It is therefore adjudged that Ordinance No. 18-63 of the city of South Euclid, to the extent that it prohibits the use of all political signs, violates Section 11, Article I of the Constitution of the state of Ohio, as well as the First and Fourteenth Amendments to the Constitution of the United States. Furthermore, pursuant to Section 2721.09, Revised Code, the city of South Euclid is permanently enjoined from enforcing the ordinance to the extent of its constitutional infirmity. *American Cancer Society, Inc.*, v. *Dayton*, 160 Ohio St. 114; *Curtiss* v. *Cleveland, supra* (170 Ohio St. 127).

Judgment reversed.

TAFT, C. J. MATTHIAS, HERBERT and BROWN, JJ., concur.

730515.1

UNITED STATES CONSTITUTION: Power of Congress over ratification of proposed amendment

LEGISLATURE: Rescission of ratification by

The question whether the state legislature, having ratified a proposed constitutional amendment, may rescind its action is a political question for determination by Congress.

Opinion No. 4779 May 15, 1973.

Josephine D. Hunsinger
House of Representatives
State Capitol
Lansing, Michigan

You have requested my opinion on whether or not a state, after ratifying a proposed Amendment of the United States Constitution (specifically the Equal Rights Amendment), can withdraw that ratification. Article V of the United States Constitution provides as follows:

> "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; . . ."

[4] Section 2721.09, Revised Code: "Whenever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."

This office has had occasion to interpret the language of this Article in relation to the analogous subject of an attempted rescission by the legislature of an application to the Congress for the calling of a constitutional convention. Your attention is directed to the opinion of Attorney General William W. Potter in a letter to the Honorable Robert D. Wardell, House of Representatives, OAG 1926-1928, p 226 (March 5, 1927).[1]

In his consideration of this question, Attorney General Potter made these observations relating to the inability of a succeeding legislature to rescind the ratification of a proposed constitutional amendment by a previous legislature.

> ". . . . Amendments to the constitution of the United States become valid and binding only when they have been ratified by the legislatures of three-fourths of the several states, or by conventions called in the several states for that purpose.
>
> "When ratification has actually taken place by the legislature of the state, such legislature cannot subsequently change its mind, reconsider its ratification of the constitutional amendment and reject the same. This proposition was involved in the right of secession claimed by the southern states. Such states having ratified the constitution of the United States, claimed to have the right to rescind such ratification and to secede from the union. The Civil War settled the proposition that a state, having once ratified and adopted the constitution of the United States could not thereafter, either by legislative act or by constitutional convention, reconsider such action and reject such ratification.
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> * * *
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> "In Jameson on Constitutional Conventions, paragraph 583, he discusses the situation in relation to the ratification of constitutional amendments. He insists that after a constitutional amendment has been ratified by three-fourths less one of the legislatures of the several states and the legislature of another state ratifies the amendment, that it has been ratified by the legislatures of three fourths of the states. It has become valid as a part of the constitution, and the power of the state legislature over the subject matter is gone. Is it any more a power exercised and therefore a power no longer existing because other states have acted, or enough other states to have made the amendment a part of the constitution? To thus hold would be to make the constitutional provision read that the amendment should be valid when ratified by the legislatures of three-fourths of the states, each adhering to its vote until three-fourths of all the legislatures should have voted to ratify. It is enough to say that such is not the language of the constitution, but that it shall be valid when ratified by the legislatures of three-fourths of the states."

In the case of *Coleman* v *Miller*, 307 US 433 (1939), the United States Supreme Court took a somewhat different approach holding definitively

[1] See also OAG 1920, p 50 (July 29, 1919); OAG 1925-1926, p 74 (Feb. 20, 1925).

that the question of the validity of an attempted rescission by a state legislature was a political one. The Court further recognized that this issue had once been resolved by Congress when it ordered the Fourteenth Amendment to be promulgated despite the fact that attempts had been made by some states to rescind their ratification. The Court 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. . . . This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.
>
> "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 the Congress in the exercise of its control over the promulgation of the adoption of the amendment."
> (*Coleman* v *Miller, supra,* at pages 449-450)

Thus the United States Supreme Court has decided that the question of the efficacy of an attempted rescission was one for Congress to determine and cited with apparent approval the manner in which Congress had decided the question in a previous case—that of the Fourteenth Amendment. While it is apparent that the Congress of the United States is not as bound by precedent as a court, the historic precedents above cited make it clear that the Michigan legislature would, in all likelihood, be indulging in a futile gesture if it were to rescind its ratification of the equal rights amendment.

