ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

October 31, 1977

MEMORANDUM FOR HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Subject: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment

This responds to your request for our opinion regarding the constitutionality of extending the period, presently scheduled to expire on March 22, 1979, for ratification by the States of the proposed Equal Rights Amendment.

In the course of addressing this general question, we have identified a number of discrete questions that we will discuss. Briefly, our views are as follows: (1) no authority suggests persuasively that an extension of seven years would be per se unconstitutional; (2) congressional action to extend the deadline for ratification can take the form of a concurrent resolution subject to majority vote of a quorum of each House; (3) we do not think that an extension would empower the States which have ratified the ERA prior to the extension to rescind that ratification during the extension period; (4) we doubt Congress may extend a right to rescind to States during the seven-year extension period; and (5) we believe that at least some of these issues would probably be held to present justiciable controversies in appropriate cases.

Before addressing these questions, we would first make several introductory observations. First, we see as essentially separate matters whether H.J. Res. 638 is constitutional and whether the issues it raises are susceptible to judicial resolution. In our view, it is important in any discussion of these issues to avoid a suggestion that because the 95th Congress or a successor Congress may have the final word on their resolution, the constitutionality of this resolution becomes an easier or an avoidable question. Secondly, we think that the lack of authoritative judicial precedent or guidance from the language of the Constitution itself makes it difficult to conclude with certainty that H.J. Res. 638 is or is not constitutional. Finally, even though we think that the determination whether this resolution is constitutional does not turn on whether an extension would free ratifying States to "rescind" their ratifications, we address that question in some detail because we feel that discussion of this question may be helpful in the general debate over this resolution.

I. Background

The two documents most relevant to our inquiry are H.J. Res. 208, 92d Cong., 2d Sess. (1972), which proposed to the several States the adoption of the ERA, and Article V of the Constitution, which sets forth the procedures for amending the Constitution. The text of the resolution is as follows:

> HOUSE JOINT RESOLUTION 208
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> Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That
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> The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
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> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Section 3. This amendment shall take effect two years after the date of ratification." 1/

1/ This resolution was adopted by Congress on March 22, 1972, when the Senate passed unamended the resolution adopted by the House of Representatives on October 12, 1971.

On March 24, 1972, certified copies of the full text of this joint resolution were transmitted to the Governors of the 50 states by the Acting Administrator of the General Services Administration with a request that each Governor submit it "to the legislature of your state for such action as it may take" and requesting also that a "certified copy of such action be sent to the Administrator of [GSA] . . ." See 1 U.S.C. §106b. As of this date, thirty-five states have submitted certifications to GSA of ratification of ERA by their respective legislatures. 2/

Article V, the sole provision of the Constitution dealing with the amendment process, reads 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; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner effect 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.

Article V does not on its face contain any requirement that an amendment, once proposed by Congress, must be ratified within a specific time period or that Congress may establish a time period in which the States will be empowered to ratify

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2/ As of this writing GSA is also in receipt of three documents from Tennessee, Idaho, and Nebraska purporting to withdraw or rescind their ratifications previously certified.

a proposed amendment. In Dillon v. Gloss, 256 U.S. 368 (1921), the Supreme Court addressed both these issues.

In Dillon, a defendant convicted of an offense under a statute passed by Congress to enforce the Eighteenth (Prohibition) Amendment, contended, inter alia, that Congress had no power to set a time limit for ratification and that, as a consequence, the Amendment itself was void because Congress had placed a seven-year limit on ratification in §3 of the Amendment. 3/ In rejecting this argument, the Court stated:

> Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified. 256 U.S., at 375-76 (footnote omitted).

After Dillon, the Supreme Court has had only one occasion to address the question of congressional power under Art. V to establish the time frame for ratification. That case, Coleman v. Miller, 307 U.S. 433 (1939), involved, inter alia, the claim that the "Child Labor Amendment," proposed by Congress in June, 1924 without Congress having set a time limit for ratification, could no longer be ratified by the Kansas

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3/ The Eighteenth Amendment had in fact been ratified within about 13 months of the time it was proposed by Congress.

legislature in 1937 because some 13 years had elapsed since its submission to the States. In response to the contention that 13 years was an "unreasonable" period of time, the Court stated:

> Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. That decision by theCongress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts. Id., at 454 (emphasis added). 4/

Because no time limit had been set by Congress in the proposed Child Labor Amendment involved in Coleman, it may be properly inferred from the quotation above that the establishment of a time limit by the Congress proposing an amendment would not leave open the question of what is a reasonable period. Certainly if a time limit had expired before an intervening Congress had taken action to extend that limit, a

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4/ The language quoted above, from the opinion of the Court, was the opinion of Chief Justice Hughes joined by Justices Stone and Reed. Justice Black wrote a concurring opinion joined by Justices Roberts, Frankfurter and Douglas, that would have disavowed the assertion in Dillon that the courts would under some circumstances ever be able to inject themselves into the type of dispute presented. Justices Butler and McReynolds dissented on the ground that a reasonable time had elapsed since the amendment was proposed. See note 51, infra.

strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by two-thirds vote of each House and thereby begin the ratification process anew.

Additionally, if the proposing Congress had fixed a specific time limit within the text of the proposed amendment itself, a strong argument could be made that any attempt to modify or extend that period would constitute an amendment to the proposed amendment, requiring the ratification process to begin again. 5/

Even assuming arguendo that H.J. Res. 638 would be

5/ Although such an argument has some appeal, a contrary conclusion is supported by the analysis of the Court in Dillon v. Gloss, supra. In that case, the seven-year limit had been included in the text of the proposed amendment and the amendment had been ratified by the requisite number of States in about 13 months. If the Court had viewed the seven-year limit as a substantive part of the amendment, it could have affirmed the limit's validity solely on the basis that it had in any event been ratified as part of the amendment itself and thereby would constitute an amendment to Art. V. Indeed, the brief of the United States in Dillon appears to embrace such an argument. See Brief for the United States at 5-6. The Court did not, however, decide the case on this proffered ground, suggesting that the Court might not have viewed the seven-year limitation as being a substantive part of the Eighteenth Amendment. See also 55 Cong. Rec. 5649 (1917)(remarks of Sen. Stone).

A contrary conclusion is also supported by the Court's decision in the National Prohibition Cases, 253 U.S. 350 (1920). In that decision, involving a challenge to the validity of the Eighteenth Amendment, Mr. Justice Van Devanter, in announcing the "conclusions of the Court," id., at 384, purported to set forth the "text" of the Eighteenth Amendment by quoting in full sections 1 and 2 but completely omitting section 3 which contained within it the seven-year limitation imposed for the first time by Congress. Id., at 385. See id., at 393 (McKenna, J. dissenting).

unconstitutional had the seven-year limit been included within the text of the ERA itself, it can nevertheless be viewed as constitutional if the placing of the limitation within what we shall refer to as the "proposing clause" permits a different result. From an analytical viewpoint, we think that respectable arguments can be made on both sides of this question.

An argument against the constitutionality of H.J. Res. 638 might be based on the following analysis: As suggested by the language of the Coleman opinion, the question of a time limit is no longer open once a time limit is imposed by the proposing Congress. Furthermore, Art. V itself can be viewed as envisioning a process whereby Congress proposes an amendment and is divested of any power once the amendment is submitted to the States for ratification, 6/ other than possibly the power declared in Coleman to judge whether ratification has occurred. Also, it can be argued that no distinction should be made between the placing of a time limit in the text of a proposed amendment and placing it in the proposing clause; to do so is to elevate form over substance. Finally, it is not unreasonable to say that States having ratified a proposed amendment with a set time period have done so in the expectation that a necessary three-fourths of the States would do so within the established limit or else the proposed amendment would fail of adoption.

An argument favoring the constitutionality of H.J. Res. 638 might proceed as follows: Dillon and Coleman confirm the power of Congress to establish a "reasonable" time in which ratification may occur and, therefore, an extension of a time once established is constitutional if the extended period is reasonable. If, under Coleman, a Congress years after an

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6/ See, e.g., 56 Cong., Rec. 446 (1917)(debate on proposed Eighteenth Amendment):

> "Article V expressly provides that once this proposed amendment has gone from the halls of Congress and rests with the States, when ratified by the States it becomes a part of the Constitution."

amendment has been proposed has the power to determine the reasonableness of the intervening time period, there is no reason to conclude that a Congress in the position of the 95th may not determine, at a specific point in time, that an amendment is still viable and will be so for a reasonable number of years in the future.

Presented with these arguments without more, we would find it difficult indeed to choose between the two. We take as given from Dillon and Coleman that whatever power the 95th Congress may have to extend the seven-year limitation must be implied from Article V itself, and we think it fairly clear that such power may be implied unless the action of the 92d Congress must be viewed as binding on all future Congresses, including the 95th and the 96th, the latter being the Congress during whose life the initial seven-year period will actually expire. In our view, the soundest approach to resolving this question is to rely to the greatest extent possible on the historical understanding of the Congresses that have made use of the time limitation device.

