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Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?

By LEO KANOWITZ* and MARILYN KLINGER**

On March 22, 1972, by a vote of 84 to 8,¹ the United States Senate adopted a joint resolution proposing the addition of the Equal Rights Amendment (ERA) to the United States Constitution.² This resolution was previously adopted by the House of Representatives by a vote of 354 to 24 on October 12, 1971.³ Pursuant to the joint resolution's language the proposed amendment must be ratified by at least three-fourths (thirty-eight) of the fifty state legislatures within seven years of the resolution's passage (*i.e.*, by March 22, 1979) to become part of the Constitution.⁴ If fewer than thirty-eight state legislatures have ratified

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1. 188 CONG. REC. 9598 (1972).

2. "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:

"Article—

"Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3. This amendment shall take effect two years after the date of ratification." S.J. Res. 8, 92d Cong., 2d Sess. (1972), H.R.J. Res. 208, 92d Cong., 1st Sess. (1971), 86 Stat. 1523.

3. 117 CONG. REC. 35815 (1971).

4. For a legislative history of the ERA up to 1971 see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 981 (1971). For recent legislative action on the amendment see S. REP. NO. 689, 92d Cong., 2d Sess. (1972) (report from the Committee on the Judiciary presented by Senator Birch Bayh for vote in the Senate).

by that date, the proponents of the ERA, should they wish to continue their efforts to add such an amendment to the Constitution, would have to start anew.

As of this writing, thirty-five states have ratified the ERA.⁵ It would thus appear that only three more state legislative ratifications are needed by March 1979 to complete the ratification process and for the amendment to become the twenty-seventh of the United States Constitution. A problem has arisen, however, with three of those state ratifications. Tennessee, Nebraska, and Idaho, having first ratified the amendment, have since purported to rescind their earlier ratifications.⁶ In addition, because of efforts exerted by the amendment's opponents, further rescissions could occur by March 22, 1979.⁷ As a result of these developments, to achieve the requisite thirty-eight state ratifications, the final count may have to include one or more states that first ratified and subsequently attempted to rescind their ratifications.

The above problem raises two initial questions. First, which branch of the federal government is to decide whether those rescinded ratifications should be included in the final count—the United States Supreme Court or the United States Congress? Second, how should the substantive issue be resolved on the merits?

It is possible that, when March 22, 1979 arrives, the questions posed herein will have been mooted by events. Conceivably, in view of the strong support evinced for the ERA by President Carter (and increased efforts by ERA supporters),⁸ more than thirty-eight unre-

5. The thirty-five states that have ratified are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

6. LEG. RES. NO. 9, 83d Leg., 1st Sess., 1973 NEB. LAWS 1547, TENN. S.J. RES. 29, 88th Gen. Assembly (1974); N.Y. Times, Feb. 10, 1977, at 18, col. 6.

7. Idaho and Kansas have contemplated rescission as of 1973. Note, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147 n.3 (1973).

8. During his presidential campaign Jimmy Carter sent telegrams to Democratic leaders in the sixteen states that had not yet ratified the amendment on August 23, 1976. He stated: "I am committed to equality between men and women in every area of government and in every aspect of life.

“

“The Carter-Mondale team will make it clear to the American people that, despite charges to the contrary, the ERA is not an elitist issue but one that affects the economic and social well-being of all Americans.

“While we have seen some progress in changing our laws to prevent discrimination

scinded state legislative ratifications will have occurred by then, obviating the need to include any rescinded ratifications in the count.⁹ On the other hand, the ERA may encounter hard times in the next few years. Voter rejection of proposed state equal rights amendments to the New York and New Jersey constitutions in November 1975¹⁰ suggests that new state legislative ratifications of the ERA may be difficult to attain. As a result of such setbacks and widespread apprehensions, unfounded as they might be, that the proposed amendment portends a disruption of familiar life patterns, the nation may have to confront the problem suggested above: whether states which have withdrawn their earlier ratifications are to be counted as having ratified the amendment when the final tally is made.

Our conclusions are as follows: (1) the United States Supreme Court, rather than Congress, is the branch of government to decide the question of rescindability, as this is a justiciable issue and not a political question; (2) a state, once having ratified the ERA, may not rescind, and any purported rescission by a state is of no legal effect; (3) even if the Court should decide that the issue is nonjusticiable, that is, one to be decided by Congress rather than the Court, Congress should count all state ratifications of the ERA without regard to subsequent efforts to rescind.

Article V of the Constitution

The amending process of the federal Constitution is set forth in article V.¹¹ The article provides for two alternative methods of initiating proposed amendments and two alternative methods for ratifying them. An amendment can be, and all twenty-six existing amendments have been, initiated upon adoption of a joint resolution by a two-thirds

against women, these steps must not be used as an excuse to withhold from women the full guarantees of the Constitution." N.Y. Times, Aug. 28, 1976, at 13, col. 3.

9. Although the issue, presented here with specific reference to the ERA may be mooted by events, the underlying constitutional questions of the efficacy and justiciability of ratification and attempted rescission of constitutional amendments will be before the nation until they are finally resolved. Many of the underlying considerations of this article can be applied to future amendments.

10. See N.Y. Times, Nov. 5, 1975, at 1, col. 5.

11. "The 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.

vote of each house of Congress. The second method, which has never been employed, authorizes Congress, upon application from two-thirds of the state legislatures, to convoke a national convention for proposing amendments.¹² If an amendment is ultimately proposed, either by joint resolution or convention, such amendment

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, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress¹³

In other words, Congress proposes the ratification method¹⁴ and upon ratification by three-fourths of the states—either by legislative decree or by convention—the amendment becomes a part of the Constitution.

Justiciability vs. Political Question

Marbury v. Madison: The Classic Theory of Judicial Review

In 1803, Chief Justice John Marshall wrote the decision in *Marbury v. Madison*¹⁵ in which he declared: “[i]t is emphatically the province and duty of the judicial department to say what the law is. . . . The judicial power of the United States is extended to all cases arising under the constitution.”¹⁶ In the light of this unequivocal statement of principle, it would seem that any case or controversy arising under article V of the Constitution is subject to judicial review, *i.e.*, justiciable. Indeed, from 1798 to 1939 the Supreme Court agreed.

Prior to 1939

Before 1939, the United States Supreme Court consistently held that issues relating to the amendment of the federal Constitution were clearly justiciable. Five of the justices who joined in the opinion of the Court in *Hollingsworth v. Virginia*,¹⁷ holding that presidential approval was not required in the constitutional amending process, had been involved directly in the conception and birth of the Constitution.¹⁸

12. For a discussion of congressional attempts to enact ratification procedures binding on state legislatures, see text accompanying notes 145-55 *infra*.

13. U.S. CONST. art. V.

14. All of the constitutional amendments to date have been ratified by the state legislative method except for the twenty-first amendment (repeal of prohibition).

15. 5 U.S. (1 Cranch) 137 (1803).

16. *Id.* at 177-78.

17. 3 U.S. (3 Dall.) 378 (1798).

18. The five Justices were William Cushing, James Wilson, James Iredell, Samuel Chase, and Oliver Ellsworth. See 1 L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE SUPREME COURT: 1789-1969*, at 57-70, 79-96, 121-32, 185-98, 223-35 (1969).

These five justices presumed without discussion that article V issues were subject to judicial review.

The nineteenth century courts were not faced with the present question. But in the early 1920s four cases decided by the Supreme Court dealt specifically with article V. In *Hawke v. Smith*¹⁹ the Court invalidated an Ohio constitutional provision requiring submittal of proposed United States constitutional amendments to popular referendum because it did not accord with the term "legislatures" in article V. The Court stressed:

[R]atification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word.

. . . .

