tion and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification."

Although rescission was hotly debated with respect to the Equal Rights Amendment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress's power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to suggest that resolution is a political question committed to Congress, but the issue is not settled.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification.[49] There is no necessary conflict, because the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an "aberration."[50] That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum, as it addressed an issue not before the Court.[51] On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the states, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past prac-

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York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying states, noted the withdrawal resolution, there were ratifications from three-fourths of the states without New York. 16 Stat. 1131.

[49] F. R. Doc. 92–11951, 57 Fed. Reg. 21187; 138 CONG. REC. (daily ed.) S6948–49, H3505–06.

[50] 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim. pr.).

[51] Id. at 118–121.