II. Historic Practice Regarding Time-Limiting Clauses

Although the placing of time limits for ratification in proposed amendments was considered in the 65th Congress, 6a/ the first occasion for its actual inclusion was in the Eighteenth Amendment. In that amendment, the limitation appears as section 3 and reads as follows:

> This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

6a/ See remarks of Senator Buckalew, 71 Cong. Globe 2771 (1866); 85 Cong. Globe 912-13, 1040 (1869).

As pointed out by the Court in Dillon, this provision was included in part because of expressed Congressional concern that other amendments proposed much earlier in the history of the Republic might still be subject to ratification. Such a possibility concerned the 65th Congress because it generally agreed, as did the Dillon court subsequently, that some reasonable time period for ratification was implicit in Art. V itself. See Dillon v. Gloss, 256 U.S., at 372-73. Although the question was not focused on generally in House debate, at least one of the participants observed that "the [seven-year] limitation here is in the article that is to be submitted and is not a separate proposition. Hence, when it is voted upon by the States and adopted it is as much a valid article and amendment as [the substance of the amendment itself]." 7/

In the Senate, fuller consideration was given to the question of the power of Congress to place a time limit on ratification. In response to the argument that Congress had no power to impose a limitation on the ratification period, several senators argued that the apparent absence of such a power in Art. V would be overcome and such a power would be recognized as part of the Constitution should three-fourths of the States ratify within the then six-year period. 55 Cong. Rec. 5650 (1917)(remarks of Sen. Promerene); id., at 5659 (remarks of Sen. Sheppard). The debate in the Senate also indicated general agreement that the power of Congress to set such a limit would be subjected to judicial review and that failure of ratification by three-fourths of the States within the fixed time period would most probably require the resubmission of the amendment by a future Congress. Id.

When the next Congress came to propose the Nineteenth Amendment, congressional fears expressed in section 3 of the proposed Eighteenth Amendment were apparently put aside. The issue apparently never arose until an attempt to include a seven-year limit was made and, without debate, rejected. 8/

When the Congress proposed the Twentieth Amendment by

7/ 56 Cong. Rec. 463 (1917).

8/ 58 Cong. Rec. 93 (1919).

S.J. Res. 14 in 1932, a seven-year limitation was written into the text of the proposed amendment itself, now section 6 of that Amendment, in language virtually identical to that contained in section 3 of the Eighteenth Amendment quoted supra. 9/ On the floor of the Senate, section 6 was explained as follows:

> "In effect, it [section 6] is the same provision that was in the prohibition [Eighteenth] amendment to the Constitution." 10/

During House consideration of S.J. Res. 14, Congressman Celler of New York proposed that a seven-year limitation, then not in the resolution, be added to what he described as the "preamble," or proposing clause, of the amendment. In doing so, he quoted at length from Dillon v. Gloss, supra. 11/

Celler's proposed amendment to S.J. Res. 14 drew immediate criticism from his colleagues. Congressman Jeffers, apparently not favorably disposed to any limit, refused to debate its wisdom

> because I think it is very clear that it [Celler's proposal] is out of place where it is being offered; but if the amendment has any virtue . . . I think it should be offered at the end of the resolution as an additional section, and then if it should be adopted it would be a part of the constitutional amendment.

9/ The phrase "as provided in the Constitution" was not included in section 6. Otherwise, the sections are identical.

10/ 75 Cong. Rec. 5086 (1932).

11/ "Proposal and ratification . . . are not treated as unrelated acts, but as succeeding steps in a single endeavor . . . ." Id., at 3856, quoting Dillon v. Gloss, 256 U.S., at 374-75.

As it is now offered it would only be a part of the proposal clause of the constitutional amendment but would not be in the constitutional amendment.

. . .

If the gentleman wants his amendment in the Constitution, it should go in as a new section, or section 6. As he has now offered it, it would be of no avail 12/

Another of Mr. Celler's colleagues, Mr. Ramseyer, intending himself to amend S.J. Res. 14 to include a seven-year limitation for ratification, indicated his agreement with Mr. Jeffers as to the question of where the limit should be placed:

The eighteenth amendment carried that 7-year provision as section 3, and it was that provision that the Supreme Court [in Dillon] held to be valid . . . .

Section 6 goes to the entire article, as to how it shall take effect. It appears in the eighteenth amendment as the last section of the amendment . . . . I am confident that is the place for it. 13/

Congressman Celler, after this discussion, withdrew his amendment. 14/

When Congress proposed what became the Twenty-First Amendment, it included as section 3 of that amendment language virtually identical to that in the Eighteenth and Twentieth Amendments. 15/ Comments on the floor of the Senate included

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12/ Id.

13/ Id., at 3856-57.

14/ Id., at 3857.

15/ The notable difference was that ratification was to be by conventions in the several states rather than by state legislatures.

statements that "the Congress which submits an amendment has the power to fix the terms upon which it may be considered," 76 Cong. Rec. 4152 (1933), and "after Congress adopts the manner of ratification, by legislatures or conventions, it has no more role to play." Id., at 4164. See also, 55 Cong. Rec. 5652 (1917).

The Twenty-second Amendment likewise contained a seven-year limitation in section 2 of the amendment patterned after prior limitations. Senator McClellan noted that "a period of 7 years' time is given, under the terms of the joint resolution [for] the amendment to be ratified . . . . " 93 Cong. Res. 1800 (1947).

The Twenty-third Amendment, proposed in 1960, for the first time did not include a seven-year limitation within the text of the amendment itself. Instead, the seven-year limitation was contained in the proposing clause, which read as follows:

> That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress . . . . (emphasis added).

The history of the Twenty-third Amendment is lengthy, as pointed out in hearings conducted by Subcommittee No. 5 of the House Committee on the Judiciary chaired by Congressman Celler. Early proposals to grant the District of Columbia voting power in the Electoral College would have amended Art. IV, §3 of the Constitution directly. 16/ In 1940 and 1941, amendments were reported out of committee containing seven-year limitations

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16/ See Hearings on H.J. Res. 529 before Subcommittee No. 5 of the House Committee on the Judiciary 82 (1960).

in the text of the proposed amendments. 17/

The House report on the amendment issued by Congressman Celler as Chairman of the full Committee on the Judiciary, explained the limitation as follows:

> "The resolution . . . consists of two parts. The first part provides by its terms that the resolution [sic] shall be valid as a part of the Constitution only if ratified by the legislatures of three-fourths of the States within 7 years after it has been submitted to them by the Congress. 8/"

Footnote 8 to the report read as follows:

> Congress first adopted the 7-year limitation provision in proposing the 18th amendment to the Constitution. It did so because, at that time, several proposed constitutional amendments already submitted to the States for ratification had long laid dormant but were nevertheless subject to being resurrected and acted upon by the several States. (See Dillon v. Gloss, 256 U.S. 368, 373 (1921).
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> The first 10 amendments to the Constitution were ratified by the necessary number of States within 10 months, 20 days of their submission by the Congress. According to a statement in Coleman v. Miller, 307 U.S. 433, 453 (1939), the average time for ratification of amendments 10-21 has been computed to be 1 year, 6 months, 13 days; 3 years, 6 months, 25 days has been the longest time used in ratifying. The 22d amendment was ratified in 3 years, 11 months, 7 days. (See also Dillon v. Gloss, 256 U.S. 368, 372; Constitution of the United States, S. Doc. 170, 82d Cong., p. 39).

H.R. Rep. No. 1698, 86th Cong., 2d Sess. 4 (1960). During the debate in the House over the resolution, it was said that

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17/ Id., at 106-08.

"the critical hurdle will be to secure the approval of three-fourths of the State legislatures on the proposed amendment within the 7-year period." 106 Cong. Rec. 12570 (1960). See also id., at 12559, 12561-63, 12571.

The Twenty-fourth Amendment included a proposing clause identical to that of the Twenty-third Amendment. The House report on the proposed amendment stated: "This resolution requires, of course, ratification of the legislatures of three-fourths of the several states within 7 years from the date of its submission by the Congress." 18/

When the Twenty-fifth Amendment was proposed in the 89th Congress, the seven-year limitation once again appeared in the proposing clause in language identical to that of the Twenty-sixth Amendment and that in H.J. Res. 208 proposing the ERA. This language eliminated the phrase "only if" and simply announced that the amendment would be valid "when ratified . . . within seven years . . . . " The reports issued regarding the Twenty-fifth 19/ and Twenty-sixth 20/ Amendments add nothing to our consideration of the time limitation.

The Senate Report on the ERA, in its "Sectional Analysis" of H.J. Res. 208, states concerning the "resolution" or proposing clause that:

> This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that a ratification reflects the contemporaneous views of the people. It has been included in every amendment added to the Constitution in

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18/ H. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

19/ See S. Rep. No. 66, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 554, 89th Cong., 1st Sess. (1965).

