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Equal Rights Amendment: Will States be Allowed to Change Their Minds

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THE EQUAL RIGHTS AMENDMENT: WILL STATES BE ALLOWED TO CHANGE THEIR MINDS?

I. Introduction

The Equal Rights Amendment was passed by Congress and proposed to the states on March 22, 1972.[1] Despite the fact that seven years is allowed for ratification, many states acted quickly and ratified the amendment without much debate or consideration. Six states ratified within one week of Congress's submission of the amendment to them and by the end of the summer of 1972 a total of eighteen states had ratified the amendment.[2] To date thirty states have ratified it; thus only eight more states need ratify in order for it to become part of the United States Constitution.[3]

After a more thorough examination of the effects that this amendment might have and despite prior ratification, several states have considered rescinding their ratifications. The only state to successfully complete a rescission resolution, however, has been Nebraska, which initially ratified the Equal Rights Amendment on March 29, 1972, exactly one week subsequent to its passage by Congress.[4] By a 31 to 17 vote, the Nebraska State Legislature directed its Secretary of State to send a resolution to Congress withdrawing their prior ratification as of March 15, 1973.[5] Since there is pressure within other states to attempt withdrawals of hasty ratifications[6] and since the amendment is close to being ratified by the requisite three-quarters of the states, the validity of Nebraska's rescission and any that are to follow may play a vital role in the life of this amendment.

In light of these facts, this note will examine the two basic questions involved in any state's attempt to withdraw its ratification of an amendment: 1) whether the states have the power to rescind under the Constitution; and 2) whether a controversy concerning the validity of rescission is justiciable; *i.e.*, is it a political question? Recent case law is sparse but the area is not without precedents. This article will examine those precedents and construe them in light of more recent decisions such as *Baker v. Carr*.[7] Thus, a historical and chronological approach will be taken toward the subject. The law to date convincingly rejects any power within the states to rescind prior ratifications and

1 CONG. REC.: H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. S. 4612 (1972). Text of the amendment at *U.S. Code Cong. & Admin. News*, 92d Cong., 1st Sess. 835 (1972).

2 The first eighteen states to ratify the Equal Rights Amendment are: Hawaii (March 22, 1972), Delaware (March 23, 1972), New Hampshire (March 23, 1972), Idaho (March 24, 1972), Kansas (March 28, 1972), Nebraska (March 29, 1972), Tennessee (April 4, 1972), Rhode Island (April 14, 1972), New Jersey (April 17, 1972), Texas (April 19, 1972), Colorado (April 21, 1972), Iowa (April 21, 1972), West Virginia (April 22, 1972), New York (May 3, 1972), Michigan (May 22, 1972), Maryland (May 26, 1972), Massachusetts (June 21, 1972) and Pennsylvania (September 26, 1972).

3 The final twelve to have ratified the amendment are: Alaska, California, Connecticut, Kentucky, Minnesota, New Mexico, Oregon, South Dakota, Vermont, Washington, Wisconsin and Wyoming. 1 WOMEN'S RIGHTS LAW REPORTER 104 (1973).

4 *See* note 2, *supra*.

5 1973 NEB. LAWS 1547 (Leg. Res. No. 9 adopted by 83d Leg., 1st Sess., March 15, 1973).

6 Michigan, for example, is one state that attempted to pass a rescission resolution. In other states, a reassessment of public opinion, urged mainly by anti-Equal Rights Amendment groups, is taking place.

7 369 U.S. 186 (1962).

asserts that such controversies concerning ratifications can and should be handled by the courts.

II. The Power of States to Rescind Their Previous Ratifications of a Constitutional Amendment

A. *The Civil War Era*

Immediately following the Civil War, the problem of rescission appeared in connection with the ratification of the fourteenth amendment. New Jersey and Ohio attempted to withdraw their ratifications of that amendment and Secretary of State Seward was unsure whether their ratifications could be counted.[8] Congress, however, passed a resolution accepting their ratifications in addition to those of South Carolina, Georgia, and North Carolina who had rejected the amendment and then subsequently ratified it.[9] Following these actions by Congress, *White v. Hart*[10] was decided by the Supreme Court. In that case, which concerned the validity of the Georgia Constitution, the Court acknowledged the finality of states' ratifications of constitutional amendments.