Current Congressional thinking on this point is found in a recent opinion by the Counsel to the U. S. Senate's Subcommittee on Constitutional Amendments, who said:

> ". . . the judicial opinions and, more importantly, the precedents established by the Congress itself make it clear that once a state has ratified an amendment, it has exhausted the only power conferred on it by Article V of the Constitution, and may not, therefore, validly rescind such action.
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> * * *
>
> "Congress, therefore, has expressed itself quite definitely on this question. It is my legal opinion as Counsel of the Subcommittee on Constitutional Amendments of the United States Senate that once a State has exercised its only power under Article V of the United States Constitution and ratified an Amendment thereto, it has exhausted such power, and that any attempt subsequently to rescind such ratification is null and void. The Attorney General of the State of Idaho has recently expressed the same view of an opinion to the legislature of that state. . . ."

FRANK J. KELLEY,
Attorney General.

UNITED STATES SENATE
Committee on the Judiciary
Subcommittee on Constitutional Amendments
Washington, D.C. 20510
February 20, 1973

State Senator Shirley Marsh
Nebraska State Senate Chambers
Lincoln, Nebraska

Dear Senator Marsh:

In accordance with your request, the purpose of this letter is to express our views on the question of whether a state may rescind its ratification of a Constitutional Amendment. Briefly the judicial opinions and, more importantly, the precedents established by the Congress itself make it clear that once a state has ratified an amendment, it has exhausted the only power conferred on it by Article V of the Constitution, and may not, therefore, validly rescind such action.

Article Five of the Constitution of the United States which establishes the procedures for the amendment of that document states in its entirety:

> 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.

When an amendment is proposed either by the Congress or by a Constitutional convention called by the Congress on the application of two thirds of the States and such an amendment is submitted to the legislatures of the states for ratification, the legislature is not exercising a legislative function, just as Congress, when it purposes, is not legislating. [1] The

[1] Mr. Justice Day, writing the opinion of the court in *Hawke* v. *Smith,* 253 U.S. 221 at 229 (1920), stated: "Ratification by a state of a constitution is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment." The Maine Supreme Court in *Opinion of the Justices,* 118 Me. 544 at 546 (1919) stated: "Here again, the State Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law making body, but is acting in behalf of and as representatives of the people as a ratifying body under the power expressly conferred upon it by Article V. The people through their Constitution might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not."

legislature in ratifying is exercising a ministerial or constituent function; the ratifying process is equivalent to a roll call of the states. The Constitution empowers states to ratify only, since the object was to determine what the people want to add to their Constitution, not to take a poll concerning views on the subject of the amendment.

The question with which we are presently concerned is whether a legislature may change its action with respect to an amendment. It is one which has several times come up in practice. One view is that the first action by the legislature of a particular state is conclusive and binds future legislatures, whether the legislature rejects or ratifies. This position, which has received little support, was taken by the Supreme Court of Kentucky in *Wise v Chandler,* 270 Ky. 1, 108 S.W.end. (1937). This case concerned the so-called "Child Labor Amendment" which had been proposed to the States by the Congress in June, 1924. In January of 1925, the legislature of Kentucky had adopted a resolution rejecting the proposed amendment. Then, some twelve years later, the Kentucky legislature passed a resolution in favor of its adoption. In the meantime the amendment had been rejected by both houses of the legislatures of twenty-six states and ratified only in five. The Kentucky court reasoned somewhat circularly that if a convention were called for purposes of ratification, such a convention could not change its actions once taken. Hence, the court held that a state legislature when sitting for purposes of ratification had no greater power than a convention and thus having once acted either affirmatively or negatively, it had exhausted its power. The Court concluded:

> 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 be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. 108 S.W. 2nd at 1033

The Supreme Court of Kansas disagreed with the Kentucky court in *Coleman v Miller,* holding that an original vote of rejection was not conclusive, although a vote of ratification would be. It was the "Child Labor Amendment" which was also at issue here. As in Kentucky, the Kansas legislature had adopted a resolution in January, 1925 rejecting the amendment, then reversed itself in January, 1937. The Court began by noting that "(i)t is settled beyond controversy that the function of a State Legislature in ratifying a proposed amendment to the Constitution of the United States, like the function of Congress in proposing an amendment, is a federal function derived from the Federal Constitution". The Court went on to note that that document empowers the legislature only with the positive power to assent to an Amendment. Any action by a legislature in disapproving an Amendment has no effect under the Constitution since it is not provided for, and a state may therefore act at any point to ratify an amendment during its pendance regardless of what has gone before. This view is supported by the commentators.

Judge Jameson in his treatise *On Constitutional Conventions; Their History, Powers, and Modes of Proceeding*[2] concludes:

> The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, '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.*' By this language is conferred upon the States, by the national Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be nullity. But, until so exercised, the power undoubtedly, for a reasonable time at least, remains. . . . . When ratified all power is expended. Until ratified the right to ratify remains. Jameson at p. 628 (emphasis in original)

The question was presented to the Supreme Court of the United States on writ of certiorari to the Kansas Supreme Court in the *Coleman* case. (*Coleman v. Miller,* 307 U.S. 433 (1939)). The Court held that the question of the effect to be given to reversals of action as to ratification by state legislatures was a "political" one to be decided by the Congress under its powers to implement Article V.

> 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 the Congress in the exercise of its control over the promulgation of the adoption of the amendment. 307 U.S. at 450

Since the Court has held that the Congress is the final arbitrater of this question, has this body ever expressed itself? We find that it has. The question arose in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866. [3] New governments were erected in those states (and in others) under the direction of the Congress. The new legislatures ratified the amendment — that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868. Ohio had first ratified then rejected the amendment on January 15, 1868. New Jersey likewise withdrew its ratification on February 20, 1868. As there were then thirty-seven states, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of the amendment." [4] In the proclamation, or certificate, of the Secretary of State issued on July 20th Ohio and New

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[2] *Jameson on Constitutional Conventions,* (Callaghan and Company, Chicago, 1887); See Also, *Willoughby on the Constitution,* Sec. 329a; Ames, "Proposed Amendments to the Constitution", House Doc. 353, Pt. 2, 54th Cong., 2nd. Sess., p. 299, 300.

[3] 15 Stat. 710.

[4] Cong. Globe, 40th Cong., 2nd. Sess., p. 3857.

Jersey were included in the ratifying states; as to their resolutions withdrawing consent, the proclamation stated that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual." [5] The Secretary certified: "If the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid Amendment are to be deemed as remaining in full force and effect, nothwithstanding the subsequent resolutions of those States which purport to withdraw the consent of those States from such ratification, then the aforesaid Amendment has been ratified in the manner heretofore mentioned, and so has become valid."

The Secretary of State was thus clearly posing to Congress for resolution the question of the effect of the actions of these two states in ratifying and subsequent rejecting the Amendment. On July 21st the Secretary's question was answered when Congress by a concurrent resolution [6], which included Ohio and New Jersey in the list of ratifying states, [7] declared the Fourteenth Amendment to be part of the Constitution and that it should be promulgated as such. The Secretary of State complied on July 28, 1868, the certificate naming all the states in the list of Congress. [8]

The question was again posed to the Congress in the case of the Fifteenth Amendment two years later. The legislature of New York ratified the Fifteenth Amendment on April 14, 1869, and withdrew its ratification on January 5, 1870. The proclamation of March 30, 1870 included New York in the list of ratifying states. [9]

Congress, therefore, has expressed itself quite definitively on this question. It is my legal opinion as Counsel of the Subcommittee on Constitutional Amendments of the United States Senate that once a State has exercised its only power under Article V of the United States Constitution and ratified an Amendment thereto, it has exhausted such power, and that any attempt subsequently to rescind such ratification is null and void. The Attorney General of the State of Idaho has recently expressed the same view in an opinion to the legislature of that state. A copy of his opinion is attached for your information.

Sincerely,

J. William Heckman, Counsel
Subcommittee on Constitutional Amendments

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5 15 Stat. 706, 707.
6 15 Stat. 709, 710.
7 The list also included North Carolina and South Carolina, which had rejected and then ratified the amendment.
8 As well as Georgia which had ratified on July 21, 1868.
9 16 Stat. 1131.