20/ S. Rep. No. 26, 92d Cong., 1st Sess. 2 (1971); H.R. Rep. No. 37, 92d Cong., 1st Sess. (1971).

the last 50 years. It is interesting to note that the longest period of time ever taken to ratify a proposed amendment was less than 4 years. The power and responsibility of Congress to impose a reasonable time limit for ratification of constitutional amendments was made clear in both Dillon v. Gloss 256 U.S. 368 (1921), and Coleman v. Miller 307 U.S. 433 (1931). 21/

In addition to this analysis in the Senate report, comments on the floor of the House and Senate generally assumed that the seven-year period was a limitation on the time in which ratification could occur. Thus, Congresswoman Griffiths, after describing the limit as "customary," went on to say that "I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our head forever." 117 Cong. Rec. 35814-15 (1971). Senator Hartke, a supporter of the resolution, stated his view that "if there is such a delay [beyond seven years], then we must begin the entire process once again." 118 Cong. Rec. 9552 (1972). See also id., at 9576 (remarks of Sen. Cook).

III. The Binding Nature of the Seven-Year Limit in H.J. Res. 208

The history of congressional use of a seven-year limitation demonstrates that Congress moved from inclusion of the limit in the text of proposed amendments to including it within the proposing clauses with and without the "only if" phrase without ever indicating any intent to change the substance of their actions. The one occasion on which Congress actually considered the possible differences between placement of the limit within or without the text of a proposed amendment, the only expressed view was that the limit would be to "no avail" were it placed without the amendment. And as recently as the debate over the ERA, the limit was viewed as a "statute." 117 Cong. Rec. 35814-15 (1971). Thus, when H.J. Res. 208 came before the Congress for consideration, it is not at all surprising that some members

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21/ S. Rep. No. 689, 92d Cong., 2d Sess. 20 (1972).

indicated their belief that the amendment process would have to begin anew were ratification not achieved within the seven-year limit.

We think there are sound reasons to view any substantive or procedural details placed in a proposing clause for an amendment as subject to modification by a succeeding Congress. First, as demonstrated above, on the only occasion on which Congress itself has directly considered this question, the only views expressed were consistent with this position.

Secondly, as the Court noted in Dillon v. Gloss, 256 U.S., at 373, "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments." Thus, Congress' power under Art. V consists of more than simply proposing amendments: it includes the power to establish the details of how an amendment, once proposed, is to be acted upon by the several States.

As the Dillon Court noted, the substantive Art. V power to propose constitutional amendments is subject only to two limitations, one being the two-thirds vote requirement and the other relating to amendments that would deprive a state of its equal suffrage in the Senate without its consent. Dillon v. Gloss, 256 U.S., at 373-74. There is nothing in the text of Art. V which would bar subsequent Congresses from taking action with respect to the details of the ratification process as distinguished from the substantive amendment itself while the amendment is being considered by the States.

We conclude that the 95th Congress, under Art. V, can act to extend the seven-year limitation period placed by the 92d Congress in the proposing clause of the ERA. The 92d Congress had the power to make the seven-year limit a part of the substantive amendment by placing the limit within the text of the ERA itself. The fact remains that it did not do so. We think our conclusion that a time limit fixed in a proposing clause should not be viewed as immutable is supported by the nature of the decision made by the 92d Congress and that which would be made by the 95th Congress were H.J. Res. 638 to be adopted.

The nature of that decision is, we think, accurately described by the opinion of the Court in Coleman, 307 U.S., at 453, as follows:

> the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic . . . .

The Court in Dillon, discussing the time limit from a somewhat different perspective, concluded that

> "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and . . . if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

256 U.S., at 375, quoting Jameson on Constitutional Conventions §585 (4th ed.). As a matter of logic, it seems to us that what constitutes a reasonable period of time for ratification of an amendment would normally be best decided not by a proposing Congress but by the Congress in session when the necessary three-fourths of the States have ratified a proposed amendment. This is so because the limit imposed by the proposing Congress is, at best, predictive, whereas a Congress presented with ratifications by three-fourths of the States is better able to base its decision concerning viability of the amendment on concrete evidence. Indeed, as indicated above, the seven-year figure adopted by Congress in proposing the Eighteenth Amendment achieved, partly by virtue of its approval in Dillon v. Gloss, a talismanic significance that has never been examined in connection with the proposal of any amendments since that have included the same limit. In short, we think it is quite reasonable to accord the seven-year limit in the ERA only the deference that the express language of the limit requires, namely, that the ERA will be viable for at least seven years. We therefore think that the 95th Congress, on the basis of a record presumably more substantial than that built by the 92d Congress, may

extend the time limit if such an extension be deemed "reasonable." 22/

We would, however, make two additional points in this regard. First, assuming that Congress may extend the time period for a reasonable length of time, questions arise as to the form such an extension should take and the vote required in each House to pass an extension.

With regard to the question of form, it is our view that

22/ We would comment briefly on the question whether, assuming the 95th Congress may extend the period established by the 92d Congress, the 96th or a subsequent Congress could shorten a period previously established. (We would observe first that the answer to this question would appear also to resolve the question whether Congress might declare a proposed amendment to no longer be viable in the absence of an explicit time limit in that amendment or its proposing clause.) Given the nature of the Congressional determination of "reasonableness" as described in Dillon and Coleman, it is certainly arguable that any Congress might, on the basis of adequate findings, determine that a proposed amendment is no longer viable because present ratification would not reflect a contemporaneous expression of the people's will. We think, however, that such an argument would have to take into account the historically accepted understanding that Congress may not withdraw an amendment once it has been proposed. See Jameson, A Treatise on Constitutional Conventions, §585, p. 634 (1887); Burdick, The Law of the American Constituion 39 (1922); Orfield, Amending the Federal Constitution 51-52 (1942). Without resolving this obviously complex question, we would additionally note that a Congressional act constituing withdrawal would perhaps run afoul of the logic if not the expressed views of James Madison, discussed at length infra, that States may not conditionally ratify a proposed amendment. The scholars cited above at the least assume, as do we, that a Congress could not "cutback" on time available for ratification of a proposed amendment because the membership no longer viewed the proposed amendment as desirable.

H.J. Res. 638 need not be presented to the President for his approval. It has long been established that the President has no role to play in the amendment process. 23/ Hollingsworth v. Virginia, 3 Dall. 378 (1798). 24/

The second, and we would readily acknowledge more difficult, question is whether the resolution to extend the period must be approved by a two-thirds vote in each House or whether a simple majority is constitutionally sufficient. Several considerations dictate the conclusion that a super-majority vote is not required. We begin our analysis with the same two Supreme Court precedents which have guided our consideration of the other questions addressed in this opinion: Dillon and Coleman. While those decisions may be subject to varying interpretations in some respects, we think that they establish two propositions which are no longer open to question.

The first proposition is that implied within Article V is the condition that a constitutional amendment may only become law if it has been ratified "within some reasonable time after the proposal." Dillon v. Gloss, 256 U.S., at 375. The Court reasoned that inherent in the amending process is the assumption that any amendment will reflect the reasonably contemporaneous "expression of the approbation of the people" in three-fourths of the states. Id.

23/ It is true that the Executive Branch, by virtue of 1 U.S.C. §106b and its predecessors dating back to 1818, has performed a ministerial function within the ratification process. We do think that congressional assignment of this function or similar functions to the Executive Branch might well require the approval of the President under Art. 1, §7, but we think this is quite different from the resolution extending the time period here.

24/ We note that this holding in Hollingsworth has been specifically approved in subsequent opinions of the Court. See, e.g., Hawke v. Smith, 253 U.S. 221, 229-30 (1920). Thus, we see no justification for limiting Hollingsworth to its facts.

The second proposition--which is suggested in Dillon and unmistakably affirmed in the opinions of both Chief Justice Hughes and Mr. Justice Black in Coleman--is that the Constitution commits to Congress the authority and the duty to decide whether that implied condition of reasonable contemporaneousness has been satisfied. Dillon v. Gloss, 256 U.S., at 375-76; Coleman v. Miller, 307 U.S., at 454, 456, 458-59. 25/ Furthermore, it is clear that Congress may make this determination after the amendment has been proposed and has been submitted to the States. Indeed, as we have suggested earlier, it would be appropriate--and some would contend mandatorily required--for Congress to assess the reasonableness of the time period at the end of the process when ratifications have been submitted by the requisite number of States. Coleman v. Miller, 307 U.S., at 454, 456. As Chief Justice Hughes reasoned, it is at this time that Congress may most accurately assess whether the conditions which prompted the proposal of an amendment have "so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it," or whether to the contrary those conditions "were such as to intensify the feeling of need and the appropriateness of the proposed remedial action." 307 U.S., at 453.