[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution.²⁰

The validity of the procedures used to exercise this power was a question arising under the Constitution. Hence, judicial review was based on article III, section 2.²¹

In the *National Prohibition Cases* in 1920,²² the Court interpreted the language of article V, "two-thirds of both Houses," to mean two-thirds of the members present and voting of a quorum. *Dillon v. Gloss*,²³ decided the following year, held that a congressionally imposed seven year limit within which the states could ratify an amendment was reasonable and "that the fair inference or implication from Article V. is that the ratification *must* be within some reasonable time after the proposal."²⁴ In 1922, the Court in *Leser v. Garnett*²⁵ judged the ratifications of the nineteenth amendment by Missouri, Tennessee, and West Virginia effective although state constitutional and procedural provisions allegedly rendered the ratifications inoperative.²⁶ In addi-

19. 253 U.S. 221 (1920).

20. *Id.* at 229-30. The California Attorney General has opined that the California electorate cannot effectively rescind, by the *initiative* process, the state's legislative ratification of the ERA. 58 OP. ATT'Y GEN. 830 (1975).

21. *Cf. Burke, Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U.W.L.A.L. REV. 1, 7 (1976).

22. *National Prohibition Cases*, 253 U.S. 350 (1920).

23. 256 U.S. 368 (1921).

24. *Id.* at 375 (emphasis added).

25. 258 U.S. 130 (1922).

26. The ratifying resolutions of Missouri and Tennessee were allegedly adopted in violation of the constitutions of those two states. Missouri had a provision in its constitution disallowing assent to a federal constitutional amendment if it impaired the right of local self-government. Mo. CONST. art. 2, § 3, *quoted in Leser v. Garnett*, 139 Md. 46, 68, 114 A. 840, 846 (1921). Tennessee's constitution prohibited action on a proposed federal constitutional amendment unless the General Assembly had been

tion, in *United States v. Sprague*,²⁷ the Court held that the choice between ratification by state legislature or by convention was within the discretion of Congress, rejecting the argument that ratification by convention was constitutionally required because the eighteenth amendment dealt with "powers over individuals."²⁸ That the Court unhesitatingly decided the issues presented by these cases suggests that the justiciability of questions arising from the amending process was, in the Court's view, a self-evident truth.²⁹ In 1939, however, the Supreme Court decided a case that seemed to change all that had preceded it.

Coleman v. Miller: Dictum or Law?

Coleman v. Miller,³⁰ or more precisely, language in that case, raises the principal obstacle to any conclusion that the United States Supreme Court, rather than Congress, is the ultimate arbiter of the effectiveness of purported state withdrawals of earlier ERA ratifications.

The issue of *Coleman v. Miller* arose from the absence of a deadline date for ratification of the proposed Child Labor Amendment³¹ submitted by Congress in 1924. In 1925 the Kansas legislature rejected

elected after the amendment was submitted. TENN. CONST. art. 2, § 32, *quoted in Leser v. Garnett*, *supra* at 68, 114 A. 840, 846-47 (1921). The Court rejected a challenge to the ratifying resolutions of these two states on the grounds that ratification is a federal function, transcending state imposed limitations. *Leser v. Garnett*, 258 U.S. 130, 137 (1922). Moreover, the resolutions of ratification by West Virginia and Tennessee were challenged as being in violation of those states' rules of legislative procedure thereby rendering them inoperative. *See Leser v. Garnett*, 139 Md. 46, 71-73, 114 A. 840, 847-48 (1921). The United States Supreme Court rejected this challenge holding that notice by the state to the federal government of ratification was conclusive upon the Court. 258 U.S. at 137.

27. 282 U.S. 716 (1931).

28. *Id.* at 729.

29. The state courts likewise had consistently held that the amending process in its entirety was justiciable. "The authorities are thus practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing Constitution is a judicial question. There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the manner required by the Constitution . . ." *In re McConaughy*, 106 Minn. 392, 409-10, 119 N.W. 408, 415 (1909) (judicial resolution of challenge to state constitutional amendment regarding taxes on balloting error grounds). *See also Rice v. Palmer*, 78 Ark. 432, 96 S.W. 396 (1906) (judicially determined whether proposed state constitutional amendment received the majority of votes); *Commonwealth v. Griest*, 196 Pa. 396, 46 A. 505 (1900) (judicially determined whether the submission of a state constitutional amendment may be by resolution as well as by legislative act approved by the executive).

30. 307 U.S. 433 (1939).

31. 43 Stat. 670 (1924) (originated in the House of Representatives).

the proposed amendment and so certified to the United States secretary of state. Twelve years later the Kansas Senate, with the aid of a tie-breaking vote from the state's lieutenant governor, voted to ratify that same previously rejected amendment. The Kansas House of Representatives followed suit.

Almost immediately thereafter a mandamus proceeding was brought in the Supreme Court of Kansas by members of the Kansas Senate challenging the Kansas legislature's action on grounds that, *inter alia*, the proposed amendment had lost its vitality because of the previous rejections by Kansas and other states and the undue length of time the amendment had awaited ratification. The state's supreme court upheld the ratification,³² and certiorari was granted by the United States Supreme Court.³³

The Court initially discussed the previous congressional treatment of ratifications following rejections and also withdrawals of previous ratifications of constitutional amendments, noting that Congress had determined that neither rejections nor withdrawals have any effect.³⁴ The Court then concluded:

[T]he question of the efficacy of ratifications by state legislatures, *in the light of previous rejection or attempted withdrawal*, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress³⁵

It is important to note that the Court in *Coleman* was presented only with the justiciability of the Kansas legislature's attempt at ratification following an earlier rejection of the Child Labor Amendment.³⁶ Its language regarding the justiciability of cases involving *rescission* of ratification went beyond the immediate issue presented to it. Nevertheless *Coleman v. Miller* was the first (and only) decision to announce that purported state withdrawals of earlier ratifications and state ratifications of earlier rejected amendments presented nonjusticiable political questions, though dictum in the 1849 case of *Luther v. Borden*³⁷ had

32. *Coleman v. Miller*, 146 Kan. 390, 71 P.2d 518 (1938).

33. *Coleman v. Miller*, 303 U.S. 632 (1938).

34. 307 U.S. at 447-49. See notes 115-17 *infra*.

35. 307 U.S. at 450 (emphasis added).

36. *Id.*; cf. L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 18-19 (1942) [hereinafter cited as ORFIELD]. "It should be carefully noted that [the Court] did not hold all questions concerning the amending process to be political. The effect of the previous rejection by a state of an amendment [and t]he interval of time in which the states might ratify an amendment was . . . held to involve a political question. Thus it is only as to these two questions that the court definitely decided that no justiciable question is involved." *Id.*

37. 48 U.S. (7 How.) 1 (1849).

hinted that this might be the case.³⁸

In *Coleman*, the Court stated two reasons for finding the ratification-rescission question a political one. First, Congress had previously made the determination as to the effectiveness of subsequent action. Second, the Court saw no constitutional or statutory basis for judicial interference.³⁹ The first reason seems to be a classic example of mistaking the familiar for the necessary.⁴⁰ The second reason is also questionable, since, as Professor Orfield has observed, "there were no stronger constitutional or statutory bases for the decisions rendered"⁴¹ in *Dillon v. Gloss*, *Leser v. Garnett*, or any of the numerous other cases arising under article V.

Moreover, an examination of the vote in *Coleman* reveals that four concurring justices insisted, *inter alia*, that article V matters were political and were therefore never justiciable.⁴² Three justices would have limited nonjusticiability to the narrow facts of the case: ratification by a state when the same amendment had been earlier rejected by that state.⁴³ Two dissenters regarded the article V issues raised in *Coleman* as susceptible to judicial determination, since *Dillon v. Gloss* had adjudicated similar issues without hesitation.⁴⁴ *Coleman v. Miller* can therefore be viewed, in spite of its far-ranging dictum, as leaving open the question whether the purported rescission of a state's earlier ratification of a constitutional amendment is a justiciable matter.

A showing that *Coleman's* treatment of purported withdrawals of state ratifications of constitutional amendments is dictum has no impact if it is determined that its finding of nonjusticiability as to rejection-ratification issues logically compels a finding of nonjusticiability as to ratification-rescission issues. Indeed, this poses a considerable problem. The *Coleman* Court's conclusion that the effect of a previous rejection

38. Although the Court in *Luther* was examining the validity of Rhode Island's new government, Chief Justice Taney deviated from the main issue to remark: "In forming the constitutions of the different States . . . and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." *Id.* at 39.

