The Phyllis Schlafly Report

VOL. 11, NO. 10, SECTION 2 BOX 618, ALTON, ILLINOIS 62002 MAY, 1978

Can a State Rescind E.R.A.?

by Senator Sam J. Ervin, Jr.

1. Several states have voted to rescind or withdraw their previous ratifications of the ERA. Other States are seriously considering doing likewise. To deter the other States from exercising their right to rescind or withdraw their previous ratifications of the Amendment, supporters of the Amendment are now making the bizarre and specious claim that a State which has rejected the Amendment may change its mind and vote to ratify whereas a State which has ratified cannot change its mind and vote to rescind or withdraw its ratification. For reasons hereafter stated, this claim lacks credible support in authority and reason.

Idaho, Nebraska, Tennessee and Kentucky have voted to rescind or withdraw their previous ratifications of ERA. Other States are seriously considering doing likewise.

To deceive state legislators who are contemplating such action into believing that they have no power to do so, and thus deter them from rescinding or withdrawing their previous ratification of the Amendment, supporters of ERA are now vociferously claiming that a state which has rejected the Amendment can change its mind and vote to ratify whereas a state which has ratified cannot change its mind and vote to rescind or withdraw its previous ratification.

Insofar as fairness is concerned, this claim is on a par with the "Heads I win and tails you lose" proposal of the coin-tossing gambler; and insofar as logic is concerned, it is on a par with the proposition that what is sauce for the legislative goose is not sauce for the legislative gander.

In the last analysis, the advocates of ERA base their bizarre and specious claim upon the supposition that it finds support in the decision of the Supreme Court of the United States in *Coleman v. Miller*, (1937) 307 U.S. 433, 83 L.Ed. 1385, 59 S.Ct. 972, 122 A.L.R. 695.

As one who has studied this question, . . . I assert without fear of successful contradiction that the *Coleman Case* decided nothing of the kind, and that in consequence those ERA supporters who make this claim have no foundation for it in authority or reason. . . .

2. The question whether a state which has ratified a proposed amendment to the Federal Constitution can change its mind and vote to rescind or withdraw its ratification was not even involved in the Coleman Case. Moreover, the question whether a state which has rejected a proposed amendment can change its mind and vote to ratify was not decided in the Coleman Case. On the contrary, the Supreme Court of the United States invoked the "political question" doctrine in the Coleman Case and adjudged that this question is a political matter for the determination of Congress and not a judicial matter for the decision of the Court.

The facts in the *Coleman Case* were simple. In 1924 Congress proposed an amendment to the Federal Constitution known as the Child Labor Amendment. The resolution submitting it to the states did not limit the time for its ratification. In 1925, the Kansas Legislature rejected it. In 1937, however, a resolution to ratify the Amendment was introduced in the Kansas State Senate, where 20 Senators voted for the resolution and 20 voted against it. The Lieutenant Governor of Kansas, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the Kansas House of Representatives on the vote of a majority of its members.

The 20 Senators who had voted against the resolution and three Representatives then brought an original action in the Supreme Court of Kansas seeking a mandamus to compel the Secretary of the Kansas Senate to record that the resolution had not passed and to restrain the officials of the Legislature from signing the resolution and the Secretary of State of Kansas from certifying it to the Governor.

These Senators and Representatives assailed the attempted ratification of the Child Labor Amendment on these grounds: (1) that the Amendment had been previously rejected by the Kansas Legislature; (2) that it was no longer open to ratification because an unreasonable time, 13 years, had elapsed since Congress had submitted it to the States; and (3) that the Lieutenant Governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

The Supreme Court of Kansas rejected these contentions and upheld the ratification of the Amendment on the ground that a state legislature which has rejected an amendment proposed by Congress may later ratify it. This ruling was in accord with the universally accepted principle that a legislative body cannot tie the hands of its successors.

The Supreme Court of the United States, which granted certiorari, split into three irreconcilable groups, who wrote four opinions.

Upon two preliminary questions somewhat procedural in nature, i.e., whether the Supreme Court of the United States had jurisdiction to review the rulings of the Kansas Court, and whether the 20 Kansas Senators had standing to sue, the Justices split five to four.