> The result [Georgia Constitution] was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail upon such an assumption [that submission of the Georgia Constitution was coerced by Congress]. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments.[11]

The fifteenth amendment also presented a rescission problem. This time New York attempted to withdraw its ratification and again Congress counted the state as among those who had ratified.[12] No attack was made upon Congress's action since New York's ratification was not essential because the requisite number of state ratifications had already been obtained.

Some commentators tend to dismiss the actions concerning the fourteenth and fifteenth amendments as products of the unusual temper of their times and suggest that they may not be valid authority today.[13] The opinion in the *Slaughter-House Cases,*[14] however, handed down two years after the fifteenth amendment was adopted, recognized the consternation of the times, but did not hesitate to construe the fourteenth amendment and thus implicitly assumed its validity. Even recently, when the fourteenth amendment has been challenged as unconstitutionally ratified, the courts have upheld the finality of states' ratification of that amendment despite the rescissions of New Jersey and Ohio and the

8 15 Stat. 707 (1868).
9 15 Stat. 709 (1868).
10 13 Wall. 646 (1871).
11 *Id.* at 649.
12 16 Stat. 1131 (1870).
13 Bondfield, *The Dirksen Amendment and the Article V Convention Process,* 66 MICH. L. REV. 949, 967 n.70 (1968); Corwin and Ramsey, *The Constitutional Law of Constitutional Amendment,* 26 NOTRE DAME LAWYER 183, 201-06 (1951); Grinnell, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?,* 45 A.B.A.J. 1164 (1959).
14 16 Wall. 36 (1872).

corruption and military control of the times.[15] Following the Civil War, then, it was assumed by Congress and the courts that the states had no power to withdraw their ratifications.

B. Leser *and* Coleman

Leser v. Garnett[16] was a suit brought against the Board of Registry of Maryland to disenfranchise two women despite the adoption of the nineteenth amendment. It was charged that, because of procedural irregularities in West Virginia and Tennessee, these two states had not successfully ratified the amendment, causing the amendment to fail for lack of the requisite three-quarters of the states. Despite the states' non-adherence to their own procedural law, the Supreme Court determined that their ratifications were final and conclusive. If ratification occurs in accordance with the Federal Constitution, the state may not deny its validity because of irregularities within their own system.[17]

In *Coleman v. Miller*[18] a problem similar to the one in *Leser* was presented. Members of the Kansas legislature sought a judgment nullifying a ratification of the Child Labor Amendment after passage of the ratification resolution. They argued that a prior rejection of the amendment by the legislature precluded the subsequent ratification. In response to this argument the majority stated:

> Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.[19]

In addition, the opinion pointed out that the Constitution mentions only ratification and not rejection when discussing the states' role in the amending process.[20] The act of ratification terminates the state's function while prior rejection is not a bar to subsequent ratification. Although neither *Leser* nor *Coleman* handled the question specifically, they both indicated that the states are without power to rescind.

C. *Analogous Situations*

Since the *Coleman* decision, the effect of ratifications, rejections, and rescissions in relation to federal constitutional amendments has not been an important issue. There have been, however, a few cases which effectively consider the state's role in other federal contexts. These cases reflect a judicial concern for attributing finality to ratifications by states upon which other states or the federal government must depend.

In *West Virginia ex rel. Dyer v. Sims*,[21] the subject of the suit was an eight

15 United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954); Negrich v. Hohn, 246 F. Supp. 173 (W.D. Pa. 1965).
16 258 U.S. 130 (1922).
17 *Id.* at 137.
18 307 U.S. 433 (1939).
19 *Id.* at 449.
20 *Id.* at 447, 450.
21 341 U.S. 22 (1951).

state compact to stop pollution in the Ohio River which had been approved by Congress. West Virginia's legislature had originally ratified the compact but the state courts had found it to be in violation of the West Virginia Constitution. The Supreme Court would not allow West Virginia to withdraw from the compact. The majority opinion held that since Congress must assent to all interstate compacts and since suits in which several states conflict must be decided in federal courts, the compact and West Virginia's State constitution must be interpreted according to federal law.[22] The Court construed the state constitution as not being in conflict with the compact thus denying West Virginia the power to withdraw from the agreement.[23] Had the compact been in violation of the state constitution, though, it seems evident from the concurring opinions that West Virginia still could not have withdrawn.[24] Cases citing *Dyer*, such as *State of Nebraska v. State of Iowa*,[25] reveal that the Supreme Court has retained for itself the power to determine the validity of interstate compacts. Conflicts with state law (as in *Leser*) will not justify rescinding a ratification which is in accordance with federal law.

