ing into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination "has been accepted." [76] But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.[77] However, the unexplained decision by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant governor's vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.[78]

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratification of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them.[79] But to what extent the political question

---

[76] Coleman v. Miller, 307 U.S. 433, 447–56 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

[77] Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. 307 U.S. at 456. Although all nine Justices joined the rest of the decision, *see* id. at 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one Justice did not participate in deciding the issue of the lieutenant governor's participation; apparently, Justice McReynolds was the absent Member. Note, 28 Geo. L. J. 199, 200 n.7 (1940). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

[78] The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 886–901 (1980), and his student note, Comment, *Rescinding Ratification of Proposed Constitutional Amendments: A Question for the Court*, 37 La. L. Rev. 896 (1977). Two perspicacious scholars of the Constitution have come to opposite conclusions on the issue. *Compare* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 414–416 (1983) (there is judicial review), *with* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 435–436 (1983). Much of the scholarly argument, up to that time, is collected in the ERA-time-extension hearings. Supra. The only recent judicial precedents directly on point found justiciability on at least some questions. Dyer v. Blair, 390 F. Supp. 1291 (N.D.Ill., 1975) (three-judge court); Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[79] In Baker v. Carr, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker*, 369 U.S. at 217, identified as elements of political questions,