If these two propositions are correct we think it must follow that Congress must have the ability to make the required determination. We can readily conceive of circumstances, however, in which a requirement of two-thirds approval for any

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25/ As we explain in our discussion in the final section of this opinion dealing with the political question doctrine, there remains some doubt whether Congress' power to establish a reasonable time is exclusive. On the question whether the judiciary may have some role to play, the Court's opinions do leave room for debate; on the question, however, whether the Constitution imposes upon Congress the primary duty to ascertain that amendments have been approved within a reasonable time there is no longer room for doubt. Congress has acknowledged the existence of this "power and responsibility" imposed upon it by Article V. See S. Rep. No. 689, 92d Cong., 2d Sess. 20 (1972), quoted in the text at note 21 supra.

decision made under Article V would deprive Congress of the ability to resolve the reasonableness question. Suppose, for example, that Congress had placed no time limitation in the proposing resolution for some amendment and that the approval of the thirty-eighth State was received many, many years after the matter was first committed to the States. 26/ Congress would have, at that time, a duty to decide whether too much time had passed, but if a resolution concluding that an unreasonably long period had elapsed would require a two-thirds vote the amendment might well become law even though a majority of Congress viewed it as inconsistent with the condition implied in Article V.

We think that common sense would dictate a strong presumption against the conclusion that the Constitution has conferred a duty upon the Legislative Branch but at the same time has imposed a super-majority requirement that could prevent it from performing that duty. Indeed, even a cursory review of the other constitutional provisions which impose super-majority requirements demonstrates that in every case the question to be addressed by Congress is clearly specified and the consequence of a failure of Congress to muster the requisite number was clearly foreseen and contemplated. Thus, for example, with respect to the approval of treaties (Art. II, §2), the Constitution makes plain that the question to be put to the Senate is whether the treaty is to be approved and the consequence of a failure to attain a two-thirds vote is clear. Similarly, with respect to trials after impeachment (Art. I, §3), the Constitution makes clear both that the Senate must have two-thirds

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26/ History has shown us that consideration by the States of proposed amendments long after their introduction is not a far-fetched hypothetical. In at least one case the State of Ohio undertook to consider an amendment some 80 years after it was proposed by Congress. See Dillon v. Gloss, 256 U.S., at 372. Indeed, it was precisely this type of concern which led the Dillon Court to conclude that Congress could impose a time limitation to prevent a State from "resurrecting" a proposed amendment that had "lain dormant for many years." Id., at 373.

concurring in the conviction and that in the absence of such a vote the impeachment will not stand. The same is true of all other super-majority provisions. 27/ What emerges from a review of these provisions, we think, is that the apparent intent of the Drafters of our Constitution (and of its amendments) was that where matters involving the Congress are concerned all decisions are to be governed by the democratic principle of majority rule, save those rare cases in which a greater burden was clearly contemplated, deemed appropriate, and made explicit in unmistakable language. Thomas Jefferson may have said it best: "The voice of the majority decides; for the res majoris partis is the law of all councils, elections, & c., where not otherwise expressly provided." 28/

The suggestion that two-thirds of both Houses must concur in order to decide whether a reasonable time has passed, we think, is incompatible with the Constitution's pattern of narrowly and carefully defined super-majority requirements. Whatever one says about the notions underlying Article V, it cannot be concluded that the Framers intended to, and expressed, a desire to impose a two-thirds requirement on such "subsidiary matters of detail." Dillon v. Gloss, 256 U.S. at 376. We think it especially plain that such a requirement could not have been intended with respect to the timeliness question. The Framers contemplated that it should be difficult to alter the Constitution. In light of that premise it is simply not reasonable to conclude that they could also have intended that State ratifications would be accorded a standing of presumptive timeliness that could only be defeated by a two-thirds vote. 29/

27/ See Art. 1, §5 (voting to expel a member of Congress); Art. 1, §7 (override of veto); 14th Amendment, §3 (removal of disability of members of Congress); 25th Amendment (Presidential resumption of power after disability).

28/ Jefferson's Manual of Parliamentary Practice §XLI, reprinted in H. Doc. No. 416, 93d Cong., 2d Sess., §508, p. 257 (1975).

29/ Our view that it is essential that Congress have the ability affirmatively and directly to decide whether the

On the face of Article V, unlike each of the other two-thirds approval provisions of the Constitution, it is simply not possible to tell what questions, other than the proposal question itself, Congress is to answer. Nor is it at all clear that the consequences of a negative vote on any subsidiary questions were understood. Finally, then, a majority vote must be accepted for the determination of reasonable timeliness. And, if Congress can determine reasonable timeliness by majority vote as the thirty-eighth ratification comes in, it may also decide by a majority vote to extend the time previously announced.

Our view is bolstered by the few scattered historical precedents which our research and the research of others has unearthed. We have found no evidence that questions dealing with the so-called subsidiary questions have ever been thought by members of Congress to require a two-thirds vote. Thus, when the Fourteenth Amendment ratification questions, which we will discuss more fully in our treatment of the rescission issue, were presented to Congress in 1868 there is no indication that Congress felt itself bound to resolve those questions by a two-thirds vote. 30/ Similarly, there is no evidence that

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(continued) ratifications reflect the "contemporaneous" judgment of the states is made the more critical when considered in light of the other conclusion we think compelled under Article V--that a State once having ratified may not rescind. See text beginning at page 28 infra. The States, in our view, are prohibited directly from announcing their view that conditions no longer warrant passage of an amendment once approved by them. Therefore, unless Congress retains the power to vote "yea" or "nay" on the reasonable timeliness question, a small minority of late-ratifying States coupled with a minority in either House of Congress might force the approval of an amendment no longer deemed appropriate by the majority. We should also add that if this event did occur we would have serious doubt whether the amendment was constitutional.

30/ See text beginning at page 33 infra. In response to Secretary of State Seward's inquiry, Congress decided by concurrent

the resolution introduced to resolve the same questions arising out of the adoption of the Fifteenth Amendment was thought to require two-thirds approval. 31/ See 91 Cong. Globe 3124 (1870). More recently, Congress has taken up consideration of a bill introduced by former Senator Ervin which outlined procedures to govern the State convention method of amending the Constitution. S. 215, 92d Cong., 1st Sess. (1971). The bill, which contained provisions dealing with the time periods in which the

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(continued) resolution that the Fourteenth Amendment had been duly ratified by the States. The resolution, S. Res. 166 passed by the 40th Congress, expressed the position of Congress that the Fourteenth Amendment had in fact been ratified by the requisite three-fourths of the States even though two States, Ohio and New Jersey, had purported to rescind their prior ratifications before three-fourths had ratified. The resolution did not indicate on its face whether a two-thirds vote was required during debate in either House on the resolution. The vote in the House for passage was 127 in favor to 33 against, a majority of about four-to-one. 78 Cong. Globe 4266 (1868). Although the vote was not recorded in the Senate, we do know that the resolution was voted on by the Senate after a motion to discharge the resolution from committee was adopted without objection and that the voice vote was presumably not so close as to persuade any opponents of the resolution to call for a recorded vote. Id., at 4230.

31/ See text beginning at page 36 infra. We hesitate to read too much into the historical evidence surrounding the Fourteenth and Fifteenth Amendments. While it is true that resolutions adopted in both cases contained no designation that a two-thirds majority would be required for approval, and while the recordation that the resolutions had been approved contains no indication that they had been embraced by two-thirds of each House, it does appear that the votes were never close. Indeed, by voice vote or otherwise, the vote in each House was in excess of two-thirds. Nevertheless, we think it not unreasonable to conclude that if members of Congress had recognized a two-thirds requirement there would have been some indication of that fact in the historical record.

States could act under the convention approach, passed the Senate by a wide margin. Again, however, there is no indication that anyone in the Senate considered that the bill would be subject to the two-thirds approval requirement. 32/ Where, as here, the answer to important questions of Constitutional law are not readily apparent from the text of the Constitution, such congressional precedents are entitled to weight.

While, for these reasons, we conclude that no more than a majority vote is required for extension, it might be conceded that the issue is not free from doubt. We recognize that this may be the only instance in which Congress is empowered to take action (apart from purely internal "housekeeping" matters) without either the constraint of a two-thirds vote requirement or the safeguard of a Presidential veto. We also acknowledge that it may be contended that this conclusion would allow a majority of one Congress to set aside actions that required the concurrence of two-thirds of some prior Congress. 33/ Despite

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32/ To our knowledge, the Ervin bill never came to the floor of the House for a vote. The bill also provided for congressional action by majority vote of each House, not subject to the veto power of the President, regarding details concerning the calling of a constitutional convention by the States. See §§6(a) and 11(b)(1) of S. 215.

33/ As we have suggested earlier, see note 22 supra, we doubt whether--either by majority or two-thirds--Congress could so shorten the time as effectively to withdraw the question from the States. Additionally, it is our view that the original time limitation need not, as a constitutional matter, have been set by a two-thirds vote. For the same reasons set forth above, we would conclude that the time period is a "subsidiary" detail which Congress could prescribe by majority vote as an incident to proposing an amendment.