In *United States v. Brown*[26] and *Omaha Tribe of Nebraska v. Village of Walthill*,[27] the validity of Nebraska's ceding of jurisdiction over an Indian tribe to the federal government was in question. In *Brown* a criminal defendant claimed that Nebraska violated its own procedural laws when it retroceded jurisdiction and thus that he could not be prosecuted by the federal government since the retrocession was invalid. The court did not agree. They used *Dyer* and *Leser* to support their holding that, despite state procedural inconsistencies, a resolution by a state such as this retrocession, if valid according to federal law and accepted by Congress, is final. When a situation arises in which the federal government has superior authority or a legitimate interest like Indian affairs, it may accept state resolutions as valid which otherwise may be invalid.[28] *Omaha Tribe* involved an attempt by Nebraska to rescind the same resolution. Again citing *Leser*, the Court held the rescission to be ineffective. The opinion pointed out that the federal government cannot be charged with investigating alleged discrepancies between state action and state law.[29] Federal law must control because attributing finality to state action within a federal context is extremely important.

22 *Id.* at 28.
23 *Id.* at 32.
24 Both concurring opinions expressed a need for finality in the ratification of compacts:
> After Congress and sister states had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she may put on the generalities of her Constitution, she is bound by the Compact, and on that basis I concur in the judgment. *Id.* at 36 (Jackson, J., concurring).
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> * * *
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> Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action. *Id.* at 34 (Reed, J., concurring).

25 406 U.S. 117 (1972).
26 334 F. Supp. 536 (D. Neb. 1971).
27 334 F. Supp. 823 (D. Neb. 1971), *aff'd per curiam*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).
28 334 F. Supp. at 539-41.
29 334 F. Supp. at 831-32.

The compact and state resolution situations indicate that withdrawal by a state from a previous commitment has often been denied by the courts. The amending of the United States Constitution is a function in which the federal government exercises more control over the states than either the compact or resolution situations and, therefore, state procedural irregularities would seem even less of a reason to allow rescission in that area. Finality is necessary in the ratification process in order to avoid uncertainty concerning the status of an amendment; and federal law, specifically the Federal Constitution, must be the only standard by which the validity of a ratification is measured if we are to have a consistent ratification process. Within this framework, rescission based only upon a state's change of mind would appear to be equally unacceptable if not more unacceptable than a rescission based on conflicts within state law.[30]

D. *Related Considerations*

Most of the literature concerning rescission has been generated by past attempts to call a nationwide constitutional convention. The tax proposal of the 1950's and the Dirksen Anti-Reapportionment Amendment of the 1960's are the most recent examples. Debates have centered on the possibility of a state rescinding its resolution calling for a constitutional convention with rescission of amendment ratifications discussed as a collateral or analogous issue.[31] In general these commentators, although some were proponents of the states' power to rescind applications for a constitutional convention, realized that ratifications of amendments should be treated as more permanent acts than convention resolutions.

> Ratification is the *final* act by which sovereign bodies confirm a legal or political agreement arrived at by their agents. Applications for constitutional conventions, however, are merely formal requests by state legislatures to Congress, . . .[32] (emphasis supplied)

Applications for a convention do not command the same respect or represent a similar need for finality as do the ratifications of amendments.

Other writers have looked to the Constitution in order to determine if there is a power to rescind.[33] They argue that the Constitution gives states the power to ratify but not the power to cancel that ratification; thus ratification should be seen as the expiration of all state power, an idea implicitly mentioned in *Coleman*.[34] One writer has gone so far as to contend that withdrawal of ratifications disrupts the amending process in the same manner as a withdrawal

30 There has been no allegation that Nebraska violated state procedure when it ratified the Equal Rights Amendment.

31 *See* Bondfield, *supra* note 13; Fensterwald, *Constitutional Law: The States and the Amending Process—A Reply*, 46 A.B.A.J. 717 (1960); Gilliam, *Constitutional Conventions: Precedents, Problems, And Proposals*, 16 ST. LOUIS L.J. 46 (1971); Grinnell, *supra* note 13; Martin, *The Amending Power: The Background of the Income Tax Amendment*, 39 A.B.A.J. 124 (1953); Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959).

32 Bondfield, *supra* note 13, at 967; *see also* Fensterwald, *supra* note 31, at 719.

33 Martin, *supra* note 31, at 127; Packard, *supra* note 31, at 162.

34 *See* note 20, *supra*.

of consideration of the amendment from the states by Congress.[35] Implicit within these assertions is a recognition that finality in the ratification process is necessary if we are to avoid uncertainty concerning an amendment until the last day.[36]

The main concern of those supporting the states' power to rescind is that amendments be ratified sufficiently contemporaneously to demonstrate the will of the entire country at one time. They argue that rescission promotes contemporaneity in that it allows states to show their current attitude toward the amendment.[37] However, it has been noted that all past amendments have been ratified within a relatively short period of time[38] and since the 1921 decision of *Dillon v. Gloss*,[39] the seven-year limitation period has always been considered reasonably short to suggest contemporaneity. The Equal Rights Amendment itself has a similar seven-year ratification limit but it has taken only a year and a half for thirty states to ratify it. Although rescission would perhaps allow reflection of current attitudes more accurately, the price of uncertainty and instability would be too high to pay. State legislatures, such as Nebraska's, could change their minds in every legislative session or every time there is a change in legislative personnel.[40] Proper consideration of the amendment the first time would defeat most desires to rescind, and if the mood of the country really has changed drastically, ratification in the remaining needed states will certainly be defeated. It is always possible to hypothesize that a state ratifying within the first year may have genuinely reconsidered and changed its mind by the time the amendment is finally passed, especially if passage comes in the sixth year. But simultaneous ratification is not possible and if we are to maintain order in the system, seven years, the period within which Congress has deemed it reasonable to amass the required votes, must be seen as sufficiently contemporaneous.

Legal precedent militates against allowing states to rescind their ratifications of a constitutional amendment for any reason except a determination by the courts that the ratification has violated the federal laws. An unconstitutional ratification is easy to imagine. Ratification by state referendum would seem to be clearly unconstitutional and possible of being held invalid by the courts.[41] In the absence of like circumstances, however, rescission by a state on its own motion must be considered invalid by Congress and the courts.

III. Is Rescission A Political Question?

A. *The Standing Issue — A Brief Note*

Establishing standing, of course, would be a crucial threshold consideration of any suit concerning constitutional amendments. Thorough treatment of the

35 Packard, *supra* note 31, at 161-62.
36 *See* Martin, *supra* note 31, at 167.
37 L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 72 (1942); Bondfield, *supra* note 13, at 958-66; Buckwalter, *Constitutional Conventions And State Legislators,* 48 CHI.-KENT L. REV. 20, 28 (1971); Fensterwald, *supra* note 31, at 719-20; Note, *Proposing Amendments to the United States Constitution by Convention,* 70 HARV. L. REV. 1067, 1074 (1957).
38 Bondfield, *supra* note 13, at 965.
39 256 U.S. 368 (1921).
40 Nebraska ratified the Equal Rights Amendment in its 82d Leg., 2d Sess. and rescinded in the 83d Leg., 1st Sess.
41 Hawke v. Smith, 253 U.S. 221 (1920).

issue would comprise a law review article in itself. It is worth noting, however, that state senators who originally voted for ratification would seem to have standing to challenge any rescission resolutions on the basis that an invalid rescission nullifies the effect of their vote. It was so held in *Coleman*[42] and in a more recent case, *Petusky v. Rampton*.[43] The *Coleman* majority based their position on *Leser* in which qualified voters were said to have standing to challenge the ratification of the nineteenth amendment because state law allowed suits against the state Board of Registry.[44] Where one is injured in a general way, however, such as a taxpayer challenging the ratification of an amendment, merely being a member of the class without further involvement has been held insufficient to establish standing.[45] Women, as a class or individually, may be viewed as having that "further involvement" in the Equal Rights Amendment situation since unconstitutional rescissions may deny them rights they otherwise would obtain. In any event, finding a state representative willing to initiate a suit would not seem to be a difficult task and it appears certain that he would have standing.

B. *State's Role in the Amending Process as a Federal Function*

Ever since *Hawke v. Smith* the act of ratification, although performed by individual states, has been viewed as a federal function.[46] In that case ratification was determined to be an expression of assent rather than an act of legislation thus denying states control over the process. Since the power to ratify is derived from the Federal Constitution, the states may not substitute their own method of ratification for that prescribed by Congress.[47] Two years later *Leser* specifically followed *Hawke* on this point;[48] and in the 1930's there were two decisions which held that the tenth amendment was no barrier to federal control of the ratification process[49] and one decision which pointed out that, unlike ordinary state legislation, the governor of a state cannot participate in the ratification of amendments.[50] More recently in *Trombetta v. State of Florida*,[51] a district court, citing the combined effect of *Hawke* and *Leser*, declared void an attempt by Florida to withhold consideration of United States constitutional amendments until a majority of its legislature's members had been elected subsequent to the submission of the amendment. The court reasoned that action of the kind contemplated would be unconstitutional state interference with a federal function.

Since states are performing a federal function, the question arises concerning which branch of the federal government has the responsibility of regulating the states in the exercise of this function. It is well settled that Congress can determine the mode of ratification (ratification by state legislatures or conven-

42 307 U.S. at 438.
43 307 F. Supp. 235, 250 (D. Utah 1969).
44 307 U.S. at 439-41.
45 Maryland Petition Comm. v. Johnson, 265 F. Supp. 823 (D. Md. 1967), *aff'd per curiam*, 391 F.2d 933 (4th Cir. 1968), *cert. denied*, 393 U.S. 835 (1968).
46 253 U.S. at 230.
47 *Id.* at 229.
48 258 U.S. at 137.
49 United States v. Sprague, 282 U.S. 716 (1931); United States v. Thibault, 47 F.2d 169 (2d Cir. 1931).
50 Smiley v. Holm, 285 U.S. 355 (1932).
51 353 F. Supp. 575 (M.D. Fla. 1973).

tions within the states)[52] and that Congress can prescribe a reasonable time period within which ratification must occur.[53] But which branch of government can decide the constitutionality of ratifications and rescissions, Congress or the courts? This is a question that has either been left unanswered in the past or has been answered in a dubious fashion. It is also a question whose answer may lead a court to term a controversy concerning the constitutionality of rescissions as "political." If the issue of validity of rescissions is committed exclusively to Congress, it would violate the separation of powers doctrine (of which the political question doctrine is a function)[54] for the courts to consider the question. In order to determine the role, if any, the judiciary is to play in this controversy, it is necessary to look at past judicial attitudes toward the amending process and re-evaluate them in light of new cases and the political question criteria expressed in *Baker v. Carr*.

C. *Before* Coleman: *An Active Court Involved in the Amending Process*

The earliest case concerning the amendment area was *Hollingsworth v. Virginia*.[55] In that case the Court determined that the President had no role in the amending process. Despite his veto power over ordinary legislation, he could not directly affect the proposal or adoption of amendments.

The Civil War era, despite the difficulties with the fourteenth and fifteenth amendments, did not produce any cases directly concerning the amending process but the *White v. Hart* opinion implied that the Court could hear challenges concerning the ratifications of amendments.[56] One commentator has noted that despite the fact that Congress's decisions were never challenged directly during this period, it should not be assumed that they would not have been justiciable.[57] Considering the questions of ratification and rescission as political was never suggested at the time.

In the 1920's and early 1930's, the Supreme Court handled a variety of cases concerning the amending process. From 1920 to 1922 the Court decided that: 1) Ohio could not use a referendum vote to ratify the eighteenth amendment;[58] 2) the 2/3 vote required in each house of Congress to propose an amendment is a vote of two-thirds of the members present, assuming presence of a quorum, and not a vote of two-thirds of the entire Congress;[59] 3) ratification must occur within a reasonable time since proposal of an amendment and ratification are so closely related;[60] and, 4) restrictions of state law cannot affect

52 United States v. Sprague, 282 U.S. 716 (1931).
53 Dillon v. Gloss, 256 U.S. 368 (1921).
54 Baker v. Carr, 369 U.S. 186, 210 (1962).
55 3 Dall. 378 (1798).
56 13 Wall. at 649. The opinion assumed that the Georgia Constitution was submitted as a voluntary offering thus Congress could accept it and it could not be withdrawn just as Congress could accept ratifications that were voluntary and deny withdrawal. However, if the state's action was explicitly forced by Congress, the submission of the Constitution would not be effective. "Congress has no power to supersede the National Constitution." It would seem then, that, if Congress exceeded its authority in accepting an invalid Constitution or ratification, its action could be challenged in the courts.
57 Clark, *The Supreme Court and the Amending Process,* 39 VA. L. REV. 621, 645 (1953).
58 Hawke v. Smith, 253 U.S. 221 (1920).
59 The National Prohibition Cases, 253 U.S. 350 (1920).
60 Dillon v. Gloss, 256 U.S. 368 (1921).

the ratifying process.[61] In addition, in 1931, *United States v. Sprague*[62] made clear that the Congress, pursuant to its Article V powers, has the power to choose the method of ratification by the states.