39. ORFIELD, *supra* note 36, at 20.

40. "[I]t seems an unusual approach for the body recognized as having the power to review acts of Congress to adopt and rely on an act of Congress as precedent . . ." *Id.* at 20.

41. *Id.* See text accompanying notes 19-28 *supra*.

42. 307 U.S. at 459 (Black, Roberts, Frankfurter, & Douglas, JJ., concurring).

43. *Id.* at 450 (Hughes, Stone, & Reed, JJ.).

44. *Id.* at 474 (Butler & McReynolds, JJ., dissenting).

of a subsequent ratification is nonjusticiable was based on an historical survey showing that either Congress or its delegatee, the secretary of state,⁴⁵ had always made the determination whether enough states had ratified a proposed amendment to make it law. The *Coleman* Court apparently felt that determining the effect of a prior rejection on a state's ratification was part of the process of counting up the number of states ratifying an amendment. If this is true, the effect of a purported withdrawal of ratification would also seem part of the same process.

There is a way to overcome this hurdle. We have said that the *Coleman* Court's statement that the effect of a purported withdrawal of a ratification by a state is dictum. It is also possible to view as dictum the Court's statement on the justiciability of the direct problem presented to them—the effect of a rejection on a subsequent ratification.

This view derives from the second holding of *Coleman v. Miller*: that Congress has the power to declare a proposed amendment no longer viable and to refuse recognition of its ratification if too much time has passed since the amendment was originally proposed. In *Coleman*, there was clearly great doubt as to whether the child labor amendment was still viable after thirteen years. In fact, two dissenting justices⁴⁶ insisted that the amendment was indeed no longer viable. Thus it may have been unnecessary for the Court to determine the effect of a prior rejection on a state's ratification since in fact the question might have been moot in light of the nonviability of the child labor amendment. Therefore, even the language in *Coleman* pertaining to the nonjustifiability of the rejection-ratification issue can be considered dictum not necessary to the disposition of the case.⁴⁷

When a rejection-ratification issue relating to an amendment that is *clearly* still viable is presented to the Supreme Court, then the Court will be free to determine the question directly, unfettered by any direct and inevitable holding of the *Coleman v. Miller* decision. If Congress continues its practice of requiring ratification within seven years,⁴⁸ the

45. See note 118 *infra*.

46. The dissents of Justices Butler and McReynolds consisted almost entirely of quotations from the *Dillon* case. See text accompanying notes 23-24 *supra*.

47. This discussion pertaining to the *Coleman* case is also applicable to *Coleman's* companion case, *Chandler v. Wise*, 307 U.S. 474 (1939), in which the Court summarily dismissed the case on the ground that after certification of ratification had been forwarded to the secretary of state there no longer was a justiciable controversy.

48. "Beginning with the proposed 18th amendment, Congress has customarily included a provision requiring ratification within 7 years from the time of the submission to the States." SENATE LIBRARY, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 163, 87th Cong., 2d Sess. 244 (1963).

Court will be presented *only* with ratification issues relating to viable amendments, as is the case in the present ERA controversy.

Baker v. Carr

The contours of the political question doctrine have taken on new dimensions in recent Supreme Court decisions, most notably in the landmark case of *Baker v. Carr*.⁴⁹

In *Baker v. Carr*, plaintiffs, state voters, asserted that their state legislature was apportioned in a manner violating the fourteenth amendment's equal protection guarantee. Attacks on malapportionment had been mounted prior to 1962, both on the basis of the equal protection clause and on the basis of the "republican form of government" guarantee of article IV, section 4. These attacks had been uniformly rejected on the ground that legislative apportionment was a question involving the allocation of political power and was not justiciable in the courts.

The Court in *Baker v. Carr*, however, decided for the first time that the equal protection claim presented by malapportionment should indeed be justiciable,⁵⁰ and while *Baker v. Carr* is generally regarded as a landmark equal protection case, it is important for present purposes because of the majority opinion's survey of past Supreme Court decisions on the justiciability-political question issue,⁵¹ followed by a succinct restatement of the present state of the law on this question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵²

The Court then observed:

Unless one of [the above] formulations is extricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases."⁵³

49. 369 U.S. 186 (1962).

50. *Id.* at 209.

51. *Id.* at 210-17.

52. *Id.* at 217.

53. *Id.*

Applying this new test to the equal protection challenge to the malapportioned state legislature in *Baker* itself, the Court concluded that the case could be decided on the merits.⁵⁴

A careful reading of the *Baker* tests for determining the presence or absence of a political question suggests that they are by no means free of ambiguity. These guidelines leave much room for the exercise of judicial discretion in their application to specific factual situations. Their production of the *Baker* result on the merits is probably best explained by the practical need for the Court to act in the malapportionment situation, since, for a variety of reasons, most notably a revulsion to the idea of committing political suicide, no other branch of government was likely to act under the circumstances.

Powell v. McCormack

If the Court took the bold step that it did in *Baker v. Carr* because, in the absence of judicial action, no other body could or would do anything to remedy the inequities in state legislative apportionment, the Court's resolution of the political question-justiciability dispute in *Powell v. McCormack*⁵⁵ cannot be explained on such pragmatic grounds. In that case, Adam Clayton Powell, a member of the United States House of Representatives, was denied his seat in the House⁵⁶ by over a two-thirds vote of his colleagues. Powell had been accused of engaging in misconduct both related and unrelated to his governmental duties as representative and committee chairman. In the appeal by Powell and voters of his congressional district following suit seeking reinstatement of Powell to his House seat, the respondents, members and custodians of the House of Representatives, contended, *inter alia*, that the decision to exclude Powell was supported by the expulsion power in article I, section 5⁵⁷ of the federal Constitution. That power, respondents argued, allowed the House to expel a member for reasons set forth by that body. Respondents also maintained that the issue was not justiciable because it involved a political question.

54. *Id.* at 237.

55. 395 U.S. 486 (1969).

56. H.R. Res. 1, 90th Cong., 1st Sess., 113 CONG. REC. 24 (1967). Two years later Congressman Powell was seated and sworn in and a fine was imposed. H.R. Res. 2, 91st Cong., 1st Sess., 115 CONG. REC. 33-34 (1969).

57. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members

"

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5.

The Court, in holding that Powell was improperly excluded from his membership in the House and requiring that he be permitted to take his rightful place in that body, concluded that the case did not involve a political question but that, on the contrary, it presented a justiciable issue.⁵⁸ Specifically, the Court's extended examination of relevant historical materials⁵⁹ revealed that congressional power, under article I, section 5, to judge the qualifications of its members was "at most a 'textually demonstrable commitment' to Congress to judge *only* the qualifications expressly set forth in the Constitution,"⁶⁰ those requirements of age, citizenship, and residence contained in article I, section 2.⁶¹ As a result, concluded the Court, the House was without the power to exclude a member-elect who met the Constitution's requirements.⁶²

The *Powell* decision is especially significant in that it reflects an awareness on the part of the Court that the American "system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."⁶³ In the Court's view:

Such a determination falls within the traditional role accorded courts to interpret the law and does not involve a "lack of the respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for non-judicial discretion."⁶⁴

The Present Mood of the Court: Justice Powell, an Illustration

The opinion in *Powell* not only recognized the essential role of the Court as the ultimate interpreter of the meaning of constitutional language, it also signaled the Court's reassertion of its supremacy within its own sphere and of its right to exercise its constitutional prerogatives, especially in relation to Congress.

58. It is interesting to note that Chief Justice Burger, before he was appointed to the Supreme Court, wrote the court of appeals decision which was reversed by the Supreme Court. In the decision, Burger affirmed the dismissal by the district court but not because of lack of jurisdiction as the lower court had decided but on political question grounds applying the *Baker v. Carr* test. *Powell v. McCormack*, 395 F.2d 577 (D.C. Cir. 1968), *rev'd*, 395 U.S. 486 (1969).