Chief Justice Hughes and Justices Stone and Reed, who adhered to Chief Justice Hughes' so-called majority opinion, and the two dissenting Justices, McReynolds and Butler, held that the Supreme Court of the United States had jurisdiction and that the 20 Kansas State Senators had standing to sue.

The other four Justices, Roberts, Black, Frankfurter, and Douglas, who adhered to the two opinions written by Black and Frankfurter, disagreed with them because of their view that Congress possesses exclusive power under Article V of the Constitution over the entire amending process and in consequence "neither state nor federal courts can review [the exercise] of that power." (307 U.S. 433, 459.)

With respect to a more substantive question, i.e., whether the Lieutenant Governor had the power to cast the deciding vote in favor of ratification, Chief Justice Hughes had this to say: "Whether this contention presents a justiciable controversy, or a question which is political in nature, and hence not justiciable, is a question upon which the Court is equally divided, and therefore the Court expresses no opinion upon that point." (307 U.S. 433, 447)

It is regrettable that Chief Justice Hughes did not reveal the mystery of how nine or five Justices could be "equally divided" on a constitutional question. In the absence of any such revelation, one is compelled to conclude that one of the Justices was suffering a species of intellectual schizophrenia which disabled him to ascertain the concensus of his own mind.

The Justices split into three irreconcilable groups upon these two remaining questions: (1) whether a state which had rejected the Child Labor Amendment could subsequently change its mind and vote to ratify it; and, (2) whether the Child Labor Amendment was no longer open to ratification because an unreasonable time had elapsed since Congress had submitted it to the states.

When the *Coleman Case* is read in its entirety, it is obvious that

the Supreme Court divided on these questions in this fashion:

1. Chief Justice Hughes and Justices Stone and Reed concluded that these questions were political questions for determination by Congress and not judicial questions for the decision of Courts. (307 U.S. 433, 436-457)

2. Justices McReynolds and Butler concluded that the Supreme Court of the United States had judicial power to adjudge and ought to adjudge that the Kansas Legislature had no power to ratify the Child Labor Amendment because an unreasonable time had elapsed since Congress had submitted it to the States. (308 U.S. 433, 470-474)

3. Justices Roberts, Black, Frankfurter, and Douglas concluded that the Supreme Court of the United States was powerless to make any pronouncement in respect to either question because Article V of the Federal Constitution had committed complete and unreviewable power over the entire amending power to Congress. (307 U.S. 433, 456-470)

These diverse conclusions compelled the affirmance of the ruling of the Kansas Supreme Court. In taking such action, Chief Justice Hughes made it plain that the Supreme Court of the United States was not expressing any opinion as to the validity of the basis of the Kansas Court's decision, i.e., that a state legislature which has rejected an amendment proposed by Congress can change its mind and ratify it. He did this by expressly stating that the Supreme Court was affirming the ruling solely "upon the grounds stated in this opinion." (307 U.S. 433, 456)

The only allusion in the *Coleman Case* to the question whether a state which has ratified a proposed amendment can change its mind and rescind or withdraw its ratification is in the form of dicta, which puts the questions of ratification after rejection and rescission or withdrawal after ratifying in the same category and which appears in this sentence:

"We think that in accordance with this historic precedent the 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 Congress in the exercise of its control over the promulgation of the adoption of the amendment." (307 U.S. 433,450)

As one who loves constitutional government, I must confess that I am abhorred by the proposition that Congress has complete and unreviewable power to control the amending process in all its stages. This proposition would permit a false decision by a partisan or radical Congress to rob the people, the states, and the courts of their power to enforce constitutional government in our land.

3. All credible commentators agree that the Coleman Case does not support the bizarre and specious claim of the supporters of ERA that a state which has rejected the Amendment can change its mind and vote to ratify whereas a state which has ratified cannot change its mind and vote to rescind or withdraw its ratification.

In preparing this statement, I read the *Coleman Case* many times. Moreover, I consulted comments on it in these publications: the first and only edition (1969) of *Modern Constitutional Law*, which was written by Chester J. Antieau, Professor of Constitutional Law at Georgetown University; the second and last edition (1968) of *The American Constitution*, which was written by C. Herman Pritchett, Professor of Political Science at the University of Chicago; the numerous editions (1920 through 1974) of *The Constitution And What It Means Today*, which was originally written by Edward S. Corwin, of Princeton University, and which has been revised by others since his death; and the various editions of the *Constitution of the United States, Revised and Annotated*, which was originally compiled and edited by Edward S. Corwin and which has been printed by the authority of Congress.