All these decisions, from *Hollingsworth* to *Sprague,* reflect a desire on the part of the Supreme Court to clarify the amending process and to establish a procedure for ratification that is constitutional. It is significant that in interpreting the constitutional requirements for the amending process that they went so far as deciding the proper number of votes needed within Congress to propose an amendment, an area which would appear to be controlled by Congress to a greater extent than the ratification process. Some writers have attempted to distinguish these cases, however, by noting that they are all decided against those challenging the ratifications.[63] This does not diminish the fact that they were all decided on the merits and not dismissed as political questions.[64] It must be observed that before *Coleman* the courts did not hesitate to decide questions concerning the amending process.

D. Coleman

In *Coleman* two central questions were asked: whether a state can ratify an amendment following a rejection of it and whether a state can ratify an amendment thirteen years after it has been proposed. The Court ruled that both questions were political but the different treatment given the two questions reveals that the Court's analysis was inconsistent and erroneous.

In connection with the rejection-ratification issue, the Court recounted the history of the Civil War Amendments and concluded that Congress had always decided this issue; therefore, it must be a political question.[65] They considered precedents holding ratification to be final, but ultimately they refused to decide the question. As mentioned before, Congress did decide this issue immediately following the Civil War but it was not suggested that the courts were excluded from considering it. Furthermore, the *Coleman* majority completely ignored the cases of the 1920's and 30's dealing with the amending process. These cases had firmly established the Supreme Court's role in defining constitutional amending procedure but the majority made no effort to distinguish them. This led one observer to comment that: "Reference shows that *Coleman v. Miller* is contrary to most precedent, and supported by none, on this issue."[66]

The issue of the timeliness of ratification was discussed in a different fashion. Two standards were established to determine if this was a political question: 1) were there sufficient criteria for a judicial decision? and, 2) was it appropriate to attribute finality to a decision of a political department of government?[67] The

61 Leser v. Garnett, 258 U.S. 130 (1922).
62 282 U.S. 716 (1931).
63 Bondfield, *supra* note 13, at 978 & n.118; Gilliam, *supra* note 31, at 51; Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517, 588 n.247 (1966).
64 *See* Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?,* 52 A.B.A.J. 326, 328 (1966).
65 307 U.S. at 448-50.
66 Clark, *supra* note 57, at 646.
67 307 U.S. at 453-54.

Court decided that the issue was too complex and concerned factors, such as the mood of the country, which were unable to be effectively determined by the judiciary. Thus the congressional acceptance of ratification could not be examined. In making this decision, the Court failed to overrule *Dillon* where the Court had previously determined seven years to be a reasonable time for ratification and where the door was left open for judicial review of whether ratification had come within a reasonable time.[68] A concurring opinion realized that the majority, by not overruling *Dillon,* may have implicitly assumed a power of judicial review in this matter and it dissented from any such implication.[69]

Although the majority may have been remiss in not effectively distinguishing *Dillon* when deciding the timeliness of ratification issue, at least they considered some reasonable criteria in connection with determining whether this issue was a political question. The cursory look at history which was the sole criterion for the rejection-ratification issue is at best unsatisfying and rebuttable.[70] The uncertain reasoning of the opinion coupled with the advent of new criteria for the political question doctrine delineated in *Baker v. Carr* will certainly cause *Coleman* to be overruled if and when it is challenged.

E. Baker v. Carr — Coleman v. Miller *Rendered Ineffective*

Baker v. Carr is the leading case on the political question doctrine. Within the majority opinion, six criteria were formulated by which a court could determine if a question is political. To understand whether the questions before us would be considered political, it is necessary to test them against these criteria because "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."[71]

The initial test is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Central to deciding whether the validity of rescission is a political question, therefore, is a determination whether Congress alone is given power to control the ratification process. This in itself requires a delicate interpretation of the Constitution by the courts.[72] In light of past Supreme Court decisions prior to *Coleman* it appears that both Congress and the courts must play a role in the ratification process.