We would also state that we gain little guidance from parsing of the words of Article V itself. Grammarians might differ over whether the two-thirds requirement modifies only the first clause, the first and second, or the entire sentence.

these considerations, however, we think that the controlling Supreme Court precedents, the historical examples, and the basic framework of the Constitution admit ultimately of no other response.

(continued) Given our presumption against reading super-majority requirements broadly, however, we do conclude that the wording of the Article itself does not compel extension of the two-thirds vote to all issues which might conceivably arise under the amending power. Finally, it should be noted that our review of the debates, and other contemporaneous history, surrounding the constitutional convention has not disclosed any substantial evidence of the Framers' thoughts on this question.

IV. The Reasonableness of H.J. Res. 638's Seven-Year Extension

In discussing whether the seven-year extension in H.J. Res. 638 is reasonable in the constitutional sense, we begin by embracing the position of the Dillon Court that the passage of time between proposal and final ratification by the requisite three-fourths of the States could be so great as to generate serious doubts as to whether a proposed amendment should be proclaimed as part of the Constitution. Passing the question whether such doubts could be resolved by the judiciary in an appropriate case, see Coleman v. Miller, supra, the fact remains that the Court's unanimous opinion in Dillon v. Gloss is the only extant judicial authority on this issue.

In Dillon, the Court unequivocally stated that a seven-year period could not be regarded as unreasonable "considering the periods within which prior amendments were ratified." 256 U.S., at 376. At the time Dillon was decided, all 17 amendments previously ratified had been ratified within four years of their proposal. Id., at 372. Since Dillon was decided, the eight amendments ratified by the States have likewise been ratified within four years, the longest period being three years and 11 months (Twenty-second Amendment) and the shortest being four months (the Twenty-sixth Amendment).

As our historical review has disclosed, the seven-year limitation "approved" in Dillon has been given talismanic significance by the Congress, which has, with one exception, placed that limitation on every subsequent amendment that was eventually ratified. The Court's opinion in Dillon obviously abscribes no special significance to the seven-year limitation. The apparent thrust of the opinion is that one factor to be considered is the time period in which other amendments have been ratified. Although the Court does not elaborate on this point, we think it may well have intended to recognize Justice Story's following comment on the ratification process:

> "Time is thus allowed and ample time for deliberation, both in proposing and ratifying amendments.

They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them . . ." 34/

The Court in Coleman took a somewhat different approach to the question of reasonableness. Instead of drawing a comparison between the time taken to ratify other amendments and the time (13 years) since proposal of the Child Labor Amendment, the Court suggested that the constitutional viability of an amendment might well turn on "an appraisal of a great variety of relevant conditions, political, social and economic . . . ." 307 U.S., at 453.

In our view, both of these factors should be taken into account by Congress in its consideration of the constitutionality of H.J. Res. 638. It should be obvious that achieving a balance between ensuring that any amendment reflects the "felt needs of today," and ensuring that adequate time is available to the States for thorough deliberation of the complex issues raised by the ERA, is finally a matter for the judgment of Congress. Should this Congress determine by majority vote of each House that the conditions which brought about the proposal of the ERA by the 92d Congress continue to exist and that an extension of seven years is not substantially out of line with the historical experience regarding prior ratifications, H.J. Res. 638 may, in our view, constitutionally be adopted assuming that the seven-year limitation placed on ratification by the 92d Congress is not to be viewed as binding. For reasons stated supra, we do not think that that seven-year limitation must be viewed as binding.

IV. The Possible Effect of H.J. Res. 638 on the Power of States to Rescind Prior Ratifications

A separate question raised by H.J. Res. 638 is whether

34/ II Story, Commentaries on the Constitution 600 (5th ed.) as quoted in brief for the United States as amicus curiae in Coleman v. Miller, supra, at 27-28.

an extension of the time period available for ratification by the States would empower them to rescind prior ratifications during the extension period. This question could conceivably arise in one of two situations. First, under the joint resolution as presently drafted, the question would be whether an extension without more would somehow trigger a right of rescission derived from Art. V itself. Second, were H.J. Res. 638 amended specifically to confer a right of rescission on the States, would it be constitutional.

We assume for the purposes of addressing these questions that if a State having ratified an amendment could constitutionally rescind that ratification during the initial seven-year period, that power would continue unabated through any extension period that might be adopted. Thus, the rescission question raised by H.J. Res. 638 might conveniently be cast as whether, assuming States may not rescind during the initial seven-year period, may they nevertheless be constitutionally empowered to do so (1) by virtue of Art. V or (2) congressional action taken pursuant to Art. V?

Because we think that the answer to these questions is dependent to a great extent on the resolution of whether States may rescind during the initial seven-year period, we turn first to that question.

The text of Art. V itself provides no conclusive answer to whether States may rescind their ratification of a proposed amendment prior to its being ratified by three-fourths of the States. 35/ It will be noted that Art. V does speak only in positive terms of ratification of a proposed amendment, giving the States the power to ratify a proposed amendment but not the power to reject. Thus, as a textual matter, it is arguable that only affirmative acts taken in the proposal or ratification process have any constitutional significance and that such acts

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35/ We do not think anyone could seriously doubt that a State's rescission of its ratification subsequent to adoption of an amendment would be a meaningless act.

are to be regarded as final. See Burdick, Law of the American Constitution, supra, at 43.

The sole expression we have been able to find regarding the probable intent of the Framers on this question is that of James Madison. During the ratification debates in the State of New York, it had been suggested that New York ratify the Constitution on the condition that certain amendments proposed by the New York Convention would be adopted. 36/ Alexander Hamilton, who objected to such a conditional ratification, sought Madison's views. Madison's reply was made in a letter, quoted in full in the margin, 37/ in which he stated that

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36/ V Papers of Alexander Hamilton 147, 177 (Syrett ed. 1961).

37/ The full text of Madison's letter is as follows:

"From James Madison[1]

N. York Sunday Evening
[July 20, 1788][2]

"My dear Sir

"Yours of yesterday is this instant come to hand & I have but a few minutes to answer it. I am sorry that your situation obliges you to listen to propositions of the nature you describe. My opinion is that a reservation of a right to withdraw if amendments be not decided on under the form of the Constitution within a certain time, is a conditional ratification, that it does not make N. York a member of the New Union, and consequently that[3] she could not be received on that plan. Compacts must be reciprocal, this principle would not in such a case be preserved. 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. What the new Congress by virtue of the power to admit new States, may be able disposed to do in such a case, I do not enquire as I suppose that is not the material point at present. I have not a moment to add more. Know my fervent wishes for your success &

> 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.

Although this statement was made with regard to Art. VII of the Constitution, which required ratification by nine of the States to "establish" the Constitution among those States, we see nothing to suggest that Madison's reasoning should not be applied with equal force to proposed constitutional amendments. Perhaps more importantly, an examination of the history of ratification of the Constitution and amendments thereto demonstrates uniform application and general acceptance of this position taken by Madison--ratification must be unconditional and irrevocable.

A. The Historical Acceptance of Madison's Principle

The New York Convention, after rejecting a proposal to ratify the Constitution conditionally, ratified the Constitution, substituting the words "fullest confidence" for the words "on condition." II J. Elliot's Debates 411-13 (1854). 38/

(continued) happiness. Js. Madison

> This idea of reserving right to withdraw was started at Richmd & considered as a conditional ratification which was itself considered as worse than a rejection: 1. In JCHW, I, 465, this letter is dated 'Sunday Evening.' After serving in the Virginia Ratifying Convention, Madison had resumed his seat in the Continental Congress. 2. This letter was written on the day after H wrote to Madison, July 19, 1788. 3. In MS, 'that that.'"

38/ The Convention also defeated a motion reserving to the State of New York a right to withdraw from the Union after a certain number of years, unless the amendments proposed previously were submitted to a general convention. II J. Elliot's Debates 412 (1854).

During this early period it was also recognized that a State, after having refused to ratify the Constitution, could thereafter ratify it. Thus, North Carolina's ratification of the Constitution in 1789 was taken as proper even though it had "rejected" the Constitution in 1788. See Warren, The Making of the Constitution 820 (1928). This principle was shortly thereafter extended to the Art. V amendment process when Pennsylvania ratified a proposed (but never adopted) amendment in 1791 after having refused to ratify it in 1790. 39/ The available records of the Second Congress indicate that there was no comment whatsoever regarding Pennsylvania's actions when notice of it was transmitted to the Senate by President Washington. See 3 Annals of Congress 15 (1791).

Thus, from an early date in our constitutional history it appears to have been accepted that the act of ratification, once taken by a State, was final and that States could ratify amendments after having "rejected" them.

These questions were not raised again until the Civil War Amendments were going through the ratification process. The first of these, the Thirteenth Amendment, had been "rejected" by the Kentucky legislature in 1865 by a resolution then presented to the Governor by the legislature. Although he took the position that the resolution did not require his assent, 40/ he commented on the resolution as follows:

(continued) It is not apparent whether Madison's letter was brought to the attention of the N.Y. Convention. Madison's letter, supra, however, indicates that the mails between New York, where Madison served on the Continental Congress, and Poughkeepsie, the seat of the New York Convention, took only a day. Hence, it is likely that Madison's letter of July 20 was utilized during the crucial debates in the New York Convention on July 23, 1788.