All of these authorities share my conviction that the Supreme Court of the United States did not decide anything whatever in the *Coleman Case* beyond some procedural questions immaterial to our present concern except the proposition that whether a state legislature has ratified a proposed amendment to the Federal Constitution is a political question for the decision of Congress and not a judicial question for the decision of the courts. . . .

The court did not answer "no" or anything else in the *Coleman Case* to the question whether a state which has ratified a proposed amendment can change its mind and rescind or withdraw its ratification. The court did not and could not answer that question in the *Coleman Case* because it did not arise in that case. In the portion of his opinion quoted by Professor Antieau and set forth above, Chief Justice Hughes alluded to the question by way of dicta when he said, in effect, that the question of the efficacy of an *"attempted withdrawal,"* of a previous ratification as well as the question of efficacy of a subsequent ratification after a "previous rejection" were political questions for Congress and not judicial questions for the courts.

The court did not answer "yes" or anything else in the *Coleman Case* to the question whether a state which has rejected a proposed amendment can change its mind and ratify it. Although the Kansas Supreme Court had based its decision upholding the vote of the Kansas legislature ratifying the Child Labor Amendment after a previous rejection upon the view that "a state legislature which has rejected an amendment proposed by Congress may later ratify," the Supreme Court refused to make any such ruling on the ground that the question of the efficacy of the action of the Kansas legislature was a political question for the determination of Congress and not a judicial question for the decision of the Court. Indeed, the Supreme Court even refused to endorse the basis on which the Kansas Supreme Court made its ruling. As appears by the opinion of Chief Justice Hughes in the *Coleman Case* (307 U.S. 433, 456), the Supreme Court of the United States affirmed the judgment of the Kansas Supreme Court upon the grounds stated by Chief Justice Hughes and not for the reasons given by the Kansas Supreme Court. ...

In 1868, Congress was dominated by huge majorities of radicals, who had passed the notorious Reconstruction Acts over President Andrew Johnson's vetos, and who were bent above all things in putting the proposed Fourteenth Amendment into effect without delay to better their prospects in the approaching fall election.

All of the Southern States except Tennessee had previously rejected the proposed Fourteenth Amendment. An irritated Congress decreed that these states would have no representation in the United States Congress until they adopted new state constitutions conforming to the Reconstruction Acts and ratified the Fourteenth Amendment. Since the states then numbered 37, ratification of the proposed Fourteenth Amendment by three-fourths of them, i.e., 28, was required by Article V to make the Amendment a part of the Constitution.

As a result of the congressional coercion, the number of ratifying states had risen to 29 by early July, 1868. Two of them, Ohio and New Jersey, however, had voted to rescind or withdraw their ratifications.

An impatient Congress ignored the action of Ohio and New Jersey and adopted its concurrent resolution of July 21, 1868, declaring that 29 states, including Ohio and New Jersey, had ratified the Fourteenth Amendment and made it a part of the Constitution. At least two of the states, North Carolina and South Carolina, which were enumerated by the resolution among the 29 ratifying states, had previously rejected the Amendment.

While an impatient Congress was taking this precipitate action on the day stated, another state, Georgia, ratified the Fourteenth Amendment and thus made the question of the constitutionality of the ignoring of the rescissions or withdrawals of Ohio and New Jersey moot. . . . An impatient Congress merely ignored what had happened. It did not adjudge that Ohio and New Jersey lacked the power to rescind or withdraw their ratifications.

And even if Congress had done so, its action would be destitute of precedential force under the well established constitutional principle that one Congress cannot tie the hands of a succeeding Congress. *Reichelderfer v. Quinn* (1932), 287 U.S. 315, 77 L.Ed. 331, 53 S.Ct. 177, 83 A.L.R. 1429. ...

