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ARTICLES

RATIFYING THE FOURTEENTH AMENDMENT IN OHIO

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In 2001, Cincinnati's long history of racial tension blossomed into riots.[a] In connection with what is now the Richard and Lois Rosenthal Institute for Justice at the University of Cincinnati College of Law, Professor John Cranley (a Cincinnati City Council member in addition to his duties at the College) and I were looking for a project we could work on with students that would be relevant to the problems facing the city and state. We knew that Ohio had ratified the Fourteenth Amendment in 1867, but rescinded that ratification in 1868 before the Amendment became effective. Accordingly, we thought that getting the Ohio General Assembly to reratify the Amendment would be a good project for students, educational to the public and the legislature on Ohio's history of ambivalence about the status of African Americans, and meaningful in and of itself.

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[a] *See generally* Cincinnati Enquirer Website, Cincinnati: 2001 Year of Unrest, http://www.enquirer.com/unrest2001/ (discussing series of police shootings and subsequent riots) (last visited Mar. 27, 2006).

In the fall of 2002, John and I offered a seminar called *Ohio and the Fourteenth Amendment*.[b] The class covered the process of constitutional amendment under Article V, the ratification of the Fourteenth Amendment generally, and Ohio's treatment of African Americans and their legal status. By September 2002 it became clear that we were on to something: states like New Jersey, New York and Oregon that had rescinded their ratifications of the Fourteenth or Fifteenth Amendments in the 1860s had later re-ratified; other states that did not ratify the Reconstruction Amendments in the 1860s ended up doing so later. We constituted ourselves the "Fourteenth Amendment Ratification Project" and tried to figure out how to get the Ohio General Assembly to act.

Thanks to John's engagement with the political community, we had some ideas about elected officials who might be interested in this project. It was important that the project not be merely bipartisan, but also non-political. We first contacted Senator Mark Mallory, Democratic Whip (in 2005, he became the first African American directly elected as Mayor of Cincinnati). We drafted a letter explaining the situation—that Ohio's last word was that the Fourteenth Amendment should be rejected—and raised the possibility of ratification. A couple of weeks later, we asked Republican Gary Cates, then speaker *pro tempore* of the House of Representatives, and as of this writing a member of the Ohio Senate, to get involved.

Senator Mallory and Representative Cates came to the College of Law to speak with us about the legislative process and how a project like this might go forward. Although at first they were skeptical (Senator Mallory said in the *Cincinnati Post*: "I thought there was some kind of mistake when I first heard about it"[c]), both were extremely encouraging, and agreed that it was important for Ohio to go on the record in support of the Fourteenth Amendment. They asked us to write a report, and promised to introduce and support legislation.

The students worked diligently and skillfully to draft the report that follows, which was released in February 2003. The original report is reprinted here as drafted, with only minor typographical changes. Senator Mallory introduced a bill ratifying the Fourteenth

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[b] Seven students enrolled in the class: Robert Baker, Daniel Dodd, Michael Haas, Rebecca Klein (now Hinkel), Peder Nestingen, Jack Simms, and Jesika Thompson.

[c] Roy Wood & Barry M. Horstman, *Ohio to Correct "Crazy History"*, CINCINNATI POST, Sept. 10, 2003, at A1.

Amendment[d] in the 125th Ohio General Assembly, Regular Session of 2003-04, on February 4, 2003.[e] He introduced the proposal at a ceremonial session of the General Assembly held to celebrate Ohio's 200th year of statehood. The resolution passed the Senate Civil Justice Committee on February 19,[f] and unanimously passed the Senate on February 25, with every Senator signing on as a sponsor.[g] Representative Cates introduced the resolution in the House on February 27;[h] it passed the House State Government Committee on March 11,[i] and then went to the full House where it passed 94-1 on March 12, 2003.[j]

While the resolution was working its way through the legislature, we did not hear anyone seriously question whether a state had the power to ratify the Amendment so long after the fact; there was precedent that other states had ratified late, and, in any event, even if a late ratification was somehow irregular, it could do no harm. More fundamentally, no legislator questioned the importance of supporting the Fourteenth Amendment. No one suggested, for example, that the project was a waste of time, because the Amendment, whatever its virtues or vices, was in force anyway, so there was no reason for Ohio to show its support for it now. Of course, legislatures adopt many ceremonial and symbolic resolutions, so something would have to be pretty trivial for it to be so meaningless that it did not warrant a parchment. But beyond that, the members of the legislature recognized that this Amendment was fundamental to all Americans; they were proud to be able to participate in ratifying an Amendment embodying values they shared. Indeed, the gallery and legislators applauded the students after they testified in support of the resolution. Many legislators spoke movingly about

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[d] *See infra* text accompanying note q for Senate Joint Resolution 2.

