refusing to reimburse Prentiss and Word their expenses because they were not members, despite having been elected in accordance with state law, while reimbursing Claiborne and Gholson even though rescission should have had the effect of voiding their seats.⁵⁹ The House's actions temporarily drove Adams to become a nullifier. He declared that both of the House's decisions were "utterly unconstitutional, null, and void, and . . . in no wise binding on the people of Mississippi, or of any other portion of the U.States."⁶⁰

Mississippi then held its third House election for the Twenty-Fifth Congress, which Prentiss and Word won.⁶¹ They served for the remainder of the Congress.⁶²

IV. LESSONS FOR ADJUDICATING THE RATIFICATION OF THE ERA

Early nineteenth century views, even if virtually unanimous, cannot resolve the question presented by the ratification of the Equal Rights Amendment. The question must be addressed and adjudicated today.

Some suggest that the Supreme Court will defer to Congress.⁶³ This might be the better course for proponents of equality. As long as proponents control at least one house, Congress is unlikely to reject the ratification. Proponents may ultimately control both houses and validate the amendment. The amendment has a two-year delayed effective date,⁶⁴ which leaves time for Congress to act before litigants can assert justiciable claims under the amendment. Even if one Congress does reject the ratification, a later one could always reverse that decision. A tribunal can overrule its own earlier adjudication of a constitutional question after due reconsideration, and the House's actions in 1837–38 are precedent for rescission.

However, the events of 1837–38 counsel against this approach. It may be reasonable for each chamber to be the sole judge of the qualifications of its own members. But courts adjudicate other constitutional issues, and the Supreme Court is the ultimate judge of them. Congress is institutionally incapable of fairly adjudicating the questions involved in the ratification of the Equal Rights Amendment. Congress cannot rightly judge its own power to add new limits to the

57. *See* *Globe*, *supra* note 6, at App. 96.

58. *See id.* at 160.

59. *See id.* at 162.

60. *See id.*

61. *See* Archives, *supra* note 36, at PRENTISS, Seargent Smith and WORD, Thomas Jefferson.

62. *See id.*

63. *See, e.g.*, Woodward-Burns, *supra* note 3.

64. *See* U.S. CONST. amend. XXVIII, § 3 ("This amendment shall take effect two years after the date of ratification.") (validity of ratification disputed).

ratification process or the effect of having included one. Congress cannot rightly judge the states' purported power to rescind given the influence of the states in congressional representation, particularly their influence through their equal suffrage in the Senate, where Senators jealously guard the rights of their home states.

Finally, Congress could easily reverse its own decision as it did in 1838, perhaps multiple times as political winds shift. What confidence can the American people have in Congress's ability to adjudicate the constitutional question? As Representative Boon said, "none whatever."⁶⁵ The Representatives knew that they were responsible for resolving legal questions of constitutional law.⁶⁶ But they knowingly acted unconstitutionally.

Practical considerations also suggest that the Supreme Court will finally decide the question. Congress has no obligation to reach a decision, and if it does not there is no rational basis for choosing between a default rule that the amendment is valid unless both houses vote to reject it, or that the amendment is invalid unless both vote to accept it. Ultimately plaintiffs will have standing to litigate their rights under the amendment, and federal courts with Article III jurisdiction will be bound to adjudicate those cases and controversies.

CONCLUSION

Under longstanding precedent, purported rescissions are ineffective. The only question, then, is whether the purported time limit is constitutional. Text and the nearly unanimous view of Representatives in the Twenty-Fifth Congress suggest that the limit is surplusage and the ratification effective.

The process of amending the Constitution is hard, and deliberately so. It is not a House election that can be returned to the people for an easy do-over. The debates over the 1837 special elections have a final lesson, a principle for resolving doubts in this case. As Representative Haynes explained, the special election was held for the benefit of the people of Mississippi. And for his part, Haynes always supported the rights of the people to the best of his ability.⁶⁷ Three quarters of the states have expressed the will and exercised the rights of their people by ratifying the Equal Rights Amendment. The Supreme Court, Congress and all of the American people should respect the result.

65. *See* *Globe*, *supra* note 6, at 160.

66. *See, e.g., id.* at App. 124 (Representative Bronson: "grave and intricate constitutional questions are involved, which must be judicially decided by this House . . .") and 56 (Representative Pope: "Surely the constitutional and legal question could be met at once, and the House was fully competent to decide it.").

67. *See* *Register*, *supra* note 6, at 1194; *see also id.* at 1198 (Representative Howard: "In all cases of contested election, this House has very properly endeavored to ascertain what the intentions of the people were, and has disregarded technical objections as to mere form.").