4. The only reasonable interpretation of Article V of the Constitution, which governs the amendatory process, is that it authorizes a state which has rejected a proposed amendment to change its mind and vote to ratify the same and permits a state which has ratified a proposed amendment to change its mind and rescind or withdraw its ratification at any time before three-fourths of the states have voted to ratify the proposed amendment and thus made it a part of the Constitution. This view rejects the unfair and illogical claim of the advocates of ERA, and permits the states to continue the search for truth until the amendatory process is consummated. And this is so regardless of whether the resultant questions are political questions for Congress or judicial questions for the courts.

I have called attention in other sections of this statement to the bizarre claim of advocates of ERA that a state legislature which has rejected the Amendment may change its mind and vote to ratify it, but a state legislature which has ratified the Amendment cannot change its mind and vote to rescind or withdraw its ratification. They cannot explain in a rational manner why they think the Constitution of the United States grants freedom to some legislative bodies, and imprisons others in mental jails.

They invoke their bizarre claim because they understandably fear that if state legislatures which ratified ERA in haste and under

their pressure are permitted to exercise their intelligence and re-examine and re-appraise ERA, they may decide to repent in wisdom of what they did in folly and vote to correct their mistake.

Other Americans, who cannot accept the arbitrary, unfair, illogical, and tyrannical view of advocates of ERA, have advanced two other views in respect to the power state legislatures may exercise in the amendatory process under Article V of the United States Constitution, which authorizes Congress and the states to amend the Constitution and prescribes the process by which they must act to exercise this awesome power.

For ease of statement, I shall call one of these views the Kentucky view, and the other the view shared by multitudes of other Americans and me. The Court of Appeals of Kentucky expressed the Kentucky view in *Wise v. Chandler*, (1937), 270 Ky. 1, 108 S.W.2d 1024, which held that if a state rejects a proposed amendment it cannot later ratify the same, unless it is resubmitted by Congress.

The Kentucky Court justified its ruling in this way: "We think the conclusion is inescapable that a state can act but once, either by convention or through its legislature, upon a proposed amendment; and whether its vote be in the affirmative or the negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress." *Chester J. Antieau: Modern Constitutional Law*, Vol. 2, Section 12:178.

The other view shared by multitudes of other Americans and me may be stated in this fashion: A state legislature does not forfeit its liberty of thought or action as long as the amendatory process is incomplete by either ratifying or rejecting a proposed amendment to the Constitution of the United States. Hence, a state legislature which has rejected a proposed amendment may change its mind and ratify it, and a state legislature which has ratified a proposed amendment may change its mind and rescind or withdraw its ratification at any time before three-fourths of the states have ratified the amendment and thus made it a part of the Constitution. *Chester J. Antieau: Modern Constitutional Law*, Vol. 2, Section 12:178; *C. Herman Prichett: The American Constitution*, pages 39-40.

On the day of its unprecedented decision in the *Coleman Case*, the Supreme Court of the United States, by a seven to two vote of the Justices, dismissed without decision the writ of certiorari previously granted by it to review the ruling of the Kentucky Court in *Wise v. Chandler* on the ground that it no longer presented a justiciable controversy susceptible of judicial determination. *Chandler v. Wise*, (1939), 207 U.S. 474, 83 L.Ed 1407.

If we are to appraise aright the role of state legislatures in the amendatory process, we must read Article V of the United States Constitution in the light of the rules devised by experience, reason, and law to enable state legislatures to perform their functions in civil government.

Article V proclaims:

"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; Provided that no Amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

No intelligent American will gainsay the proposition that voting to amend the Constitution of the United States is the most crucial task a state legislator can perform. This is true because an amendment to the Federal Constitution will control the lives of all generations of Americans as long as time shall last unless it is sooner removed from that instrument by another Amendment.

With the exception of the proviso making secure the right of each state to equal suffrage in the Senate, there is not a syllable in Article V which undertakes to put any limitation whatever upon what state legislatures can do in their amendatory role except the implied limitation that they can not effectively act after a proposed amendment has been ratified by three-fourths of the states and made a part of the Constitution.

On the contrary, except for the proviso stated, every word of Article V is in complete harmony with these conclusions: (1) A state legislature does not forfeit its liberty of thought or action as long as the amendatory process is incomplete by either ratifying or rejecting a proposed amendment to the Constitution of the United States; and (2) hence, a state legislature which has rejected a proposed amendment may change its mind and ratify it, and a state legislature which has ratified a proposed amendment can change its mind and rescind or withdraw its ratification.