[e] OHIO LEGISLATIVE SERVICE COMMISSION, FINAL STATUS REPORT OF LEGISLATION—125TH GENERAL ASSEMBLY (April 26, 2005), *available at* http://www.lsc.state.oh.us/status125/srl125final.pdf (scroll to page 28).

[f] *Id.*

[g] *Id.*

[h] OHIO HOUSE OF REPRESENTATIVES JOURNAL (125th General Assembly), Feb. 27, 2003, at 197, *available at* http://www.legislature.state.oh.us/Journals.cfm?GenAssem=125 (follow "February 27, 2003" hyperlink).

[i] OHIO HOUSE OF REPRESENTATIVES JOURNAL (125th General Assembly), Mar. 11, 2003, at 241, *available at* http://www.legislature.state.oh.us/Journals.cfm?GenAssem=125 (follow "March 11, 2003" hyperlink).

[j] OHIO HOUSE OF REPRESENTATIVES JOURNAL (125th General Assembly), Mar. 12, 2003, at 274-75, *available at* http://www.legislature.state.oh.us/Journals.cfm?GenAssem=125 (follow "March 12, 2003" hyperlink).

the importance of civil rights and equality during the debates on the floor of the full Senate and House.

Ohio's newspapers also supported ratification.[k] *Cincinnati Enquirer* columnist Denise Smith Amos wrote two columns about the project.[l] There were only a couple of bumps in the road. "Some House members took issue with how the amendment has been used in federal court cases to erode states' rights in areas such as abortion and school prayer."[m] Some legislators considered proposing amendments to the ratification to make clear that they were approving some Fourteenth Amendment jurisprudence, but not all of it. Finally, only Cincinnati Republican Representative Tom Brinkman voted "no" in the House, preventing unanimous legislative approval. According to the *Cincinnati Enquirer*, his "no" vote had to do with federalism and abortion: "'It's misapplied constantly by the country to get states to do things they don't want to do,' Brinkman said. 'Most importantly to me, 45 million babies have been murdered since judges forced *Roe v. Wade* down the throats of citizens.'"[n]

We had a hand in drafting the resolution itself, although of course the legislators were in charge. We advocated for language stating that the validity of the earlier rescission was debatable, because, as we argued in the report, there were respectable arguments on both sides.

On September 17, 2003, the students appeared in Columbus with Senator Mallory, Representative Cates, the Chief Justice, and other luminaries for a transmittal ceremony; Secretary of State Ken Blackwell presented the executed ratification resolution to Governor Robert Taft, who then formally presented it to a representative of the National Archives. The ceremony was carried live on C-SPAN.[o] Each member of the project received a ceremonial copy of

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[k] *See* Editorial, *Correcting an Old Mistake*, CINCINNATI POST, Mar. 10, 2003, at A8; Editorial, *Important Symbolism*, CINCINNATI ENQUIRER, Feb. 4, 2003, at B12; James Drew, *Will Ohio Finally Move to Ratify the 14th Amendment?*, TOLEDO BLADE, Mar. 9, 2003, at B5.

[l] Denise Smith Amos, *Ohio Finally Joins the Rest of the U.S.*, CINCINNATI ENQUIRER, Mar. 16, 2003, at A2; Denise Smith Amos, *Ohio Needs to Plug a Loophole*, CINCINNATI ENQUIRER, Feb. 5, 2003, at A2.

[m] Wood & Horstman, *supra* note c; *see also 14th Amendment Opposition* (Ohio Public Radio Broadcast Mar. 5, 2003), *available at* http://statenews.org/story_page.cfm?ID=3755&year=2003&month=3.

[n] Shelley Davis, *Lawmaker Under Fire Over Vote on 14th*, CINCINNATI ENQUIRER, Mar. 20, 2003, at C3.

[o] *14th Amendment Ratification Ceremony* (C-Span television broadcast, September 17, 2003).

the resolution, signed by the President of the Senate, the Speaker of the House and the Clerk of the Senate; mine hangs proudly in my office. During his successful 2005 bid for mayor of Cincinnati, Mark Mallory described the ratification of the Fourteenth Amendment as "the highlight of my legislative career."[p] This project was certainly the highlight of my legal career, and I believe it was for many of the others. Ohio's action made the Fourteenth Amendment unanimous; every state in the Union as of 1868 ratified it unequivocally at the time, ratified it later, or, if it rescinded its ratification, rescinded its rescission.

[p] Jon Craig, *On their Records: Who Will Lead? Mark Mallory*, CINCINNATI ENQUIRER, Oct. 16, 2005, at E1.

REPORT TO THE GENERAL ASSEMBLY OF THE STATE OF OHIO RECOMMENDING RATIFICATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

FEBRUARY 11, 2003

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INTRODUCTION

On January 4, 1867, Ohio became the seventh state to ratify the Fourteenth Amendment to the United States Constitution, which guaranteed all persons equal protection of the laws and prohibited deprivation of life, liberty or property without due process of law. Unfortunately, after Ohio voters defeated a referendum which would have extended the franchise to African Americans, the General Assembly rescinded its ratification of the Fourteenth Amendment on January 15, 1868.[1] When Secretary of State William H. Seward declared the Fourteenth Amendment valid, he did not definitively address the validity of Ohio's rescission, nor did the United States Congress.[2]

Since that time, the Fourteenth Amendment has become recognized as a foundation of American liberty, and, acknowledging its importance, many states have ratified the Fourteenth Amendment even after it came into effect. Courts and constitutional scholars, however, have made strong arguments that Ohio's 1868 rescission was valid, making Ohio the only state existing at the time of the Fourteenth Amendment's proposal that did not support it when it became law or at some point thereafter.

The Fourteenth Amendment rivals the Bill of Rights in importance. The Fourteenth Amendment is fundamental to protection against discrimination on grounds of race, religion or sex, and to safeguarding fundamental rights, such as freedom of speech and the right to marry. In *Brown v. Board of Education*,[3] the Supreme Court relied on the guarantees of equal protection in the Fourteenth Amendment to declare that racial segregation in schools was illegal. In *Loving v. Virginia*,[4] the Supreme Court held that Virginia's ban on interracial marriages of whites violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[5] In a series of decisions, the Supreme Court relied on the

1. *See* 1 U.S.C. LXIV (2000).

2. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 378 n.11, 409 nn.188-89 (2001) (citing 15 Stat. App. 706, 707 (William H. Seward, Proclamation No. 11, July 20, 1868) and 15 Stat. App. 708 (William H. Seward, Proclamation No. 13, July 28, 1868)). Since Alabama and Georgia ratified the Fourteenth Amendment in mid-July, 1868, the requisite three-fourths of the necessary states was reached regardless of the validity of Ohio's rescission. It is therefore indisputable that the Fourteenth Amendment became a valid part of the United States Constitution in 1868.

3. 347 U.S. 483, 493, 495 (1954).

4. 388 U.S. 1 (1967).

5. *Id.* at 11-12.

Due Process Clause of the Fourteenth Amendment to hold that most of the rights guaranteed in the Bill of Rights apply to the States.[6]

Ohio's rescission of the Fourteenth Amendment has not gone unnoticed. National publications, courts and extremist groups have relied on Ohio's rescission of the Fourteenth Amendment in arguing that the Fourteenth Amendment is not a valid amendment. *U.S. News and World Report* published an article by David Lawrence titled *There is no 14th Amendment.*[7] Relying in part on Ohio's rescission, Lawrence called the Fourteenth Amendment "null and void." Courts have pointed to Ohio's rescission to suggest that the Fourteenth Amendment was not properly ratified.[8] Many extremist groups cite Ohio's rescission on their websites and in their literature to argue that the Fourteenth Amendment, and consequentially, federal protection of civil rights, are invalid.[9]

This report explores the reasons that Ohio rescinded its ratification of the Fourteenth Amendment. Part I demonstrates that Ohio's rescission of the Fourteenth Amendment was a Democrat-led reaction to Republican lawmakers' earlier expansion of African American rights. Part II explains why, as a legal matter, Ohio's rescission of the Fourteenth Amendment may have been valid. Part III notes that other states have ratified the Fourteenth Amendment in the decades since it was adopted. Part IV establishes that Ohio's ratification of the Fourteenth Amendment would be valid. This re-

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6. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (prohibition on cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable search and seizure); Largent v. Texas, 318 U.S. 418 (1943) (freedom of religion); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

7. David Lawrence, *There Is No 14th Amendment*, U.S. NEWS & WORLD REPORT, Sept. 27, 1957, at 140.

8. *See, e.g.*, Dyett v. Turner, 439 P.2d 266, 272 (Utah 1968) (noting that "Ohio . . . withdrew its prior ratification"); *cf.* Douglas H. Bryant, Note, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 575 (2002) (noting Ohio's rescission).

9. *See, e.g.*, Lex Angliea, *The Fourteenth Amendment Never Passed*, http://www.truthsetsusfree.com/14thAmendment.pdf; Gene Healy, *Roger Pilon and the 14th Amendment*, http://www.lewrockwell.com/healy/healy3.html; Judge L. H. Perez, *The 14th Amendment is Unconstitutional*, http://www.sweetliberty.org/fourteenth.amend.htm; Shield of Faith, *Fraudulent 14th Amendment*, http://www.shieldoffaith.freehomepage.com/world/freedom/14amendment.htm; Judge L. H. Perez, *The Unconstitutionality of the Fourteenth Amendment*, http://www.secessionist.us/unconstitutionality_of_the_14th.htm.

port concludes by urging Ohio to ratify the Fourteenth Amendment.

DISCUSSION

I. OHIO RESCINDED THE FOURTEENTH AMENDMENT TO SHOW OPPOSITION TO REPUBLICAN LAWMAKERS' EFFORTS TO PROTECT AFRICAN AMERICAN RIGHTS

Shortly after taking office in 1868, Ohio Democrats rescinded Ohio's ratification of the Fourteenth Amendment. Since the middle of the century, African American rights expanded or contracted depending on which party was in office. Many Republicans favored extending greater rights to African Americans, while Democrats generally opposed such action. The General Assembly's rescission of the Fourteenth Amendment under Democratic control was another in a string of actions to undo Republican expansion of African American rights.

African American rights first expanded in Ohio when Republicans took control of the Ohio General Assembly in 1857. The General Assembly passed a series of personal liberty laws that were meant to nullify the federal Fugitive Slave Act.[10] The personal liberty laws set free persons from Ohio prisons held under Fugitive Slave Act charges, outlawed bringing any person into Ohio with the intention of holding him as a slave, made criminally liable anyone who held or arrested a person suspected of being a fugitive slave, and required that persons removing African Americans from Ohio establish their right to do so in court.[11]

Democrats later repealed the first two personal liberty laws,[12] and the Ohio Supreme Court declared the remaining laws invalid since they contradicted federal law.[13] Democrats also passed a "visible admixture" law (later declared unconstitutional in *Anderson v. Millikin*[14]) requiring judges to reject the vote of any person whose

10. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 136 (1970).

11. GEORGE H. PORTER, OHIO POLITICS DURING THE CIVIL WAR PERIOD 157 (AMS Press 1968) (1911).

12. *See id.* at 22.

13. *See Ex parte* Bushnell, 9 Ohio St. 77, 184-85 (1859) (holding that Ohio's liberty laws contradicted the U.S. Fugitive Slave Act).

14. 9 Ohio St. 568, 568 (1859) (holding that visible admixture law was invalid since the laws' definition of race contradicted the definition of race agreed upon in the Ohio Constitutional Convention of 1850).

skin color betrayed a "visible admixture of African blood."[15]

A year later, in 1860, the General Assembly ratified the Corwin Amendment, which was designed to prohibit Congress from banning slavery.[16] The Corwin Amendment was an effort to appease the South and prevent them from seceding from the Union.[17] Although ratified by the United States Congress, the amendment drew little support among states.[18] However, the Democrat-led General Assembly ratified the Corwin Amendment on May 13, 1861, making Ohio one of only three states to do so.[19]

In the 1866 national and 1867 state elections, African American rights remained a divisive issue. Congress proposed the Fourteenth Amendment in June of 1866, and in the fall elections, Ohio Republicans expressed support for its ratification. Republicans thwarted Democrats' attempts to make the Fourteenth Amendment and African American suffrage central issues during the campaign by downplaying the link between the Fourteenth Amendment and African American suffrage.[20] Republican success was partially attributable to the Amendment being drafted to avoid direct references to suffrage.[21] In the end, Republicans won sixteen of nineteen Congressional seats, as well as three state offices.[22]

In 1867, under Republican leadership, the Ohio General Assembly passed two important proposals to extend suffrage and other civil rights to African Americans. First, the General Assem-

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15. *See* PORTER, *supra* note 11, at 22.

16. Specifically, the Amendment stated: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state." *See* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 515 (2003) (citing CONG. GLOBE, 36th Cong., 2d Sess. 1364 (1861)).

17. *See* PORTER, *supra* note 11, at 60.

18. *Id.* at 26.

19. Illinois and Maryland are the other two states. *See id.* at 25.

20. *See* JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT, 191-93 (1956) [hereinafter JAMES, FRAMING]; *see generally* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984) [hereinafter JAMES, RATIFICATION].

21. *See* JAMES, FRAMING, *supra* note 20, at 191-93. Many were unsure at the time whether the federal government (as opposed to state governments) could even confer voting rights. JAMES, RATIFICATION, *supra* note 20, 161-64; *see also* the entire rescission message, 64 STATE OF OHIO, THE JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF OHIO 12 (1868). Many wanted to confer only citizenship upon African Americans without suffrage. *See Senator Lane's Great Speech, "My (Bread and Butter) Policy*, THE CINCINNATI COMMERCIAL, August 20, 1866, at 1.

22. *See* FELICE ANTHONY BONADIO, OHIO POLITICS DURING RECONSTRUCTION 1865-1868 205, 214-18, 224 (1964); *see generally* JAMES, RATIFICATION, *supra* note 20.

bly ratified the Fourteenth Amendment.[23] Second, the General Assembly authorized a referendum to allow non-whites to vote by removing the word "white" from the suffrage provision of Ohio's Constitution.[24] This change, if passed by voters, would have extended to African Americans the same political rights that whites enjoyed.[25]

The election of 1867 proved both of these proposals unpopular. For the first time in more than a decade, Democrats swept both houses of the legislature after campaigning on a platform opposing the Fourteenth Amendment (which had not yet been ratified by the required three-fourths of the states) as well as the proposed expansion of the right to vote to African Americans. The electorate refused to extend the franchise to African Americans by a margin of more than 50,000 votes.[26]

After their victory, Democrats responded to voters' opposition to African American civil rights. Since the proposed expansion of suffrage to African Americans had been defeated in the statewide referendum, Democrats turned to Ohio's ratification of the Fourteenth Amendment. The resolution passed by the House provided in part:

> WHEREAS, One of the objects to be accomplished by said proposed amendment was to enforce negro [sic] suffrage and negro political equality in the states; and,
>
> WHEREAS, The adoption of said resolution was a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race, endangering the perpetuity of our free institutions: therefore,
>
> *Resolved by the General Assembly of the State of Ohio*, That the above recited resolution be and the same is hereby rescinded.[27]

Although this language was modified in the final version, it is clear that Ohio's rescission represented opposition not only to African American suffrage but also to African American political equality in general.[28]

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23. *See* 1 U.S.C. LXIV (2000).

24. Article V, § 1 of the 1851 Constitution provided suffrage rights for "every *white male citizen of the United States*." Anderson v. Milliken, 9 Ohio St. 568, 570 (1859) (emphasis in original).

25. *See* BONADIO, *supra* note 22, at 247-48.

26. *Id.* at 275.

27. *See* STATE OF OHIO, *supra* note 21, at 12, 32-33.

28. *See id.* at 44-46.

In 1868, the validity of Ohio's rescission was not directly resolved by Congress or the courts. Despite controversy about the validity of the first rescission of the ratification of a constitutional amendment in United States history, the Republican-controlled Congress passed a concurrent resolution declaring the Fourteenth Amendment adopted, and ordered Secretary of State Seward to promulgate it.[29]

II. OHIO'S RESCISSION OF THE FOURTEENTH AMENDMENT MAY HAVE BEEN VALID

Article V of the Constitution establishes procedures for congressional proposal and state ratification of constitutional amendments, but it is silent about the possibility of states rescinding their ratifications.[30] Courts and academics have interpreted this silence in different ways. The most persuasive interpretation is that states have the power to rescind a ratification if they act before an amendment becomes effective. This interpretation renders Ohio's rescission valid.

The Supreme Court addressed the issue of rescission in *Coleman v. Miller*, a case that concerned a state ratification of a proposed amendment prohibiting child labor in the United States.[31] The Court held that the issue of whether a state legislature could ratify a constitutional amendment after that body had previously rejected the same amendment was a political question, "with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."[32] The Court noted the argument that "ratification [of an amendment] if once given cannot afterwards be rescinded and the amendment rejected."[33] Hence, in *Coleman* the Supreme Court assigned Congress jurisdiction over the issue of ratification, and hinted that once ratified, amendments cannot be rescinded.

The *Coleman* decision is not controlling for several reasons. Most importantly, *Coleman* is a plurality opinion, not endorsed by a

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29. For a brief history of the ratification, see Harrison, *supra* note 2, at 380. Congress passed the concurrent resolution on July 21, 1868. *See supra* text accompanying note 2; *see also* CONG. GLOBE, 40th Cong., 2d Sess., 890 (1868) (notification of the rescission).

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

31. 307 U.S. 433 (1939).

32. *Id.* at 450.

33. *Id.* at 447.

majority of the Court.[34] Thus, the opinion stating that rescission is a matter for Congress is only instructive. It is also dicta, in that the validity of rescission made no difference to the outcome of the case. That *Coleman* is not the last word is made clear by the acts of state legislatures to rescind prior ratifications even after *Coleman* was decided. For example, several legislatures ratified the Equal Rights Amendment but later rescinded their ratifications.[35]

The Court's holding in *Coleman* has also been criticized by scholars who contend that rescission is not a political question to be decided by the U.S. Congress, but an issue to be resolved by state legislatures. This argument was carefully articulated by Professor Michael Stokes Paulsen of the University of Minnesota Law School. Professor Paulsen argues that before an amendment has been ratified by three-fourths of the states, the authority to ratify an amendment rests with the states. Paulsen explains that the ratification process under Article V is made up of many separate and distinct legislative acts. First, Congress proposes an amendment. Then, each state legislature ratifies (or does not ratify) the proposed amendment. Paulsen argues that state ratification is a standard legislative act. Just as a state can repeal a law it has passed, a state can also repeal the ratification of an amendment until three-fourths of the state legislatures have ratified the amendment. Hence, under Paulsen's view, "an amendment results, once and for all, whenever there *concurrently exists* a valid, *unrepealed* enactment of Congress proposing an amendment and the valid, *unrepealed* enactments of thirty-eight state legislatures ratifying that proposal."[36] Paulsen also notes that, on this basis, "Ohio and New Jersey validly rescinded their ratifications of the Fourteenth Amendment in early 1868 and should not have been included in the number of states voting affirmatively."[37]

A U.S. District Court adopted a similar position to Paulsen's position in *Idaho v. Freeman*.[38] In *Freeman*, the court held that the rescission of a congressional amendment is valid when it occurs

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34. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 708 (1993).

35. *See* SAMUEL S. FREEDMAN & PAMELA J. NAUGHTON, ERA: MAY A STATE CHANGE ITS VOTE? 1 (1978) (discussing rescissions by Idaho, Nebraska and Tennessee).

36. Paulsen, *supra* note 34, at 722.

37. *Id.* at 726 n.172; *see also* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

38. 529 F. Supp. 1107, 1149 (D. Idaho 1981), *vacated as moot sub nom.* Nat'l Org. for Women v. Idaho, 459 U.S. 809 (1982). In *Freeman*, the district court held that

before the ratification of three-fourths of the states. The court reasoned that a state should be allowed to change its position before the ratification process is complete. The court explained that not allowing rescissions would allow for an amendment to become part of the Constitution even though "the people have not been unified in their consent."[39] Specifically, without rescission, there would be no way to ensure that there was support of the people of three-fourths of the states since some states could have changed their position after ratifying the amendment.

The validity of Ohio's rescission has never been, and may never be, definitively resolved as a legal question; there is respectable authority on both sides. There is no doubt, however, that Ohio's last word on this fundamental issue is a formal act of the General Assembly opposing the Fourteenth Amendment.

III. Many States Have Ratified Amendments After Their Adoption to Recognize the Importance of Those Amendments

The Fourteenth Amendment is similar in stature to the Bill of Rights and the Nineteenth Amendment, which extended voting rights to women. Both the Nineteenth Amendment and the Bill of Rights were ratified by every state existing in the United States when they became law. Many of these ratifications occurred after the amendments were adopted.[40] With the exception of Ohio, the same can be said for the Fourteenth Amendment. Every state existing at the time the Fourteenth Amendment was proposed either ratified the Amendment it at that time, or subsequently expressed support for it, but for Ohio.[41]

Many states ratified the Fourteenth Amendment after it became law in 1868: Delaware in 1901; California and Maryland in 1959; and Kentucky, celebrating the Bicentennial, in 1976.[42] Delaware, Maryland and Kentucky rejected the amendment when they first considered it. Like Ohio, New Jersey ratified the Fourteenth

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Idaho's rescission of its ratification of the Equal Rights Amendment was valid and therefore could not be counted as a ratifying state. *Id.*

39. *Id.* at 1149.

40. *See* 1 U.S.C. LXII n.12, LXVI (2000).

41. *See id.* at LXIV. Oregon rescinded its ratification, but it did so after the Fourteenth Amendment became effective, and therefore the rescission was clearly invalid. *Id.* New Jersey, like Ohio, rescinded its ratification before the Fourteenth Amendment became effective, but in 1980 it passed a resolution expressing support for the amendment. *Id.*

42. *Id.*

Amendment, but rescinded before it became effective. New Jersey, however, ultimately expressed support for the amendment in 1980.[43]

The texts of state ratifications reflect a desire to support the principles of the Fourteenth Amendment and honor the role the Amendment has played in American society. For example, Maryland and California's ratifications of the Fourteenth Amendment each recognized that, "[the] said 14th Amendment has long been a vital part of the Constitution of the United States and should be ratified by the State of [Maryland or California, respectively] to show the concurrence of this great State with the principles therein enunciated."[44]

At least two states' efforts to ratify the Fourteenth Amendment reflect a desire to rectify their historical error of not ratifying the amendment earlier. Kentucky ratified the Fourteenth Amendment as part of its celebration of the Declaration of Independence in 1976.[45] Kentucky's ratification recognizes that, "this Bicentennial year is an appropriate time to erase this shadow on Kentucky's history."[46] Similarly, New Jersey's current efforts to repeal its rescission of the Fourteenth Amendment are motivated by a desire to correct its historical mistake. According to Rutgers historian Clement Price, New Jersey rescinded the Fourteenth Amendment to prevent the migration of "hundreds of thousands of blacks . . . into New Jersey."[47] New Jersey Senator Leonard Lance, who drafted and is a co-sponsor of the resolution, recognized that "New Jersey has a checkered past regarding the 14th Amendment . . . . As a matter of setting the record straight historically, this resolution says we withdraw our withdrawal."[48]

At present, Ohio is the only state in the Union as of 1868 not to have either ratified or expressed support for the Fourteenth Amendment. Ohio's reasons for rescinding its ratification were racist. Despite the importance of the Fourteenth Amendment, the last word from the Ohio legislature is to reject the principles enunciated in the Amendment. The Ohio General Assembly must change that.

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43. *Id.*

44. *See* 1959 Md. Laws 1458; *see also* 1959 Cal. Stat. 5695.

45. *See* 1 U.S.C. LXIV (2000).

46. *See* 1976 Ky. Acts 564.

47. *See* Herb Jackson, *Senate Panel Rights a 133-Year-Old Wrong*, THE RECORD (Hackensack, N.J.), Feb. 22, 2002, at A3.

48. *Id.*

IV. Post-Adoption Ratification is Valid and Effective

Post-adoption ratification has been used by many states to ratify amendments, and it has a firm legal footing. Article V does not limit the time a state has to ratify an amendment,[49] and diligent research suggests that the Supreme Court has not invalidated any post-adoption ratifications.

Some constitutional scholars argue that there must be a "contemporaneous consensus" amongst state amendment ratifications.[50] In other words, states must ratify an amendment within a reasonable time period (even where the amendment does not specify a time period) for their ratifications to have legal effect in the amendment's ratification.[51] Actual practice suggests that the "contemporaneous consensus" model is not correct. Proof of this seems to be the Twenty-Seventh Amendment, which was first proposed in 1789, ratified by Ohio in 1873, and not ratified by the final state until 1992,[52] hardly a contemporaneous ratification process. No plaintiff has successfully challenged the validity of the Twenty-Seventh Amendment.[53] Mississippi, the last state to ratify the Nineteenth Amendment, did so in 1984, six decades after it became law in 1920;

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49. *See* U.S. Const. art. V.

50. *See* Paulsen, *supra* note 34, at 684-85.

51. This view finds the most judicial support in *Dillon v. Gloss*, 256 U.S. 368 (1921), in which the Supreme Court stated that Congress had the power to put time limits on constitutional amendments and added that all constitutional amendments have some reasonable "expiration date." However, the Court's statements about amendment expiration are dicta; the holding is that Congress may put time limits on constitutional amendments. Although statements in *Dillon* seem to support the requirement of a "contemporaneous consensus," in the subsequent case of *Coleman v. Miller*, 307 U.S. 433 (1939), the Court refused to decide the case on those grounds, despite a claim that the Kansas ratification at issue had "expired." See Paulsen, *supra* note 34, at 707-12, for a lengthy discussion. The Twenty-seventh Amendment adds further doubt to any future application of *Dillon*. The Twenty-seventh Amendment became effective on May 7, 1992, as Michigan became the thirty-eighth state to ratify it. 1 U.S.C. LXIX (2000). The *Dillon* court specifically mentions what would become the Twenty-seventh Amendment as one of:

> four amendments proposed long ago [which] are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.

256 U.S. at 375. If the Twenty-seventh Amendment is indeed valid, as many commentators hold, then the Court's statement is simply incorrect.

52. 1 U.S.C. LXIX (2000).

53. The Department of Justice issued an opinion that the Twenty-seventh Amendment was validly adopted. *See* Memorandum Opinion for the Counsel to the President, 16 Op. Off. Legal Counsel 87 (Nov. 2, 1992).

several states ratified the Bill of Rights in 1939, a century and a half after adoption. Additionally, the Supreme Court seems to have abandoned any requirement that state passage of constitutional amendments must be roughly "contemporaneous." Hence, post-adoption ratification has been used by many states to add their names to the list of states that ratified certain amendments and it has solid legal footing.

CONCLUSION

For the foregoing reasons, it is respectfully recommended that the General Assembly of the State of Ohio pass a joint resolution ratifying the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

THE FOURTEENTH AMENDMENT
RATIFICATION PROJECT

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125TH GENERAL ASSEMBLY, STATE OF OHIO
REGULAR SESSION 2003-2004
SENATE JOINT RESOLUTION NO. 2[q]

JOINT RESOLUTION

Providing for the ratification of the Fourteenth Amendment to the United States Constitution to guarantee equal protection and due process to all persons born or naturalized in the United States.

BE IT RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

WHEREAS, Both houses of the thirty-ninth Congress of the United States of America, at the first session of such Congress, by a constitutional majority of two-thirds of the members of each house thereof, made a proposition to amend the Constitution of the United States in the following words, to wit:

"*Joint Resolution proposing an amendment to the constitution of the United States.*

Be it resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, (two-thirds of both houses concurring,) That the following article be proposed to the legislatures of the several states as an amendment to the constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as a part of the constitution, namely:

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the

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[q] There are differences between the language of this Resolution and the language of the Thirty-ninth Congress's Joint Resolution proposal, which later became the Fourteenth Amendment. This Resolution is printed exactly as it was adopted by the Ohio General Assembly.

whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens, twenty-one years of age in such state.

SECTION 3. No person shall be a senator or representative in congress, or elector of president or vice president, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article."

WHEREAS, The General Assembly of the State of Ohio ratified the Fourteenth Amendment to the United States Constitution by a Joint Resolution adopted January 11, 1867, but by a further Joint Resolution, voted to rescind its ratification of the Amendment on January 15, 1868, before the Amendment became effective in July 1868; and

WHEREAS, The State of Ohio is considered by many authorities to have ratified the Amendment, but other authorities assert that Ohio's rescission may have been valid; and

WHEREAS, The validity of the Fourteenth Amendment is in-

disputable regardless of the validity of Ohio's rescission because Congress approved it by a two-thirds majority on June 13, 1866, and every State in the Union at the time has subsequently supported it, thereby exceeding the necessary three-quarters majority; and

WHEREAS, The Fourteenth Amendment is the primary guaranty for individual rights and liberties through its protection of the privileges and immunities of citizens of the United States, its prohibition on the deprivation of life, liberty or property without due process of law, and its guaranty of equal protection of the laws; and

WHEREAS, The ratification of the Fourteenth Amendment demonstrates the support of the people of the State of Ohio for the principles embodied therein; now therefore be it

RESOLVED, By the General Assembly of the State of Ohio, that the said Amendment to the Constitution of the United States is hereby ratified; and be it further

RESOLVED, That the Secretary of State of the State of Ohio be directed to deliver to the Governor of this state a certified copy of this resolution, and such certified copy shall be forwarded at once by the Governor to the Administrator of General Services, United States Government, Washington, D.C., to the President Pro Tempore of the Senate of the United States, to the Speaker of the House of Representatives of the United States, and to the Secretary of State of the United States.