39/ See Ames, Amendments to the Constitution of the United States, reprinted in H. Doc. 353, 54th Cong., 2d Sess. (pt. 2) 300 n. 4 and 320 (1891).

40/ Jameson, note 22 supra, at 630.

> Rejection by the present Legislative Assembly only remits the question to the people and the succeeding legislature. Rejection no more precludes future ratification than refusal to adopt any other measure would preclude the action of your successors. When ratified by the legislatures of three-fourths of the several States, the question will be finally withdrawn, and not before. Until ratified it will remain an open question for the ratification of the legislatures of the several States. When ratified by the legislature of a State, it will be final as to such State; and, when ratified by the legislatures of three-fourths of the several states, will be final as to all. Nothing but ratification forecloses the right of action. When ratified all power is expended. Until ratified the right to ratify remains. 41/

Both the rescission and subsequent ratification questions were presented together in connection with the ratification of the Fourteenth Amendment. By the middle of July, 1868, twenty-nine States had ratified that amendment. At that time there were thirty-seven States, twenty-eight thus constituting the majority of three-quarters required by the Constitution. However, two of those twenty-nine States, North and South Carolina, previously failed to ratify it and then reversed themselves; 42/ in two others, Ohio and New Jersey, the legislatures had passed resolutions withdrawing their prior ratification of the Amendment. On July 8, 1868, the Senate adopted a resolution requesting the Secretary of State to transmit to the Senate a list of the States whose legislatures had adopted the Amendment. 81 Cong.

41/ Id., quoting Acts General Assembly, Ky., 1865, p. 157.

42/ This figure is based on the recitals of the Proclamation of July 28, 1968, 15 Stat. 708. According to the Brief of the United States as amicus curiae in Coleman v. Miller, supra at 14, the Amendment had been rejected prior to ratification by seven States: Alambama, Arkansas, Florida, Georgia, Louisiana, North Carolina and South Carolina, which, with the exception of Georgia, had ratified it prior to July 20, 1868.

Globe 3857 (1868). On July 15, 1868, the President transmitted to the Senate the report of the Secretary of State in compliance with that resolution. The report drew attention to the resolutions of the legislatures of New Jersey and Ohio purporting to withdraw their ratifications. Id., at 4070. On July 18, 1868, Senator Sherman introduced a Joint Resolution declaring that the Fourteenth Amendment had been ratified. Id., at 4197.

Two days later, July 20, 1868, Secretary of State Seward published a document in which he recited by name the 29 States which had ratified the Amendment, including those which had sought to revoke their ratification and those which originally had rejected it. 15 Stat. 706. With respect to New Jersey and Ohio, he observed:

> "And whereas it further appears from official documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or of either of them, to the aforesaid amendment . . ."

He then certified that--

> "if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States."

He thus indicated that the effectiveness of the amendment was

contingent on the power of the State legislatures to withdraw their consent from the ratification.

The following day, July 21, 1868, Congress adopted the Sherman resolution, supra, as a concurrent resolution not presented to the President. 43/ 81 Cong. Globe 4266, 4295-96 (1868). That resolution stated that whereas the Fourteenth Amendment had been ratified by the legislatures of 29 States, counting among them North Carolina, South Carolina, New Jersey and Ohio, the Amendment was "hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State."

On the same day, Georgia, which previously had rejected the Amendment, ratified it. 15 Stat. 708. Rumors, the authenticity of which were questioned, of that ratification reached the House of Representatives during its deliberation on the Sherman resolution. In view of the questionable nature of that information, the House did not amend the resolution so as to include Georgia among the ratifying States. 81 Cong. Globe 4296 (1818).

On July 28, 1868, Secretary Seward, in compliance with the Sherman resolution, unconditionally certified that the Fourteenth Amendment had become valid to all intents and purposes as a part of the Constitution of the United States. 15 Stat. 708. He listed New Jersey, Ohio, Georgia and the two Carolinas among the ratifying States.

As the result of the ratification of the Amendment by Georgia, it had been approved by twenty-eight, i.e., the

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43/ The submission by Congress of a constitutional amendment to the States need not be presented to the President (Hollingsworth v. Virginia, supra. It therefore would appear that a congressional determination as to whether an amendment has been adopted by the requisite number of States can be passed as a concurrent resolution which is not presented to the President. See also note 24 supra.

requisite number of States, even if New Jersey and Ohio were disregarded. This consideration, however, did not render the congressional determination academic. First, the congressional decision must be read in the light of the situation which existed when it was made. At that time, Congress had not received official notice of Georgia's ratification of the amendment. Therefore, the ratifications of New Jersey and Ohio were necessary to carry it. Secondly, it should also be noted that the adoption of the Amendment required not only the inclusion of the States which had adopted the amendment and then sought to repudiate their ratification (New Jersey and Ohio) but also that of the States which first had rejected the Amendment and then ratified it (North and South Carolina, and subsequently Georgia). The Fourteenth Amendment thus could not have been adopted without the ratifications of States which originally had rejected it.

The adoption of the Fifteenth Amendment involved problems analogous to those which arose on the occasion of the adoption of the Fourteenth Amendment. In this case, however, the Amendment was published and certified by the Secretary of State without congressional guidance.

By the middle of February 1870, the Fifteenth Amendment had been ratified by 30 States, one more than the required number. Two of them, however, Ohio and Georgia, had originally rejected it. Mathews, Legislative and Judicial History of the Fifteenth Amendment 65-67 & n. 45 (1909). Also, New York rescinded its ratification in January 1870. The amendment therefore could be considered adopted only if the States which first had rejected it were counted or if the rescission by New York were considered to be without effect.

Congress was aware of these problems but was unable to take any action on them. 44/ Thus, the New York resolutions rescinding the ratification of the Amendment were referred by the Senate to the Committee on the Revision of the Laws on January 11, 1870. 88 Cong. Globe 377 (1870). The Committee

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44/ See Note, 49 Ind. L. J. 147, 151 (1973).

reported back on February 22, 1870, with the recommendation that the New York resolutions be indefinitely postponed. A spectacular debate ensued between Senator Conkling of New York and Senator Davis of Kentucky, 89 Cong. Globe 1477-81 (1870), but it does not appear that the Senate took any action on the report. On February 21, 1870, a resolution was introduced in the Senate declaring that the Fifteenth Amendment had become valid. The resolution was referred to a Committee, id., at 1444. The Committee submitted its report on April 18, 90 Cong. Globe 2738 (1870) and the resolution was passed over on the motion of its sponsor, 91 Cong. Globe 3124 (1870). On March 3, 1870, the Senate adopted a resolution requesting the Secretary of State to advise it of the States which had ratified the Amendment, 89 Cong. Globe 1653 (1870). The response from the Secretary is unknown.

Finally, on March 30, 1870, President Grant sent Congress a message advising it of the promulgation of the Fifteenth Amendment by the Secretary of State. 90 Cong. Globe 2298 (1870). The certificate of the Secretary of State, 16 Stat. 1131, listed twenty-nine States, including Ohio and New York but excluding Georgia, as having ratified the Amendment, and continued:

> "And, further, that the States whose legislatures have so ratified the said proposed amendment constitute three-fourths of the whole number of States in the United States.
>
> "And further, that it appears from an official document on file in this Department that the legislature of the State of New York has since passed resolutions claiming to withdraw the said ratification of the said amendment which had been made by the legislature of that State, and of which official notice had been filed in this Department.
>
> "And, further, that it appears from an official document on file in this Department that the legislature of Georgia has by resolution ratified the said proposed amendment . . . . "

The statement "that the States whose legislatures have so ratified the said proposed amendment constitute three-fourths of the whole number of States" tends to indicate that the Secretary of State did not recognize the withdrawal of New York to have been effective. The separate enumeration of Georgia seems to have served the same purpose, because the ratification of New York would not have been required if Georgia had been included in the list of ratifying States. The separate listing of Georgia could not have been due to last minute ratification by that State. The proclamation was dated March 30, 1870. Georgia had ratified the Amendment on February 2, 1870, followed by Iowa (February 3, 1870), Nebraska (February 17, 1870) and Texas (February 18, 1870). See U.S.C.A. Constitution, Amendment XV, Historical Note. The last three States were included in the first list of ratifying States.

The House of Representatives signified its approval of the promulgation of the Fifteenth (and Fourteenth) Amendment by adopting on July 11, 1870, a resolution to the effect that the amendment had become valid as a part of the Constitution. 93 Cong. Globe 5441 (1870). 45/ No similar action was taken in the Senate, except, of course, for its later adoption of legislation implementing the Amendment.