These conclusions are inescapable. Moreover, they are inseparable from the spirit and purpose of Article V, which clearly contemplates that state legislators shall act with complete liberty of spirit and complete freedom of mind as long as state legislatures are participating in the amendatory process.

The rules derived by experience, reason, and law to enable state legislatures in America to perform their functions in civil government are well established in all areas of our land. They are two-fold in nature, and may be stated with simplicity as follows:

1. A state legislature may do what the state and federal Constitutions do not forbid it to do, *16 Am. Jur. 2d, Constitutional Law*, Section 228; *72 Am. Jur. 2d, States*, Sections 40, 41; *73 Am. Jur. 2d, Statutes*, Section 33; *Giozza v. Tiernan* (1893), 148 U.S. 657, 37 L.Ed. 599, 13 S.Ct. 721; *Chicago, Burlington and Quincy Railroad v. County of Otoe* (1873), 16 Wall. (U.S.) 667, 21 L.Ed. 375; *Ware v. Hylton* (1796), 3 Dall. (U.S.) 199, 1 L. Ed. 568; *Lassiter v. Northampton County Board of Elections* (1948), 248 U.S. N.C. 102, 102 S.E.2d 853, affirmed 360 U.S. 45, 3 L.Ed.2d 1072, 79 S.Ct. 985; *Village of North Atlanta v. Cook*, (1963), 219 Ga. 316, 133 S.E.2d 585, 589.

2. A state legislature cannot restrict or limit the right of a succeeding legislature to exercise its constitutional power in its own way. In other words, it cannot tie the hands of its successors. *72 Am. Jur 2d, States*, Section 40; *73 Am. Jur. 2d, States*, Section 34; *Stone v. Mississippi* (1880), 101 U.S. 814, 25 L.Ed. 1079; *Newton v. Mahoning County* (1880) 100 U.S. 548, 25 L.Ed. 710; *Boston Beer Co. v. Massachusetts* (1878), 97 U.S. 25, 24 L.Ed. 989; *Bank of Columbia v. Okely* (1819), 4 Wheat. (U.S.) 235, 4 L.Ed. 557; *Fletcher v. Peck* (1810), 6 Cranch (U.S.) 87, 3 L.Ed. 162; *State v. Wall* (1967) 271 N.C. 675, 683, 157 S.E.2d 363; *Kornegay v. City of Goldsboro* (1920), 180 N.C. 441, 105 S.E. 187; *Village of North Atlanta v. Cook* (1963), 219 Ga. 316, 133 S.E.2d 585, 589.

What has been said makes these things plain:

1. The claim of ERA supporters that a state which has ratified the Amendment cannot rescind or withdraw its ratification is totally repugnant to Article V and the rules devised by experience, reason, and law to enable state legislatures to perform their functions in civil government.

2. Although it is impartial and illogical, the Kentucky view is inconsistent with Article V because it prohibits further activity by ratifying and rejecting states while the amendatory process is still going on.

3. The view shared by multitudes of other Americans and me is in complete harmony with Article V and the rules devised by experience, reason, and law to enable state legislatures to perform their functions in civil government. Hence, this view is the sound one.

5. If the Supreme Court should adhere to its unprecedented ruling in the Coleman Case, Congress will be obligated to judge the question of whether ERA has been ratified by the true meaning of Article V, which is that a state legislature has power to ratify ERA after having previously rejected it and that a state legislature has power to rescind or withdraw its ratification of ERA after having previously ratified it. Since reason, the Constitution and prior Supreme Court decisions compel the conclusion that whether a proposed amendment to the Federal Constitution has been ratified in conformity with Article V is rightly a judicial question, and since subsequent Supreme Court decisions disclose the existing tendency of the Supreme Court to narrow the "political-question doctrine", it seems probable that the Supreme Court will return to its former position and hold that whether ERA has been ratified is a judicial question for its ultimate decision.

The *Coleman Case* is unprecedented. Moreover, it is contrary to six prior decisions of the Supreme Court, which covered the first 150 years of the nation's history, and which recognized and applied the sound constitutional principle that the question whether a proposed amendment to the Constitution of the United States has been ratified in conformity to Article V is a judicial question for the ultimate decision of the Supreme Court itself. I cite these six cases below.

