SUMMARY OF LAW RESPECTING THE CONSTITUTIONALITY OF CONGRESSIONAL LEGISLATION AUTHORIZING STATES TO RESCIND RATIFICATIONS OF A PROPOSED CONSTITUTIONAL AMENDMENT

Would a Congressional enactment authorizing a state to rescind its ratification of the proposed Equal Rights Amendment be Constitutional under Article V of the United States Constitution? Clearly, if rescission is unconstitutional, no Congressional enactment can alter that fact.

I. Rescission Is In Direct Conflict With The Textual Framework Of Article V And Contrary To The Interpretation Of Article V Expressed By James Madison.

1. A reading of Article V will show that only the affirmative act of ratification is recognized. Once that act has been carried out, the authority and power of the state granted by Article V is exhausted.

2. James Madison, a principal architect of the United States Constitution, said, in a letter to Alexander Hamilton, in 1788:

> "The Constitution requires an adoption in toto and for ever. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must viciate the ratification."

II. Congress Has Never Recognized A Rescission As Being Valid, Even In Instances Where The Final Adoption Of The Proposed Amendment Was Dependent Upon The Rescission Issue.

1. During ratification of the Fourteenth Amendment, 28 states were needed for ratification; 29 had ratified, but two of these states had attempted to rescind their ratification. Congress declared the Fourteenth Amendment ratified, listing the two states which attempted to rescind among those which had ratified the amendment.

2. New York attempted to rescind its ratification of the proposed Fifteenth Amendment, but was nonetheless listed as a ratifying state by the Secretary of State, and the ratification was accepted by the Congress.

III. Congress Has Repeatedly Recognized That Rescission Is Not Authorized Under Article V.

1. In 1924, recognizing that rescission was not possible, an attempt was made to amend Article V so as to allow for rescission. A sponsor of the proposed amendment said that as Article V is currently drawn,

> ". . .no state can change its vote from the affirmative to the negative in the matter of a constitutional amendment. Once ratified by a State, that State cannot change. . ."
> 65 Cong. Rec. 4492 (1924)

Another sponsor said:

> "In practice, therefore, it may be said. . .and I think it is generally regarded to be. . .the law that a State may reconsider and change a rejection, but may not reconsider and change a ratification."

2. In 1973, a Senate committee attempting to set forth a procedure for calling a constitutional convention, cited prior rejections by Congress of rescissions and stated:

> "The committee is of the view that the former ratification rule [not recognizing rescission] should not control this question and, further, should be changed with respect to ratification." S. Rep. No. 336, 92d Cong., 1st Sess. 14 (1971); S. Rep. No. 293, 93d Cong., 1st Sess. 14 (1973).

3. Senator Birch Bayh, Chairman of the Senate Subcommittee on the Constitution of the Senate Judiciary Committee, said in 1974:

> "I am firmly convinced that, once a State legislature has exercised the powers given it by Article V of the Constitution, it has exhausted its power in this regard and may not later go back and change its mind." 120 Cong. Rec. 5574 (1974).

IV. Judicial Precedents Demonstrate That An Authorization Of Rescission Would Be Unconstitutional.

1. Maine, when ratifying the Eighteenth Amendment, wanted to use its referendum and initiative process. The Maine Supreme Court, in Opinion of the Justices, 118 Me. 544 (1919), aff'd sub nom Hawke v. Smith, 253 U.S. 221 (1920) held at page 548-549 that the act of a legislature in ratifying an amendment was final and binding and is not subject to rescission either by the legislature itself or by popular referendum. This decision was affirmed by the United States Supreme Court.

2. The Supreme Court of Kansas, in Coleman v. Miller, 146 Kan. 390 (1937), aff'd. 307 U.S. 433 (1939), said:

> "From the foregoing and from historical precedents, it is also true that where a State has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make Article V of the federal constitution read that the amendment should be valid 'when ratified by three-fourths of the states, each adhering to its vote until three-fourths of all the legislatures shall have voted to ratify.'" 146 Kan. at 403.

This decision was affirmed by the United States Supreme Court.

3. The Supreme Court, in Dillon v. Gloss, 245 U.S. 368 (1927) and Coleman v. Miller, 307 U.S. 433 (1939), examined and noted with approval the Fourteenth and Fifteenth Amendment precedents respecting Congressional non-recognition of rescission.

4. In both Hawke v. Smith, 253 U.S. 221 (1920) and Lesser v. Garnett, 258 U.S. 130 (1922) the Supreme Court of the United States upheld the concept that a state may place no condition on its ratification, saying in Lesser v. Garnett:

> "The function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." 258 U.S. at 137.

The entire legal memorandum from which this summary was prepared is available from The NOW Action Center, 425 13th Street, N.W., #1001, Washington, D.C. 20004.