Substantial Supreme Court precedent supports this view and indicates that

68 *Id.* at 452.

69 *Id.* at 458 (Black, J., concurring):

> There is no disapproval of the conclusion arrived at in *Dillon v. Gloss*, that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a "reasonable time." Nor does the Court now disapprove its prior assumption of power to make such a pronouncement.

70 *See* Orfield, *supra* note 37, at 20.

71 369 U.S. at 217. All six criteria are listed on the same page.

72 *Id.* at 211:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

> at least some of the procedural questions which may arise in the amending process can be settled on the merits by the judiciary.[73]

Congress, by virtue of Article V, is given the power to choose the method of ratification by the states (state legislatures or conventions within the states) and *Dillon* construed the Constitution as allowing Congress to determine a reasonable time within which ratification must occur;[74] but this does not diminish the Supreme Court's role as "ultimate interpreter of the Constitution."[75] The constitutionality of a state's action or procedure in connection with the amending process must be decided by the courts, even if their decision only affirms the constitutionality of action taken by Congress, since this function of constitutional interpretation has been committed to them. "The effect of rejection is very much the sort of question which the Court habitually decides, since it arises out of an interpretation of the Constitution."[76]

In the same vein, the second criterion, "lack of judicially discoverable and manageable standards," presents no problem since the standard by which a rescission resolution is measured is the Constitution itself. The question of the timeliness of ratification is not analogous here since that question may involve an assessment of the present attitude of the country towards the amendment for which there is a lack of criteria readily discoverable by the judiciary.[77] Whether state action conformed to the Constitution, however, would require only a consideration of history and an interpretation of that document, a task which the court is well-equipped to perform.

In addition, the important policy consideration, the need for finality balanced against the need for contemporaneity, is not "of a kind clearly for nonjudicial discretion." Questions such as this one must be considered as inextricably intertwined with the Court's interpretation of the Constitution. *Powell v. McCormack* offers an example. In this case, the Court was confronted with the suggestion that in deciding whether Congressman Powell could be excluded from the House it was granting itself the power to interfere with the internal business of Congress. The Court responded by pointing out that:

> [A] determination of petitioner Powell's right to sit would require no more than interpretation of the Constitution. 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 nonjudicial discretion" (citation omitted). Our 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. The alleged conflict that such adjudication may cause cannot justify the court's avoiding their constitutional responsibility (citation omitted).[78]

73 Bondfield, *supra* note 13, at 978.
74 *See* notes 52 and 53, *supra.*
75 *See* Powell v. McCormack, 395 U.S. 486, 549 (1969); *see also,* note 72, *supra.*
76 Clark, *supra* note 57, at 645.
77 *But see* Orfield, *supra* note 37, at 19-20 and Clark, *supra* note 57, at 648; both authors argue that deciding upon a reasonable time within which to ratify an amendment is no more difficult than judging state statutes by due process and other fourteenth amendment criteria.
78 395 U.S. at 548, 549.

Analogously, the Court's policy determination in a rescission case would revolve around interpreting whether the Constitution dictates finality or contemporaneity as the more important consideration in the amending process.

Powell v. McCormack also establishes that the Courts may construe the constitutional limitations of congressional authority in an area which is assumed to be under congressional control without "expressing a lack of respect due coordinate branches of government." *The National Prohibition Cases* which decided what constituted the two-thirds vote within Congress necessary to propose amendments, displayed a similar role for the courts.[79] In light of these cases, construing the validity of a state's rescission would not seem to demonstrate disrespect towards Congress either. A case on point is *Hoellen v. Annuzio*[80] where it was asserted that a determination of whether the franking privilege had been misused by a member of Congress was a political question. A statute regulating this privilege needed to be interpreted so the court felt the political question doctrine was not a deterrent to judicial review.

> The mere fact that this statute purports to regulate the conduct of Members of Congress does not, without more, take it outside the bounds of proper judicial scrutiny. For this court to construe this statute no more involves a lack of respect due the Congress, . . . than the construction of a statute not involving the conduct of Congressmen.[81]

The Constitution also regulates the acts of Congress and the states. A judicial decision delineating the power of the states to rescind or the power of Congress to accept that rescission is a necessary result of judicial interpretation of the Constitution.

Finally, it is evident that there is no need for "adherence to a political decision already made" since the political decision to rescind is the source of this controversy. It is that decision itself whose constitutionality must be decided. "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[82] Furthermore, there is no "potential of embarrassment from multifarious pronouncements by various departments on one question," because a decision by the Supreme Court that the issue is not "textually demonstrable" within the power of Congress would preclude action by that body on the question. The central concept to all six criteria as applied to the rescission issue is the realization that the Supreme Court can and must interpret the Constitution. As noted in *Powell,* possibilities that other branches of the Government might disagree with the Court's decision must not deter the Court from acting.

Baker and the cases following it mark a significant retreat from *Coleman.* By establishing workable criteria for judging what is a political question, *Baker* has effectively limited the potency of *Coleman*'s scant view of history. "*Baker* should also permit a return from the deviation in *Coleman* to the line of cases that have considered without hesitation the validity of ratification of constitu-

79 253 U.S. 350 (1920).
80 348 F. Supp. 305 (N.D. Ill. 1972).
81 *Id.* at 312.
82 369 U.S. at 217.

tional amendments."[83] This is not to say that the political question doctrine has gone unnoticed recently. It has been used considerably by the courts to facilitate an avoidance of judicial review of cases involving foreign affairs. But, in the future it appears that this doctrine will not frustrate judicial review of the validity of ratification or rescission of constitutional amendments.

> [T]he Court will not usually apply the doctrine to the constitutional guarantees of individual rights and to conflicts of competence among the departments of the federal government and between the federal government and the states.[84]

A suit concerning rescission, then, may be the catalyst the Court needs to finally overrule *Coleman* by applying the *Baker* criteria to similar facts.

IV. Conclusion

In a rescission case the courts may find *Petusky v. Rampton*[85] to be a useful model. *Petusky* is a district court case which was eventually reversed by the Court of Appeals for the Tenth Circuit on jurisdictional grounds;[86] but despite its reversal, the district judge's reasoning offers a possible approach to the problem.

The subject of dispute in *Petusky* was a resolution passed by Utah's legislature, which had been determined in a prior case to be unconstitutionally apportioned, calling for a convention to propose antireapportionment amendments. A state senator sought to have the resolution declared unconstitutional because the state legislature was seeking to perpetuate its own unconstitutional existence by passing this resolution. The district judge agreed. In a prelude to his holding, he noted that historically the Supreme Court has determined the validity of ratifications[87] and that any attempt to alter the Constitution must be effected consistently with current constitutional requirements.[88] Thus, exercise of the judicial power to interpret the Constitution becomes essential. After reviewing the facts, the opinion concluded that the resolution was unconstitutional and that Congress cannot be compelled by invalid resolutions. An order was given directing the Secretary of State of Utah to request the return of the resolution from Congress.[89]

Although the *Petusky* case involves a convention resolution, which does not command the same respect as ratifications, a similar procedure could be followed by the courts in a rescission case. If the courts are to handle this issue properly, they must realize the need for constitutional interpretation, recognize the unconstitutionality of rescission, and prepare a holding which will effectuate their decision. Issuing an order to a state may foreclose any possibility of animosity

83 Wolf, *supra* note 64, at 329.
84 Scharpf, *supra* note 63, at 587.
85 307 F. Supp. 235 (D. Utah 1969).
86 431 F.2d 378 (10th Cir. 1970).
87 307 F. Supp. at 250.
88 *Id.* at 251, 257.
89 *Id.* at 256-57.

being displayed by Congress.[90] It would *also* seem possible to handle the issue as a declaratory judgment, thus foregoing the need for any form of injunction.

In any event, a clear and definitive statement on the rescission issue and its political question aspects is needed if we are to avoid uncertainty concerning the status of the Equal Rights Amendment and of any future amendments raising the same questions. Presently, the fate of the Equal Rights Amendment may be determined by the court's answers to these questions. The law is clearly on the side of those in favor of the amendment; any suits should produce a nullification of rescissions and, consequently, cause states to consider the merits of amendments more astutely before undertaking the irrevocable act of ratification.

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90 Gilliam, *supra* note 31, at 57:

> Here may be the solution of the problem that Orfield noted as being unanswered in *Coleman v. Miller,* that is, where and when the Court would deal with questions as to the amendatory procedure. While the Court might hesitate in assuming direction over Congressional action in the process, it might not be as reluctant with reference to the action of the States.