United States v. Sprague (1931), 282 U.S. 716, 75 L.Ed. 640, 51 S.Ct. 220, 71 A.L.R. 1381; *Leser v. Garnett*, (1922) 258 U.S. 130, 66 L.Ed. 606, 43 S.Ct. 217; *Dillon v. Gloss* (1921), 256 U.S. 368, 65 L.Ed. 994, 41 S.Ct. 510; *Hawke v. Smith* (1920), 253 U.S. 221, 64 L.Ed. 877, 40 S.Ct. 498; *National Prohibition Cases*, (1920) 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (Note: Reported as Rhode Island v. Palmer); *Hollinsworth v. Virginia*, (1798) 3 Dall. 378, I. L.Ed. 644. ...

If the Supreme Court should adhere to its unprecedented ruling in the *Coleman Case* that questions of the validity of votes of state legislatures engaged in the amendatory process under Article V are political rather than judicial questions under the "political-question doctrine", Congress should be required by the oath of its members to support the Constitution to recognize and implement the true meaning of Article V, which is that a state legislature has power to ratify ERA after having previously rejected it and that a state legislature has power to rescind or withdraw its ratification of ERA after having previously ratified it. Any other Congressional conclusion would be faithless to Article V.

Sound reason compels the deliberate conclusion that the holding in the *Coleman Case* constitutes a temporary judicial aberration, and that the Supreme Court will welcome an opportunity to return to its original position, i.e., that questions concerning the ratification of proposed amendments to the Federal Constitution are judicial questions for the ultimate decision of the Supreme Court in accordance with the provisions of Article V.

I set forth below the basis for this observation. Under Section 2 of Article III of the Constitution, the judicial power of the United States extends to all cases arising under the Constitution, and various Acts of Congress grant the District Courts of the United States original jurisdiction to try such cases and the Courts of Appeal and the Supreme Court of the United States appellate jurisdiction to review the trial of such cases.

Undoubtedly, the most important case which can arise under the Constitution is one involving the question whether that instrument has been changed in the only way in which it can be changed, i.e, by an amendment which has been ratified by three-fourths of the states.

The phraseology of Article III and the Acts of Congress implementing such Article undoubtedly suffice to vest in the courts of the United States jurisdiction to hear and determine cases of this nature, and such Courts did in fact exercise such jurisdiction without question and with the complete satisfaction to the nation during the 150 years after the Constitution became effective.

On June 5, 1939, however, the Supreme Court turned its back on the words of Article III and the Acts of Congress implementing them and 150 years of its own history and adjudged that a case of this nature is a political question for Congress and not a judicial question.

These naked facts indicate that the Supreme Court had some difficulty in reaching this strange decision: the case was argued October 10, 1938; it was restored to the docket for re-argument January 30, 1939; it was reargued April 17 and 18, 1939; and it was finally decided on June 5, 1939 by Justices hopelessly split into three irreconcilable groups, no group constituting a majority.

The Court cited no precedential authority for this unprecedented judicial decision except the historic fact that Congress had declared by a resolution of July 21, 1868, that the Fourteenth Amendment had been ratified by the requisite number of states.

Chief Justice Hughes cited this historic fact in an opinion in which only two other Justices concurred. He added that this decision of the Congress "has been accepted", and suggested that Congress had the unreviewable authority to make it because Congress had power to authorize the Secretary of State to perform the ministerial function of counting the certificates of the states indicating ratification and to promulgate the arithmetic result.

It is certainly not surprising that the congressional decision was "accepted" in 1868. Huge radical majorities in both Houses of Congress had reduced President Andrew Johnson to a state of presidential impotence, and cowed the then Supreme Court itself into complete subservience to their will by threatening to take away the appellate jurisdiction of the Court, and even to abolish the Court itself by constitutional amendment. As a consequence, the Court solemnly adjudged that it did not even have original jurisdiction of "cases *** in which a state shall be a Party" under clause 2 of section 2 of Article III in April and May, 1867, when Mississippi attempted to secure an injunction to prevent the President from carrying out the reconstruction acts, and Georgia asked the Court to enjoin the military officers from enforcing these acts in that state. (See article on "The United States of America" on page 813 of Volume 22 of the *Encyclopedia Britannica*, Fourteenth Edition.)