59. 395 U.S. at 521-48.

60. *Id.* at 548 (emphasis added).

61. "No Person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be Chosen." U.S. CONST. art. I, § 2.

62. 395 U.S. at 550.

63. *Id.* at 549.

64. *Id.* at 548-49, quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Powell v. McCormack, moreover, appears to be a sound application of *Baker's* constitutional test for justiciability. At the same time, it evokes a mood of judicial activism,⁶⁵ a willingness to reach out to resolve social issues that other branches of government ignored.⁶⁶ Although in *Baker* the Court asserted that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers,"⁶⁷ derived directly from the Constitution, there is so much room for discretionary manipulation of the *Baker* tests that one cannot help suspecting that a finding by the Court of the presence of a political question, like its determination of such related questions as standing, ripeness, or mootness, may often reflect attitudes of members of the Court on the appropriate role of the federal judiciary in the American political system rather than the application of the *Baker* tests to new factual situations.

Except for a few of its holdover members, the present Supreme Court, which may confront the question of the justiciability of ERA ratification withdrawals, clearly harbors different judicial philosophies from the activist Warren Court.⁶⁸

The growing influence of Justice Powell, one of the newer members of the Court, on recent standing issues reflects the Court's increasing tendency to embrace the virtues of judicial self-restraint over the activism of the Warren era. To be sure, in one sense standing implicates different concerns than those raised by the political question doctrine.⁶⁹ Yet the Court has noted that they are both aspects of the fundamental problem of justiciability.⁷⁰

That is why Justice Powell's views, first expressed in a concurring opinion in *United States v. Richardson*⁷¹ and later adopted as the

65. See note 68 *infra*.

66. Justice Powell, a leading spokesman for judicial restraint described it thus: "Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform." *United States v. Richardson*, 418 U.S. 166, 191 (1974) (Powell, J., concurring).

67. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

68. See Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?* 54 CORNELL L. REV. 1 (1968). See also Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43 (1975); Dorsen & Kurland, *The Burger Court—A Preliminary View*, 28 RECORD 109 (1973); Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REVIEW 265 (1971).

69. See *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

70. *But see id.* at 98.

71. 418 U.S. 166, 180-97 (1974) (Powell, J., concurring).

prevailing view of the Court in *Warth v. Seldin*,⁷² reveal much about the Court's present mood with respect to its relationship with Congress when collisions between them are in the offing.

Richardson was a mandamus action by a federal taxpayer to compel the secretary of the treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency and to enjoin any further publication of a consolidated statement which did not reflect its receipts and expenditures. The taxpayer asserted standing to bring the action based on the allegation that Congress had violated article I, section 9, clause 7⁷³ of the Constitution.

The majority opinion, delivered by Chief Justice Burger, held the taxpayer had failed to bring himself within the scope of the standing requirements of *Flast v. Cohen*.⁷⁴ The taxpayer's challenge was not addressed to the taxing or spending power but to the statutes regulating the CIA's accounting and reporting procedures; there was, consequently, no "logical nexus" between his status as "taxpayer" and the Congress' alleged failure to require more detailed reports of the CIA's expenditures.⁷⁵ The Court also rejected the respondent's assertion that he was aggrieved by the CIA's failure to account because he did not satisfactorily "show that he *has sustained or is immediately in danger of sustaining a direct injury* as the result of that action. . . ."⁷⁶

Mr. Justice Powell concurred in the *Richardson* result, while rejecting, because of its own illogic,⁷⁷ the Court's adherence to the "logical nexus" test for taxpayer standing developed in *Flast v. Cohen*. That

72. 422 U.S. 490 (1975).

73. "No Money Shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

74. 392 U.S. 83 (1968). "First, the taxpayer must establish a logical link between [taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Id.* at 102.

75. 418 U.S. at 175.

76. *Id.* at 177-78, quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

77. Justice Powell pointed out the various inconsistencies: "The opinion purports to separate the question of standing from the merits . . . yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining 'whether there is a logical nexus . . .'" 418 U.S. at 180-81. "Similarly, the opinion distinguishes between constitutional and prudential [i.e., judicial self-restraint,] limits on standing. . . . I find it impossible, however, to determine whether the two-part 'nexus' test created in *Flast* amounts to a constitutional or a prudential limitation" *Id.* at 181. "[I]t is impossible to see how an inquiry about the existence of 'concrete adverseness' [as presented in *Baker v. Carr*] is furthered by an application of the *Flast* test." *Id.* at 182.

illogic had been underscored in *Flast* itself both by Justice Harlan,⁷⁸ a leading proponent of judicial self-restraint, and by Justice Douglas,⁷⁹ the activist nonpareil.

What makes Justice Powell's concurrence in *Richardson* significant for present purposes is his express rationale for agreeing with the result. According to Justice Powell:

Relaxation of standing requirements is directly related to the expansion of judicial power. . . . [A]llowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. . . . [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.⁸⁰

Furthermore, Justice Powell emphasized that the Court was the "insulated judicial branch"⁸¹ of the federal government. Allowing unrestricted taxpayer or citizen standing, he stated, "underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the concurrent drift toward expanded standing."⁸² Justice Powell concluded that the Court "should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in *Flast* and *Baker v. Carr*."⁸³ Taxpayer and citizen suits, he stressed, were attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System."⁸⁴ The Court, he asserted, should affirm "traditional prudential barriers" to disallow such use of the federal judiciary.

By 1975, the philosophical perspective of Justice Powell, revealed

78. "[T]he Court's standard for the determination of standing [requisite personal stake in the outcome] and its criteria for the satisfaction of that standard [logical link between status and type of legislation attacked, and nexus between status and nature of constitutional infringement alleged] are entirely unrelated." 392 U.S. at 122 (Harlan, J., dissenting).

79. "While I have joined the opinion of the Court, I do not think that the test it lays down is a durable one for the reasons stated by my Brother Harlan." *Id.* at 107 (Douglas, J., concurring).

80. 418 U.S. at 188 (Powell, J., concurring).

81. *Id.*

82. *Id.* at 189.

83. *Id.* at 196.

84. *Id.*, quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

in his *Richardson* concurrence, had become the perspective of a Court majority, as expressed in the *Warth v. Seldin*⁸⁵ opinion written by Justice Powell himself. In *Warth*, various petitioners had sought declaratory and injunctive relief and damages against a town and members of its zoning, planning and town boards, claiming that the town's zoning ordinance excluded persons of low and moderate income from living in the town, thereby violating petitioners' constitutional and statutory rights.⁸⁶

The opinion examined the relationships of the different petitioners to the allegations set forth and then tested those relationships against standing principles, concluding, to the dismay of the dissent,⁸⁷ that none of the petitioners had sustained a claim to standing.

Justice Powell for the majority emphasized that standing requirements stem not only from constitutional dictates, but also from "prudential" considerations, thereby reiterating his views in the *Richardson* concurrence.⁸⁸ Powell insisted that in both its constitutional and prudential dimensions standing "is founded in concern about the proper—and properly limited—role of the Courts in a democratic society."⁸⁹

The acquiescence by a majority of the Burger court in *Warth v. Seldin* to the notion that the standing doctrine is based as much, if not more, upon nonconstitutional "prudential" considerations as upon the dictates of the constitutional separation of powers doctrine discloses a mood of the Court in 1976 that is markedly different from what it was at the time it rendered its opinions in *Baker v. Carr* (1962), *Flast v. Cohen* (1968), and *Powell v McCormack* (1969). The Court's willingness to respect congressional authority as evidenced by Powell's language in *Richardson*⁹⁰ and *Warth*⁹¹ is diametrically opposed to the

85. 422 U.S. 490 (1975).

86. Petitioners claimed that the zoning ordinance violated their constitutional rights under the first, ninth, and fourteenth amendments and statutory rights under 42 U.S.C. §§ 1981-83 (1970). Similar claims have since been rejected by the Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 97 S. Ct. 555 (1977).

87. "[I]t is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing." 422 U.S. at 520-21 (Brennan, J., dissenting).

88. 418 U.S. 166, 196 (1974).

89. 422 U.S. at 498, citing *U.S. v. Richardson*, 418 U.S. 166 (1974) and *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974). *Schlesinger* held there was no standing to bring a class action challenging Reserve membership of members of Congress as being in violation of the Incompatibility Clause of Art. I, § 6.

90. "Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." 418 U.S. at 189.

91. "Without such [prudential] limitations . . . the courts would be called upon

aggressive assertion of judicial prerogatives in the political question arena in *Baker and Powell*.⁹²

As a result of these developments, it is not unlikely that the Court, as presently constituted, may be less willing than in the past to resolve the present ERA justiciability issue in a manner that precludes Congress from making a determination allegedly committed to it by the Constitution.

On the other hand, despite such current philosophical tendencies on the Court, the *Baker v. Carr* test remains its most authoritative doctrinal definition of a nonjusticiable political question. As will be demonstrated subsequently, applying that political question test to the ERA rescindability issue points almost ineluctably to a conclusion of justiciability.

The *Baker v. Carr* Test

Some phases of the *Baker* test can be disposed of as being clearly inapplicable to the question at hand. For example, the "potentiality of embarrassment from multifarious pronouncements by various departments on one question"⁹³ relates to the foreign relations activities of

to decide abstract questions of wide public significance though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." 422 U.S. at 500.

92. Justice Powell's views on the ERA itself may bear on his potential approach to resolving the ratification question. The Court struck down a federal statute according different benefits to male and female members of the uniformed services in *Frontiero v. Richardson*, 411 U.S. 677 (1973). Significantly, four justices asserted that sex, like race, was a suspect classification and hence triggered close scrutiny. *Id.* at 682. Concurring, Justice Powell argued that the discriminatory government practice could be invalidated on the less rigorous rational basis standard on the authority of *Reed v. Reed*, 404 U.S. 71 (1971). More important, he suggested that characterizing sex classifications as "suspect" was inappropriate because the ERA was already making its way through the ratification process. *Id.* at 692. In his view, "this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." *Id.* In expressing this view, Justice Powell may have overlooked the principal impetus behind the ERA—previous inaction by the Court in response to numerous instances of official sex discrimination challenged under existing constitutional provisions. See L. KANOWITZ, *WOMEN AND THE LAW* 1-99, 149-54 (1969). More recently, Justice Powell has conceded that under recent Supreme Court cases, the "relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Craig v. Boren*, 97 S. Ct. 451 (1976) (Powell, J., concurring). But this concession by no means undermines the attitude he expressed in *Frontiero* of deferring to Congress in matters related to the ratification of the equal rights amendment.

93. 369 U.S. 186, 217 (1962).

the United States government⁹⁴ and is therefore irrelevant to the present issue. The same observation can be made with respect to "an unusual need for unquestioning adherence to a political decision already made,"⁹⁵ especially when, in the case of ERA ratification, *whether* a political decision has been made is precisely the point in question.

By contrast, other aspects of the *Baker* test are much more germane to the justiciability of the effect of a purported withdrawal by any state of its prior ERA ratification. One such aspect is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."⁹⁶ The validity of a state's rescission attempt hinges on the meaning of the constitutional language "when ratified." It would seem that the Court's interpretation of this language is no more indicative of a lack of the respect due a coordinate branch of the federal government than are the frequently encountered invalidations of congressional legislation on grounds that the legislation exceeds constitutional authority.⁹⁷

Nor does a decision by the Court whether a state may rescind its prior ratification of a pending constitutional amendment require "an initial policy determination of a kind clearly for nonjudicial discretion."⁹⁸ The only policy determination involved in this issue is that laid out by the framers of the Constitution, whose intentions have always been examined when the Court interprets constitutional language.

Another facet of the *Baker* test is "a lack of judicially discoverable and manageable standards" for resolving the issue.⁹⁹ But the Court

94. "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislative; but many such questions uniquely demand single-voiced statement of the Government's views." *Id.* at 211.

95. *Id.* at 217. An example of this principle occurred during the Reconstruction when the Court, because of the need for solidarity of purpose, refused to rule on whether the Georgia Constitution had been coerced by Congress and was therefore invalid. *White v. Hart*, 80 U.S. (13 Wall.) 646 (1871).

96. 369 U.S. at 217. *Baker* partially relied on *Field v. Clark* in which the Court, ruling on a challenge to the validity but not the authenticity of a signed United States statute, stated: "The respect due to coequal and independent departments requires the judicial department" to rely on congressional authentication to "determine . . . whether the Act, so authenticated, is in conformity with the Constitution." *Field v. Clark*, 143 U.S. 649, 672 (1892). See also *Leser v. Garnett*, 258 U.S. 130 (1922). *Leser* relied on *Field* in determining that the ratifications certified by the secretary of state were conclusive upon the Court. *Id.* at 137.

97. *E.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969). "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a] coordinate [branch] of government'" *Id.* at 548.

98. 369 U.S. at 217.

99. *Id.*

would be able through the process of interpreting constitutional language to explicate the meaning of article V. The Court has always found such a standard manageable.¹⁰⁰

Perhaps the most troublesome aspect of the *Baker* test is the "textually demonstrable constitutional commitment of the issue to a coordinate political department."¹⁰¹ The existence and scope of such a commitment are matters to be resolved by the Court.¹⁰² In *Powell v. McCormack*, the Court, while examining the "scope of any 'textual commitment' under Art. I, § 5,"¹⁰³ explored the historical background of the passage in question to determine the framers' intent. In the case of article V, there is sparse discussion in the Constitutional Convention debates; much of the recorded deliberation deals with Congress' role in proposing constitutional amendments rather than with their ratification.¹⁰⁴ After brief and sporadic debate on an amending article proposed by Edmund Randolph,¹⁰⁵ James Madison proposed an amending article virtually identical to the present article V, and, following another day of debate, it and the entire Constitution was approved and signed.¹⁰⁶ Thus, the Constitutional Convention debates shed little light upon the framers' intent regarding the phrase "when ratified."

Militating against a finding that the Constitution makes a textual commitment of amendment controversies to Congress are the indications that the framers were unwilling to leave the entire amending process within the exclusive control of Congress.¹⁰⁷ Article V requires amendments to be ratified by three-fourths of the states, and provides for an alternative means of amendment initiation through a convention on the application of two-thirds of the states.¹⁰⁸

Chief Justice Warren, in *Powell*, explained that to determine whether there was a textual commitment, the Court must first discover if the Constitution has granted any power to Congress through the article and must then determine whether the exercise of that power is suscepti-

100. See notes 17-29 & accompanying text *supra*.

101. 369 U.S. at 217.

102. *Powell v. McCormack*, 395 U.S. 486, 521 (1968).

103. *Id.*

104. See 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 531 (1881).

105. *Id.* at 128.

106. *Id.* at 558.

107. Initially, the framers were reluctant to give Congress *any* power in the amending process. At the Convention George Mason said, "It would be improper to require the consent of the National legislature, because they may abuse their power and refuse their assent on that very account." *Id.* at 182.

108. See text accompanying notes 11-12 *infra*.

ble of judicial supervision.¹⁰⁹ In the light of the *Powell* decision, it is difficult to conclude that the effectiveness of state ratifications should be left to congressional determination. Arguably, such a conclusion might derive from the facts that one of the two ways of amendment initiation is through the federal legislative process and that, regardless of how an amendment is initiated, Congress determines its mode of ratification—by state legislature or by convention. However, the language of article V clearly limits Congress' powers to (1) proposing amendments, (2) calling a convention for proposing amendments when enough states so request, and (3) proposing the mode of ratification. There simply is no mention of congressional authority to interfere with the ratification process once the mode of ratification is chosen.