The only pertinent judicial announcement of that period is a dictum in White v. Hart, 13 Wall. 646, 649 (1871) to the effect that the validity of the adoption of the Fourteenth and Fifteenth Amendments by Georgia was a political question not subject to judicial scrutiny. The Court said:

> "Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action

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45/ On April 11, 1870, the House adopted a resolution authorizing the celebration of the adoption of the Amendment in the Hall of the House of Representatives. 90 Cong. Globe 2586-2587 (1870).

of the political department of the government, and is concluded by it (citing Luther v. Borden, 7 Howard, 43, 47, 57; Rose v. Himely, 4 Cranch 272; Gelston v. Hoyt, 3 Wheaton, 324 Id. 634; Williams v. The Suffolk Ins. Co., 13 Peters, 420)."

The issue whether a State can change the position by its legislature with respect to a constitutional amendment also arose in various degrees in connection with the adoption of the Sixteenth, Eighteenth, and Nineteenth Amendments. In none of these instances did the Secretary of State refer the matter to Congress.

Arkansas, which originally had rejected the Sixteenth Amendment, subsequently ratified it. The certificate of the Secretary of State lists Arkansas without comment among the ratifying States. 37 Stat. (Pt. II) 1785. It is, however, not apparent whether the approval of that State was required to obtain the necessary number of ratifications. S. Doc. 314, 76th Cong., 3d Sess. 25 (1940).

The issue whether ratification by the State legislature was final arose indirectly in connection with an attempt in Maine to subject the ratification of the Eighteenth Amendment by the State legislature to the State's initiative and referendum procedures. The Maine Supreme Court held that the amendment could not be subjected to a referendum. Opinion of the Justices, 118 Me. 544 (1919). One of the reasons for the decision was the consideration that, under the precedents established in connection with the adoption of the Fourteenth and Fifteenth Amendments, the legislation ratifying an amendment was final and could not be rescinded. Id., at 548-49. 46/

The Nineteenth Amendment was ratified by the State of Tennessee on August 18, 1920. On August 26, 1920, the Secretary of State issued his certificate declaring that the amendment had been adopted by the required number of States, including Tennessee, 41 Stat. (Pt. II) 1823. Five days later,

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46/ In Hawke v. Smith, 253 U.S. 221 (1920), the Supreme Court reached the same result but for other reasons.

the Tennessee legislature sought to rescind the resolution adopting the amendment on the ground that it had been approved in the absence of a quorum and in violation of constitutional procedural safeguards. The Secretary of State disregarded the resolution of rescission. See 65 Cong. Rec. 4491-92 (1924) (Remarks of Sen. Wadsworth); Clements v. Roberts, 144 Tenn. 129 (1920); Leser v. Board of Registry, 139 Md. 46, 71-73 (1921), aff'd sub. nom. Leser v. Garnett, 258 U.S. 130, 137 (1922).

Thereafter, Senator Wadsworth of New York and Congressman Garrett of Tennessee introduced an amendment to Article V of the Constitution. The part of that proposal pertinent here would have provided that

> "until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote." 47/

The proposal thus would have overturned by constitutional amendment the rule postulated by Madison and established in connection with the Civil War Amendments by enabling a State to rescind its ratification of an amendment until the time when the amendment becomes effective; and by preventing a State which had rejected an amendment from changing its position once more than a quarter of the States had rejected the amendment.

Both sponsors of the proposal conceded that these provisions were contrary to existing law; indeed both conceded that their proposals were designed to remedy what they considered to be a defect in the Constitution. Thus Senator Wadsworth stated, 65 Cong. Rec. 4492 (1924):

> "It is apparent that under Article V, as now 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 can not change, even though it does so before a sufficient

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47/ 65 Cong. Rec. 4493 (1924. See also id., at 2152-53.

number of States have ratified so as to insert the amendment in the Constitution itself. Tennessee tried to change. It cannot be done under Article V.

"Mr. WALSH of Massachusetts. Mr. President, having once rejected, can it change?"

"Mr. WADSWORTH. Yes; the legislature of a State may change from the negative to the affirmative at any time."

In the House of Representatives Congressman Garrett explained this part of the proposed amendment, 66 Cong. Rec. at 2159:

"The third proposition or change is that which gives a State that has ratified a chance to reconsider, provided it be done before its action in conjunction with that of others has become law.

"A State which has said 'no' may now change and say 'yes.' What can be the injustice in permitting a corollary whereby it may, within reasonable time limits, change from 'yes' to 'no'?

* * * * *

"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.

* * * * *

"I believe and undertake to maintain that there is no more reason in governmental ethics why an affirmative act should not have the right of reconsideration than a negative prior to the time when the affirmative act actually makes law, and hence the third proposed change."

The Wadsworth-Garrett proposal apparently never got to a vote in either House.

The question whether a State can change a position taken with respect to a constitutional amendment arose again in connection with the Child Labor Amendment. That amendment had been submitted to the States in 1924. In the following year it appeared that more than one-fourth of the States had affirmatively rejected it. Congressman Garrett thereupon introduced a resolution which would have required the Secretary of State to report to Congress the action reported to him by the States regarding the amendment. 67 Cong. Rec. 576 (1925). Supporters of the amendment opposed the resolution because they feared that it was designed to lay the foundation for the claim that the amendment had been irretrievably defeated. Id., at 1505-06 (1926). Congressman Garrett stated, id., at 1506, that he had

> "no doubt that it is within the power of the legislature of any State that has acted on the amendment adversely to reconsider its action and act favorably, if it chooses to do so within the next year or two, for I imagine the Supreme Court would hold that was within a reasonable time." 48/

The resolution passed, id., at 1507, and the Secretary of State submitted his report on February 9, 1926, which indicated that the amendment had been ratified in 4 States, affirmatively rejected in 13, failed ratification in both Houses in 3, and that some adverse action had been taken in some form by one House in 6 States. Id., at 3801. No action was taken on that report.

The tide turned, however, in the 1930's, when an ever-increasing number of States, including many who had previously rejected the amendment, began to ratify it. 49/ The question

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48/ This statement was based in part on Dillon v. Gloss, 256 U.S. 368 (1921).

49/ See Coleman v. Miller, 307 U.S., at 473 (Chronology of

whether a State could ratify the amendment after its legislature had once rejected it was subsequently presented in Coleman v. Miller, 307 U.S. 433 (1939), and its companion case, Chandler v. Wise, 307 U.S. 474 (1939).

In 1925, the Kansas Legislature rejected the Child Labor Amendment and sent a certified copy of that action to the United States Secretary of State. In 1937, the Kansas Legislature adopted a resolution ratifying the amendment by a vote of 21-20, with the Lieutenant Governor casting the decisive vote. Several outvoted Kansas legislators thereupon instituted mandamus proceedings against the Secretary of the State Senate designed to prevent the ratification resolution from becoming effective. The complaint was based, inter alia, on the arguments (a) that the State of Kansas had once rejected the amendment, and (b) that the amendment, having been rejected by both Houses of the legislatures of 26 States and having been ratified only in five States between 1924 and 1927, had failed of ratification within a reasonable period and thus no longer was viable. Coleman v. Miller, 307 U.S., at 435-36. 50/ The Supreme Court of Kansas denied the writ. Coleman v. Miller, 146 Kan. 390 (1937). That court, relying on the precedent of the Civil War Amendments, held:

> "It is generally agreed by lawyers, statesmen and publicists who have debated this question that a state legislature which has rejected an amendment proposed by Congress may later reconsider its action and give its approval, but that a ratification once given cannot be withdrawn. (At 400).

(continued) Child Labor Amendment, footnote to dissenting opinion of Butler, J.), and the amicus curiae brief filed by the United States in Coleman v. Miller, note 34 supra, Appendices A and B.

50/ The Child Labor Amendment, as noted supra, had no provision requiring its adoption within a specific period of time. This proposed amendment was never actually ratified by three-fourths of the States.

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"It would seem, then, that a state legislature which has rejected an amendment proposed by congress may later reconsider its action and give its approval. (Willoughby on the Constitution, sec. 329a.).

"In a release from the department of state under date of April 20, 1935, attached as an exhibit to plaintiff's petition in this case, giving the status of the child-labor amendment, it appears that in five states, Indiana, Minnesota, New Hampshire, Pennsylvania and Utah, after the proposed amendment had been rejected, each of the states later adopted a resolution of ratification. When these states rejected the amendment, was their power with reference to the proposed amendment exhausted? If so, the subsequent ratification would be void. Is it to be seriously argued that the secretary of state could not count these five states in making up the total number of states necessary to adopt the amendment?

"Thus it appears to be an historical fact that many states have rejected proposed amendments, and have later ratified them. (At 401).

"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 5 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.'

"It is clear, then, both on principle and authority, that a proposed amendment once rejected by the legislature of a state may by later action of the same legislature be ratified; and that when a proposed amendment has once been ratified the

power to act on the proposed amendment ceases to exist." (At 403)(emphasis added).