Fortunately for the ultimate welfare of our country, the adoption by Congress of the resolution falsely reciting that Ohio and New Jersey had effectually ratified the Fourteenth Amendment was not the only event which occurred in our land on July 21, 1868.

While Congress was proclaiming this untruth, Georgia actually became the twenty eighth state to ratify the Fourteenth Amendment. By so doing, Georgia rendered the Congressional untruth relating to Ohio and New Jersey immaterial, and made ratification of the Fourteenth Amendment an accomplished and acceptable fact.

When all is said, the question of whether a state has ratified or rejected a proposed amendment to the Federal Constitution does not properly come within the scope of the "political-question doctrine" as that doctrine has been enunciated and applied in many Supreme Court cases.

The "political-question doctrine" is based on the separation of governmental powers made by the Constitution itself. Under the doctrine, the Federal judiciary has no power to make any decision in respect to any question if the power to make the decision is expressly or impliedly committed by the Constitution to some other department or agency of government.

The inapplicability of the "political-question doctrine" to the *Coleman Case* is demonstrated by words used by Chief Justice Hughes himself in that case. He said: "In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." (307 U.S. 433, 454-455) Both of these considerations were lacking in the *Coleman Case*.

There is not a syllable in Article V or any other provision of the Constitution which intimates in the slightest way that it is appropriate to attribute to a politically-surcharged Congress, which has already declared by a two-thirds vote that a proposed amendment to the Federal Constitution is "necessary", the unreviewable power to make a final decision as to whether the proposed amendment has been ratified in conformity with Article V. On the contrary, Article V and every other provision of the Constitution recoils at the suggestion that the most important question which can arise in our system, i.e., whether our Constitution has been changed by an amendment conforming to Article V, should be left to the final determination of what is essentially a political body which is more concerned with political expediency than with the search for truth. Indeed, Article V and every other provision of the Constitution declare by their words, spirit, and purpose that the decision of this question should be made by the judiciary acting with what Edmund Burke described as "the cold neutrality of the impartial judge."

Moreover, there is no basis whatever for claiming a "lack of satisfactory criteria for a judicial determination" of a question of this nature. As a practical matter, the question is susceptible of judicial determination under most circumstances by a simple inspection of certificates issued by the appropriate state officers attesting the action taken by their respective legislatures.

Since the handing down of the *Coleman Case*, the scope of the "political-question doctrine" has been substantially narrowed by *Baker v. Carr*, (1962) 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, where the Court held in repudiation of former decisions that whether a state had unconstitutionally apportioned voting power in the election of state legislators presented a judicial question and not a political question; *Bond v. Floyd*, (1966) 385 U.S. 116, 17 L.Ed.2d 235, 87 S.Ct. 339, where the Court held in substance that whether a state legislature had unconstitutionally deprived a state representative of his seat because of his expressed views presented a judicial question and not a political question; and *Powell v. McCormack*, (1969) 395 U.S. 486, 23 L.Ed.2d 491, 89 S.Ct. 1944, where the Court held in essence that whether the United States House of Representatives had unconstitutionally deprived a Representative of his seat was a judicial question and not a political question. ...

In the light of these decisions and this adjudication, it seems obvious that the Supreme Court will hold, if the occasion for its acting in the matter should arise, that whether the Equal Rights Amendment has been ratified is a judicial question for the decision of the federal judiciary, and not a political question for the decision of Congress.

Be this as it may, Article V requires that it be decided in accordance with its true meaning, which is that a state may ratify the Amendment if it has previously rejected it, and that a state may rescind or withdraw its ratification if it has previously ratified it.

The Phyllis Schlafly Report

Box 618, Alton, Illinois 62002

Published monthly by Phyllis Schlafly, Fairmount, Alton, Illinois 62002.

Second Class Postage Paid at Alton, Illinois.

Subscription Price: For donors to the Eagle Trust Fund -- $5 yearly (included in annual contribution). Extra copies available: 15 cents each; 8 copies $1; 50 copies $4, 100 copies $8.