The present situation is remarkably similar to that of *Powell v. McCormack*, in which Congress' power with regard to *expulsion* of a member was limited to the specific qualifications of age and residency and therefore did not extend a right to *exclude* a member for alleged misconduct. In other words, the Court interpreted the phrase, "Each House shall be the Judge of the . . . Qualifications of its own Members"¹¹⁰ to be limited to those standing qualifications set out in article I, section 2, clause 2;¹¹¹ that is, only congressional judgment as to the standing qualifications was held to be a textually demonstrable commitment to Congress.

The textually demonstrable commitment in the constitutional amendment process is similarly limited to proposing amendments, calling a convention should two-thirds of the states so request, and specifying one of the two modes of ratifying. At most, one can infer additional congressional power to propose only incidental regulations to carry out that commitment. Nor is this proposed application of the textual commitment phase of the *Baker* test incompatible with the result in *Coleman v. Miller*.¹¹² If the dictum in that case is disregarded, as it should be, it is clear that *Coleman* decided only that, when a constitutional amendment may no longer be viable, the Court could not prevent the question of the validity of a ratification after a prior rejection from coming before the political departments.¹¹³

Such an interpretation is an entirely different proposition from reading into article V's language a textually demonstrable commitment

109. 395 U.S. at 519.

110. U.S. CONSR. art. I, § 5.

111. See text accompanying notes 55-62 *supra*.

112. 307 U.S. 433 (1939). *Coleman* is discussed in text accompanying notes 30-44 *supra*.

113. 307 U.S. at 450.

to Congress to decide the effect to be given to a state's withdrawal of its earlier ratification of a federal constitutional amendment. For, as one commentator has observed, while

the duty imposed on Congress by Article V implies certain powers incident to fulfilling that duty [t]he Constitution commits numerous powers to the political branches without committing absolute and unreviewable discretion in the exercise of those powers.¹¹⁴

Rescission Efficacy if Justiciable

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,¹¹⁵ fifteenth,¹¹⁶

114. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1637-38 (1972).

115. Upon receipt of Ohio's rescission the Senate referred it to the Committee on the Judiciary with the effect of killing the resolution. CONG. GLOBE, 40th Cong., 2d Sess. 876-78 (1868). Secretary of State William Seward, in his announcement to Congress on the fourteenth amendment, stated:

"[I]t is made the duty of the Secretary of State forthwith to cause any amendment to the Constitution of the United States, which has been adopted according to the provisions of the said Constitution, to be published in the newspapers authorized to promulgate the laws, with his certificate specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution . . . ;

"[W]hereas neither the act . . . nor any other law, expressly or by conclusive implication, authorizes the Secretary of State to determine and decide doubtful questions . . . as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution;

"And whereas it appears from official documents on file in this Department that the amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the States of . . . New Jersey [and] Ohio . . . ;

"And whereas it further appears from official documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of the said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States

"Now, therefore, be it known that I, WILLIAM H. SEWARD, Secretary of State of the United States . . . do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States." 15 Stat. 706-07 (1868). Thereafter, both Houses passed concurrent resolutions declaring the adoption of the amendment. The next day the Secretary of State certified the adoption of the amendment. *Coleman v. Miller*, 307 U.S. 433, 438-39 (1939).

116. Ohio rejected and then ratified the amendment. New York ratified and then

and nineteenth¹¹⁷—either Congress itself or the secretary of state, in promulgating the amendments¹¹⁸ included within the requisite number of ratifying states one or more states that had first ratified and then purported to rescind.¹¹⁹ In other words, in each instance efforts to rescind were regarded as void and without effect.

The apparent rationale for this action by Congress and the secretary of state is that the language of article V confers upon the state legislatures (or state ratifying conventions) only the authority to ratify¹²⁰ a proposed federal constitutional amendment.¹²¹ Once that function is exercised, the state legislature (or state convention) has exhausted all of its article V power, so that nothing it purports to do thereafter in connection with the pending constitutional amendment is of any force or effect. In 1887, Judge Jameson expressed it this way:

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

rescinded. A joint resolution was introduced in Congress to declare ratification of the fifteenth amendment. It was referred to the Committee on the Judiciary and never reached a vote. CONG. GLOBE, 41st Cong., 2d Sess. 1444 (1870). Therefore no formal resolution was directed from Congress when Secretary of State, Hamilton Fish, proclaimed the amendment ratified, including Ohio and New York in his list of states which had ratified. 16 Stat. 1131 (1870).

117. West Virginia ratified following rejection and Tennessee attempted to rescind. Secretary of State Bainbridge Colby simply promulgated the nineteenth amendment without any questions directed to Congress. 41 Stat. 1823 (1920).

118. In 1951 Congress substituted the GSA for the Secretary of State: "Whenever official notice is received at the General Services Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Administrator of General Services shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." Act of Oct. 31, 1951, Pub. L. No. 82-248, § 2(b), 65 Stat. 710 (codified at 1 U.S.C. § 106b (1970)).

119. It should be noted at this point that only in the case of the fourteenth amendment were the disputed states necessary to make up the requisite total for ratification. As to the fifteenth and nineteenth amendments, three-fourths of the existing state legislatures ratified notwithstanding the disputed states.

120. *Cf.* BLACK'S LAW DICTIONARY 1428 (4th rev. ed. 1968): "Ratify. To approve and sanction; to make valid; to confirm; to give sanction to."

121. "[T]he function of a State legislature in ratifying a proposed amendment to the Federal Constitution . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the . . . State." *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920). "[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution . . ." *Id.* at 230. *See also* *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1856).

power [to ratify] has been exercised—it, *ipso facto*, ceases to exist¹²²

Of course, neither Congress nor the secretary of state is bound by principles of *stare decisis*. Nor, a fortiori, is the United States Supreme Court bound by executive or legislative interpretations of constitutional language. Nevertheless, it is submitted that past dispositions by Congress and the secretary of state were sound, both as a matter of policy and of logic, and should be followed by the United States Supreme Court when and if it is faced with the substantive question of the efficacy of a purported rescission of a state's ERA ratification.¹²³

To support the above conclusion, there is first, the very language of article V itself. In *United States v. Sprague*,¹²⁴ specifically referring to article V, the Court said:

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.¹²⁵

With those words in mind, it should be stressed that article V provides that proposed amendments become part of the Constitution "when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof" The crucial word in this formulation is "ratified."¹²⁶ As the Supreme Court has explained, "ratification by a State of a constitutional amendment is . . . the expression of assent . . . of the State to a proposed amendment to the constitution."¹²⁷

Although the term "ratified" has also been used to indicate the final result of amendment approval, that is, the attainment of approval or ratification by three-fourths of the states, its article V meaning is: the individual acts of ratification by each State signifying its approval and assent to the proposed amendment. That the framers intended this meaning appears from their intentions with respect to the initial ratifications by state conventions of the original Constitution. Replying to a letter from Alexander Hamilton, James Madison observed:

122. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 632 (1887). See also *id.* at 628-30.

123. *Id.* at 632.

124. 282 U.S. 716 (1931).

125. *Id.* at 731.

126. "[R]atification is but the expression of the approbation of the people" *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

127. *Hawke v. Smith*, 253 U.S. 221, 229 (1920).

[A] reservation of a right to withdraw, if [the Bill of Rights] be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification In short, any *condition* whatever must vitiate the ratification. . . . The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification which was abandoned as worse than a rejection.¹²⁸

Moreover, in the light of the Court's characterization of the Constitution as "an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought,"¹²⁹ the fact that article V includes no language expressly authorizing rescission of a once ratified amendment points strongly toward the conclusion that rescissions were not within the framers' intent.

A second rationale supporting nonrescindability of state ratifications of constitutional amendments stems from the practical difficulty of amending the Constitution. That amending the Constitution should be a more difficult task than amending or passing ordinary legislation is almost a self-evident proposition.¹³⁰ A constitution is a basic charter for a people, designed to provide their fundamental governmental doctrine for a substantial period of time, if not indefinitely. By contrast, legislative acts are designed to deal with specific social or economic needs as perceived at specific times. Still, constitutions should not be made so difficult to amend that they become virtually impossible to alter¹³¹ when, in the light of fundamentally changed perceptions of a society's basic needs, such amendments appear necessary to massive numbers of the people in the society governed by that constitution. The danger to be avoided is, as Professor Orfield has observed, that the "amending process may be made so difficult as to prevent the adoption of amendments which are unquestionably sound."¹³²

In a two hundred year period, the United States Constitution has been amended a mere seventeen times (counting the Bill of Rights as a single amendment). During the same period, there have been over five thousand amendments proposed to Congress.¹³³ This low success ratio

128. 2 D. WATSON, *THE CONSTITUTION OF THE UNITED STATES* 1317 (1910).

129. *United States v. Sprague*, 282 U.S. 716, 732 (1931).

130. "[A]mendment of the Constitution (let us hope!) will remain a highly unusual thing." Black, *Amending the Constitution: A Letter to a Congressman*, 82 *YALE L.J.* 189, 195 (1972).

131. "The Constitution made the amendment process difficult, and properly so. It certainly was not the intention of the original Convention to make it impossible." Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 *MICH. L. REV.* 875, 895 (1968) [hereinafter cited as Ervin].

132. ORFIELD, *supra* note 36, at 210.

133. See SENATE LIBRARY, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE*

suggests that amending the federal Constitution is already an enormously difficult undertaking. In addition, the efforts to secure passage of a joint congressional resolution proposing the ERA spanned a fifty year period, from 1923 to 1972.¹³⁴ Against this background, it is arguable that the ERA has had sufficiently difficult hurdles to overcome in the *normal* course of the ratification process. To confront it with an additional, perhaps insurmountable, hurdle (the possibility that states which first ratified it will be able to rescind that ratification before three-fourths of the states have signified their ratification of the amendment or before the time limit for ratification has expired) is to make amending the Constitution qualitatively much more difficult than the framers had contemplated.

This leads to still another, more political reason supporting the view that ratification rescissions should not be accorded any effect: the practical exigencies of the process itself. Recognition of a power of the states to rescind their ratifications would, it is submitted, create an enormous potential for tactical abuse. ERA proponents, state legislators, and members of Congress were, in view of congressional precedent,¹³⁵ justified in presuming that once a state ratified the amendment, no more attention need be paid to it. Recognizing that article V does not require unanimity of endorsement, proponents have tended to select the most promising states within which to concentrate their finite resources of funds, energy, and influence in order to achieve their goal. Permitting a state to withdraw its ratification could upset the entire tactical and strategic approach of the amendment's proponents in a way not contemplated when it was first submitted to the states by Congress.

Against these considerations, there is the superficially attractive argument in favor of allowing a state legislature to reverse its ratification decision¹³⁶ (in either direction) on a proposed constitutional amend-

UNITED STATES OF AMERICA, S. DOC. NO. 163, 87th Cong., 2d Sess. iv (1963). Five congressionally proposed amendments have not been ratified by the states. In 1789, only ten of twelve proposed amendments were ratified to become the Bill of Rights. The other two were articles providing for the growth of the House in proportion to the population of the country and for the determination of congressional compensation only when a new House had been elected. In the 11th Congress an article was proposed relating to the acceptance by U.S. citizens of titles of nobility from foreign governments. In 1861, the 36th Congress proposed an article prohibiting a constitutional amendment to abolish slavery, and in 1924 the 68th Congress passed the child labor amendment resolution. *Id.* at 244-45.

134. See note 4 *supra*.

135. See notes 115-17 *supra*.

136. See generally Comment, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93 (1973).

ment when it decides that its earlier action was a mistake. But in view of historical precedent, the intentions of the framers, and the difficulty entailed in amending the federal Constitution, the unfettered right of a state legislature to change its decision hardly seems justifiable.

Moreover, legislative mistakes in judgment with regard to adopted constitutional amendments are not irrevocable. One need only refer to our nation's experience with the "noble experiment."¹³⁷ The American people, having first been persuaded of the desirability of adding the eighteenth amendment, prohibiting the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes" were subsequently persuaded to amend the federal Constitution once more by adding the twenty-first amendment, repealing the eighteenth. What must be stressed, however, is that in order to undo what they came to perceive as the mistake of Prohibition, Americans had to submit to the same laborious process they confronted when the eighteenth amendment was originally introduced and ratified. There was no resort to the "shortcut" of rescinding individual state ratifications prior to its total ratification by the necessary three-fourths of the state legislatures.

We do not wish to be understood as suggesting that the American people will regret the addition of the ERA to the federal Constitution.¹³⁸ Despite the gloomy prophecies by some ERA opponents of its supposed negative effects, we believe that the amendment will cure widespread injustices resulting from unwarranted assumptions about the differences between men and women. The addition of that amendment to the federal Constitution will not, in our opinion, be a mistake.¹³⁹ The point is that, even if it is concluded after some years of experience with the

137. See generally H. ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* (1950).

138. When Senator Birch Bayh presented the equal rights amendment to the Senate for passage he said: "The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land." S. REP. NO. 689, 92d Cong., 2d Sess. 11 (1972).

139. See generally M. DELSMAN, *EVERYTHING YOU NEED TO KNOW ABOUT ERA* (1975); *Hearings on the ERA Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 2 (1971); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871 (1971).

ERA that its adoption was a mistake, recourse in the form of repeal will be available.¹⁴⁰

Rescission Efficacy if Not Justiciable

As indicated earlier,¹⁴¹ purported rescissions by some states of their earlier ratifications of the fourteenth, fifteenth, and nineteenth amendments were regarded as nullities by Congress, on the theory that a state's ratification exhausts its entire power with respect to the amendment ratified.¹⁴² This theory, as we have explained is sound for many reasons.¹⁴³ Should the Court decide, however, that the issue is nonjusticiable, can one be certain that Congress will accord "rescinded" ratifications of the ERA the same treatment accorded rescissions of earlier amendments?

That Congress would not be required to accord the same treatment to ERA ratification rescissions as it has historically accorded rescissions of earlier amendments flows from the fact that Congress, not being a court, is not bound by principles of stare decisis. Nevertheless, were it not for some congressional activity in the late 1960's and early 1970's there would be no reason to think that Congress would treat the ratification process surrounding the ERA any differently than it has treated that process with respect to the fourteenth, fifteenth, and nineteenth amendments.

The slight uncertainty as to how Congress might treat rescissions of ERA ratifications¹⁴⁴ stems from Congress' efforts, initiated in

140. From our expression of support for the ERA on the merits, some might infer that our analysis of the amending process itself, and its conclusion that the Court can and should decide that a state may not rescind its earlier ratification, is motivated by partisan political considerations rather than by an objective appraisal of the relevant constitutional language. Such an inference would be erroneous. In the years ahead one or more proposed amendments not to our liking (*e.g.*, an anti-abortion amendment, an antibusing amendment, an amendment permitting capital punishment, an amendment permitting prayer in schools) may garner the support of two-thirds of each house of Congress and be sent to the states for ratification. Though we would undoubtedly oppose them on the merits, we recognize that everything we have written with regard to the process of ratifying the ERA would apply to such other amendments as well.

141. See notes 115-17 *supra*.

142. See also *Coleman v. Miller*, 307 U.S. 433, 449 (1939).

143. See notes 115-40 & accompanying text *supra*.

144. A bill introduced in 1870 that would have made attempted withdrawal of state ratification null and void was passed by the House. CONG. GLOBE, 41st Cong., 2d Sess. 5356-57 (1870). It died, however, after being reported unfavorably by the Senate Judiciary Committee. CONG. GLOBE, 41st Cong., 3d Sess. 1381 (1871). In the 67th and 68th Congresses, the Wadsworth-Garrett amendment was proposed which would have left states free to change prior action until the requisite three-fourths majority

1967¹⁴⁵ and pursued until 1973,¹⁴⁶ to prescribe procedures for the *convention method* of proposing amendments and their ratification.¹⁴⁷ Passed in the Senate by a vote of eighty-four to nothing in 1971,¹⁴⁸ the bill¹⁴⁹ was reintroduced as S. 1272 in the 93rd Congress on March 19, 1973 by Senators Ervin and Brock.¹⁵⁰ It again passed the Senate on July 9, 1973, was sent to the House the next day, but never emerged from the House Judiciary Committee.

The bill has been called "a thoroughly misconceived piece of legislation . . ." ¹⁵¹ For present purposes, it is important to note that its section 13(a) provided:

Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed

had ratified or time expired. The amendment never reached a vote. 65 CONG. REC. 3675-79 (1924).

145. S. 2307, 90th Cong., 1st Sess. (1967). See Ervin, *supra* note 131, at 879.

146. S. 623, 91st Cong., 1st Sess. (1969); S. 215, 92d Cong., 1st Sess. (1971); S. 1272, 93d Cong., 1st Sess. (1973).

147. S. 2307, 90th Cong., 1st Sess. (1967) arose after the following series of events. In 1964 the Supreme Court decided *Reynolds v. Sims*, which, on the basis of the fourteenth amendment equal protection clause established the one-person-one-vote requirement: state legislative apportionment on the basis of population. *Reynolds v. Sims*, 377 U.S. 533 (1964). That same year the Court, in *Lucas v. Forty-Fourth General Assembly of Colorado*, held on the basis of *Reynolds* that both houses of a bicameral state legislature must be apportioned according to population notwithstanding that the state electorate voted in favor of one house being apportioned according to other factors. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964). Reacting to these cases, especially *Lucas*, Senator Dirksen proposed S.J. Res. 103, 89th Cong., 1st Sess. (1965), the so-called Dirksen amendment. See Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 858 (1968). The amendment would have allowed the electorate to decide the apportionment; as long as one house was apportioned according to population, the other house could be apportioned on the basis of population, geography, or political subdivisions. The Dirksen amendment, received a majority vote in the Senate, but fell short of the requisite two-thirds vote for constitutional amendments.

"In December, 1964, following the decision in *Reynolds v. Sims*, the Seventeenth Biennial General Assembly of the States recommended that the state legislatures petition Congress to convene a constitutional convention to propose an amendment along the lines of the Dirksen amendment Twenty-two states submitted constitutional convention petitions to Congress during the Eighty-ninth Congress . . . and four more during the first session of the Ninetieth Congress If one counted the petitions adopted by four other states, questionable in regard to their proper receipt by Congress, this brought the total number of state petitions on the subject of state legislative apportionment to thirty-two." Ervin, *supra* note 131, at 877. This was two short of the requisite two-thirds of the states.

148. 117 CONG. REC. 36804 (1971).

149. S. 215, 92d Cong., 1st Sess. (1971).

150. The ERA was passed by Congress on March 22, 1972, so no potential legislation could have affected its ratification. See notes 1-3 & accompanying text *supra*.

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

amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourth of the States.¹⁵²

Even recognizing the elasticity of the "necessary and proper" clause¹⁵³ of article I, section 8, there is serious doubt about Congress' power to proscribe detailed state procedures under article V's authorization to propose one of the modes of ratification, *i.e.*, by state convention or by state legislatures.

In this connection, it is important to distinguish Congress' powers with respect to the calling of a constitutional convention pursuant to article V and its authority to prescribe state legislative procedures for ratifying proposed amendments. Thus, Professor Bonfield has stated that Congress does have the implied power under

its authority to call a convention . . . to fix the time and place of meeting, the number of delegates, the manner and date of their election, their qualifications, the basis of apportioning delegates, the basis for voting in convention, the vote required in convention to propose an amendment to the states, and the financing and staffing of the convention.¹⁵⁴

By contrast, congressional power to regulate legislative rules of procedure in ratifying amendments has been seriously questioned by Professor Orfield. In his view:

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.¹⁵⁵

But even if it is determined that Congress can prescribe detailed state legislative procedures for ratifying convention-proposed amendments, what significance attaches to the fact that the Ervin bill passed the Senate so overwhelmingly? Does this apparent congressional endorsement of the states' freedom to rescind prior ratifications of amend-

152. Ervin, *supra* note 131, at 902. In addition, section 13(b) provided that any state may ratify a proposed amendment even though it previously may have rejected it and that questions concerning state ratification or rejection of amendments were to be determined solely by Congress and its decisions were to be binding on all courts, state and federal. *Id.*

153. "Congress shall have the Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof."

154. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 987 (1968). See also Ervin, *supra* note 131, at 879.

155. ORFIELD, *supra* note 36, at 64-65. See also Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 208 (1951).

ments *proposed by the convention method* reveal probable congressional sentiment with respect to rescissions of proposed amendments such as the ERA, initiated not by a constitutional convention, but by a vote of well over two-thirds of the members of both houses of Congress?

A negative answer is warranted by the fact that ratification of congressionally proposed amendments implicates entirely different political and social considerations than are involved when amendments are proposed by a convention of the states convened, ultimately, as a result of their own initiative. A constitutional convention represents an extraordinary, extra-legislative institution, one that, in many respects, shatters the traditional tripartite division of the federal government and becomes in effect a fourth branch.¹⁵⁶ Though Congress may ultimately become involved in the process, pursuant to its authority under article V to propose a "mode" of ratification, Congress' involvement in a convention-sponsored amendment is limited. Essentially, the impetus for the amendment comes from outside Congress itself. Under these circumstances, it is not unreasonable for Congress to assume an attitude toward the states that in effect tells them, "You may change your decisions about ratifying *your own* proposed amendment all you want, at least until we have received valid and unrescinded ratifications of such amendment from three-fourths of the states."

By contrast, when confronted with a congressionally sponsored amendment, of which the ERA is an example and which is by definition Congress' own creature, there is no reason to conclude that either the House or the Senate ever intended to abandon the traditional approach to ratification rescissions that had been followed in adopting the fourteenth, fifteenth, and nineteenth amendments.¹⁵⁷

156. "While in existence [the convention] is a separate arm of the nation, coordinate with Congress in its sphere." ORFIELD, *supra* note 36, at 47.

157. Moreover, the House of Representatives has never voted on the proposed legislation under discussion. Even the Senate's own rationale for permitting states to rescind the ratification of convention-sponsored amendments is seriously deficient. That rationale is based upon a perceived analogy with the right of the states to rescind their applications to convoke a constitutional convention. S. REP. No. 293, 93d Cong., 1st Sess. 14 (1973). The report of the Judiciary Committee even states: "An application [to call a convention] is not a final action. It merely registers the state's view. . . . On the basis of the same reasoning, a state should be permitted to retract its ratification. . . . *Id.* The fact of the matter is, there is no precedent to support the presumption that a ratification is *not* a final action or that it *merely* registers the state's views. As Professor Bonfield has emphasized: "Applications for a constitutional convention . . . are merely 'formal requests' by state legislatures to Congress, requesting the latter to call a Convention for proposing Amendments [T]hey do not share the same dignity of finality as ratifications" Bonfield, *Proposing Constitutional Amend-*

Therefore, should the Court hold the issue nonjusticiable and thus one for congressional evaluation and determination, Congress probably will follow two hundred years of practice and decide that rescissions are inefficacious with regard to the ERA.

Conclusion

Whether a state's purported rescission of an earlier ratification of the proposed ERA is effective is a justiciable nonpolitical question to be determined ultimately by the United States Supreme Court. Moreover, the Court, in examining the merits of that question, should hold that a purported rescission by a state that had previously ratified the amendment is null and void, since by ratifying the amendment a state exhausts all its powers under article V. Finally, if, because of the broad discretion it retains under the *Baker v. Carr* test for determining the presence of a political question as well as its present marked inclination to exercise restraint in its dealings with Congress, the Court decides that the effect of the purported rescissions by the ratifying legislatures is for Congress to determine, Congress should adhere to its past practice of counting only the earlier ratifications and ignore any subsequent efforts at rescission.

ments by Convention: Some Problems, 39 NOTRE DAME LAW. 659, 671 (1964). Professor Bonfield had previously noted that ratification is the "final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents." *Id.*