The Supreme Court of the United States affirmed the decision of the Supreme Court of Kansas in an unusually complicated ruling. See note 4, supra.

The opinion of the Court, written by Chief Justice Hughes and on this issue actually joined by Justices Stone and Reed, and presumably joined by Justices Black, Roberts, Frankfurter and Douglas, 51/ recited the historic precedent established on the occasion of the adoption of the Fourteenth and Fifteenth Amendments and observed that this "decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted." 307 U.S., at 450.

The question whether a State has the power to change its position with regard to the adoption of a constitutional amendment does not seem to have become a serious issue in connection with any of the later amendments submitted to the States.

The problem, however, did arise indirectly in connection with legislation designed to establish procedures for calling constitutional conventions. In that context the Senate committee reports conceded that under existing law a State could not rescind its ratification of a constitutional amendment but took the position that the law should be "changed." 52/ The bills

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51/ On this particular point, we think that the opinion of Chief Justice Hughes must rightly be thought of as an opinion of the Court as it is described at its outset. We say this because Justice Black and those joining his concurring opinion clearly reached the merits of the issues raised, 307 U.S., at 456 (under "compulsion" of the court's holding on the standing question) and also indicated that his disagreement with Hughes' opinion was limited to aspects of Hughes' opinion not relevant to the present discussion, id., at 458.

52/ "The question of whether a State may rescind an application

therefore provided in effect that a State could rescind its ratification of a proposed constitutional amendment until it had been validly adopted. Both bills passed the Senate but died in the House of Representatives. 53/

(continued) once made has not been decided by any precedent, nor is there any authority on the question. It is one for Congress to answer, Congress previously has taken the position that having once ratified an amendment, a State may not rescind.

The committee is of the view that the former ratification rule should not control this question and, further, should be changed with respect to ratifications. Since a two-thirds concensus among the States in a given period of time is necessary to call a convention, obviously the fact that a State has changed its mind is pertinent. An application is not a final action. A State is always free, of course, to reject a proposed amendment. Of course, once the constitutional requirement of petitions from two-thirds of the States has been met and the amendment machinery is set in motion, these considerations no longer hold, and rescission is no longer possible. On the basis of the same reasoning, a State should be permitted to retract its ratification, or to ratify a proposed amendment it previously rejected. Of course, once the amendment is a part of the Constitution, this power does not exist." S. Rep. No. 336, 92d Cong. 1st Sess. 14 (1971); S. Rep. No. 293, 93d Cong., 1st Sess. 14 (1973).

53/ The latest congressional recognition of the rule that a state cannot rescind its ratification of a constitutional amendment of which we are aware is Senator Bayh's statement on the floor of the Senate, delivered on March 6, 1974:

> "Mr. BAYH. Mr. President, one of the questions which has aroused considerable interest with respect to the proposed 27th amendment to the Constitution has been whether a State once it has ratified the amendment may later change its mind and rescind its ratification. The issue was first raised by the State of Nebraska which has now rescinded its earlier ratification. Several

B. The Application of Madison's Principle

When the Supreme Court held in Dillon v. Gloss, supra, that Congress has implied power under Article V to set a time period for ratification of a proposed amendment, it was writing on what was virtually tabula rasa. Likewise, in approaching the question whether Congress may extend a limitation once set, we think that historical understanding, while informative, cannot be thought of as conclusive.

With regard to whether a State might rescind during an "extension" period there is certainly a temptation to assume that the question may be approached in the same manner because, no extension ever having been contemplated, it follows that the question of rescission during such a period could not have been contemplated. Were we to take such an approach, we could perhaps be easily persuaded by the argument that "[t]he extension of time for ratification but not for rescission would be . . . grotesque . . . . " 54/

That argument appears to be that failure to provide for rescission would permit an amendment to be ratified without the "contemporaneous consensus" required by the Constitution (presumably required by Article V as interpreted in Dillon v. Gloss, supra). This lack of a "contemporaneous consensus" would, under this view, perhaps be evidenced by several or

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(continued)

other states, in addition, have similar rescission resolutions pending before their State legislatures.

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

54/ Statement of Charles L. Black, Jr., Sterling Professor of Law, Yale University, on Extension of Time for Action on Amendments for the States, October 12, 1977.

many attempted rescissions by States that would give a reasonable man reason to think that no consensus existed.

That analysis confuses two issues that should, we think, be sharply differentiated in the consideration of H.J. Res. 638. First is the issue whether the period of 14 years proposed in H.J. Res. 638 is "reasonable" in view of the interpretation placed on Art. V in Dillon v. Gloss and with which we are in agreement. If 14 years or possibly a lesser period is, in the judgment of Congress, "reasonable," then the question of the power of States to rescind in the last seven years of the 14-year period is irrelevant. The second issue is, of course, whether the States may rescind a prior ratification during the extension period because the will of its people has in fact changed since initial ratification. This argument would appear to reduce to the proposition that a seven-year extension can be viewed as "reasonable" only if no substantial number of States actually attempt to rescind their ratifications during the extension period. Under this view, the power to rescind functions as a sort of escape valve permitting the States themselves to determine what is or what is not a "reasonable" period of time by acts of rescission.

We are unable to agree with that analysis. In our view, the lesson of history, including prior congressional interpretation of Art. V with regard to the Fourteenth Amendment, is that States may not rescind a ratification. And we think Dillon v. Gloss and Coleman v. Miller are equally dispositive in rejecting any possibility that States, rather than Congress, are to have the final say concerning whether an amendment has been ratified within a "reasonable" time.

In our view, the most persuasive argument that Art. V permits rescission during an extension period is predicated on a notion that State legislatures may have relied on the seven-year period established in H.J. Res. 208 by assuming that they would be held to their ratification for a seven-year period and no longer. We have examined the certifications of ratification submitted to GSA by the 35 States having ratified the ERA and are unable to conclude that such reliance is indicated, at least on the face of those documents. More

importantly, we think that such a concept of "reliance" is essentially no different, in kind, from the proposal before the New York Convention to ratify the Constitution on a conditional basis, an act that James Madison viewed as invalid. We say "no different in kind" because, from a purely analytical point of view, the only difference would be that Congress' act of setting a seven-year limit in H.J. Res. 208 or in H.J. Res. 638 would have to be viewed as equivalent to Congress' extending to the States a right to ratify an amendment conditionally. We think that the whole thrust of history is that Art. V, as interpreted, does not permit States to rescind or otherwise place conditions upon their ratifications. If we are correct in this view, we think it follows that such a power can be granted only by an amendment to Art. V itself.

V. The Political Question Doctrine

Although we think that the constitutional questions raised by H.J. Res. 638 should be addressed on their merits without reference to the likelihood that the courts will finally resolve any or all of them, we recognize that the difficulty of those questions coupled with the uncertainty we (and presumably others) entertain with regard to our resolution of them can give rise to congressional interest in this question.

Prior to the decision in Coleman v. Miller, the Court consistently entertained and resolved questions arising out of the amendment and ratification process. 55/ In Coleman itself, we think that a majority 56/ of the Court squarely held that the effect of prior rejection on ratification was a political question not justiciable in the courts and that the same majority took the same view of the effect of rescission on final ratification by three-fourths of the States. We see no

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55/ See Hollingsworth v. Virginia, supra; Dillon v. Gloss, supra, Hawke v. Smith, supra; The National Prohibition Cases, supra; Leser v. Garnett, supra; United States v. Sprague, supra.

56/ See note 51, supra.

reason why the Court would change its prior position on the political nature of these questions unless perhaps if this aspect of Coleman were premised on the understanding that the answers to these questions had been firmly settled by history and were not subject to reversal by a future Congress.

There was, however, no clear majority in Coleman, as pointed out by Justice Black in his concurring opinion, for the position that courts could never review the question of reasonableness. Thus, we are not at all certain that the question of the reasonableness of the seven-year extension might not be subjected to judicial review in an appropriate case, particularly were ratification by the requisite three-fourths of the States to be obtained toward the end of the 14-year period.

We think that decisions of the Supreme Court subsequent to Coleman, 57/ as well as the cases cited in note 55, supra, indicate that the questions of the power of Congress to extend a ratification, the vote by which such an extension must be adopted, and perhaps whether Congress might confer on the States a right to rescind 58/ are more likely to be viewed as justiciable controversies in appropriate cases. We take this view because these questions do not appear to present situations in which there is either a textually demonstrable commitment

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57/ E.g., Baker v. Carr, 369 U.S. 186 (1962); Powell v. McCormack, 395 U.S. 486 (1969).

58/ Even assuming that the question of the effect of a rescission is non-justiciable under Coleman, as we do, it is possible that the Court would take a different approach were H.J. Res. 638 to be amended to provide explicitly for such a right to rescind. This is so because the power of Congress to grant such a right to the States by statute would perhaps be placed on a different footing.

of their resolution to the Congress or there are no judicially discoverable standards by which to resolve the questions presented.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel