EXTENSION OF THE SEVEN YEAR PERIOD FOR RATIFICATION
OF THE PROPOSED EQUAL RIGHTS AMENDMENT

Introduction

The issues addressed in this memorandum are whether the Congress of the United States can extend the time period within which states may ratify the proposed Twenty-Seventh Amendment to the Constitution and, if so, in what manner such an extension can be achieved. It is our conclusion that Congress has absolute and unreviewable authority to extend the ratification period and that this can be achieved by means of a bill, a joint resolution, or a concurrent resolution approved by a simple majority of each House.

I. Congress Has Absolute And Unreviewable Authority To Prescribe Or Determine The Time Within Which States May Effectively Ratify A Proposed Constitutional Amendment

In 1972, the Congress of the United States, by a vote of 354 to 24 [1] in the House of Representatives and 84 to 8 [2] in the Senate determined the necessity of and submitted to the states for ratification a proposed Amendment to the Constitution of the United States. The Joint Resolution [3] which proposed the Amendment states as follows:

> 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 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

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1/ 117 Cong. Rec. 35815, October 12, 1971.

2/ 118 Cong. Rec. 9598, March 22, 1972

3/ H.J. Res. 208 (92d Cong., 2d Sess., 1972); 86 Stat. 1531.

three-fourths of the several states within seven years from the date of its submission by the Congress:

Article -

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.

This amendment, hereinafter referred to as the "Equal Rights Amendment", would, when ratified, become the Twenty-Seventh Amendment to the United States Constitution.

Article V of the Constitution sets forth the means available for amendment of the United States Constitution. It provides as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions of three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no state, Without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V sets forth no specific time limit within which ratification by three-fourths of the several states must take place. This

lack of specific guidance has resulted in litigation only twice. Dillon v. Gloss, 256 U.S. 368 (1921); Coleman v. Miller, 307 U.S. 433 (1939). In those cases, the United States Supreme Court ruled that Congress had sole and unreviewable authority to prescribe in advance, or in the absence of such prescription, to determine the period within which the states may effectively ratify a proposed amendment as well as to determine whether a state's ratification was effective even though its legislature may have previously rejected ratification or subsequently voted to withdraw the ratification.

In Dillon v. Gloss, 256 U.S. 368 (1921), Dillon was arrested for transporting liquor in violation of the National Prohibition Act (41 Stat. 305, 308). He filed an appeal from the denial of a writ of habeas corpus, claiming that the Eighteenth Amendment was invalid because it contained a seven year time limit within which the states had to ratify that amendment. Therefore, he argued, the National Prohibition Act (which was based upon the Eighteenth Amendment) was invalid and his incarceration was unlawful.

In rejecting this argument, the Supreme Court held that, although Article V of the Constitution did not provide a specific time period for ratification, ratification could properly take place within a "reasonable" period after the proposal of the Amendment to the states by the Congress. The Court further said:

> Of the power of Congress, keeping within reasonable limits, to fix a 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.

Dillion v. Gloss, 256 U.S. At 373-376. The Court concluded that the placing of a seven year limitation upon the period of ratification was a proper exercise of Congressional authority.

In Coleman v. Miller, 307 U.S. 433 (1939), twenty-one members of the Kansas legislature sought a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution stating that the Kansas Senate had ratified the proposed Child Labor Amendment. The ratification was assailed on three grounds. First, that when the Kansas Senate, in 1937, voted to a tie on ratification, the Lieutenant Governor's vote in favor of ratification to break the tie was unlawful because he was not part of the "Legislature" of Kansas. Second, that since the Kansas legislature, in 1925, had rejected the proposed amendment, as had 26 other states, the amendment could not be ratified by subsequent votes of ratification. Third, that the amendment had lost its vitality because more than a reasonable period of time had expired since the amendment was first proposed in 1924.

The Supreme Court was equally divided and therefore expressed no opinion on whether the issue of the Lieutenant Governor's right to vote for ratification was proper or whether it presented a justiciable controversy, or a question which is political in its nature and hence not "justiciable". 307 U.S. at 447. The opinion of the Court, written by Chief Justice Hughes, ruled that questions concerning the efficacy of ratification in light of a previous rejection, and the vitality of a ratification which occurs substantially after the proposal of an amendment are political questions to be determined by Congress and not the Courts.

307 U.S. at 452, 457. Four other Justices voted to dismiss the writ on the ground that whole amending process "is 'political' in its entirety, from submission, until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." 307 U.S. at 459.

Chief Justice Hughes' opinion, relied upon Dillon v. Gloss, 256 U.S. 368 (1919), stating that Dillon stood for the proposition that Congress had the power to fix a reasonable time for ratification. 302 U.S. at 452. From this he reasoned:

> But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratification. That question was not involved in Dillon v. Gloss, supra., and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

307 U.S. 452-453. He emphasized that because there are no judicially manageable standards on which to determine the period during which ratifications by the states are effective, such question is non-justiciable. The concurring opinion emphasized that the courts have no authority to guide, control or interfere in any part of the amending process because the Constitution textually commits that process solely to the Congress. 4/

4/ It should be noted that Chief Justice Hughes did not say that the Courts have authority to determine what constitutes a reasonable period. His opinion was merely a reaffirmation of Dillon - that a reasonable limitation on ratification was required by the Constitution - and that Congress has the responsibility to decide what is a reasonable period since the standards which must be employed in making such a determination are political rather than judicial. 307 U.S. at 453-454. The concurring Justics (Black, Roberts, Frankfurter and Douglas) urged that because the Constitution (Continued)

These two concepts, a textually demonstrable constitutional commitment of the issue to a coordinate political department and a lack of judicially discoverable and manageable standards for resolving the issue, were subsequently adopted by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), as two of six criteria which must be considered in determining whether questions are political and, as such, non-reviewable by the Courts. 5/ In Baker, the Court, citing Coleman v. Miller, stated (at 369 U.S. 210):

> In determining whether a question falls within [the political question] category, the appropriateness under our system of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. Coleman v. Miller, 307 U.S. 433, 454.

4/ (Continued) grants Congress sole control over the amending process: "any judicial expression [i.e. Dillon and Judge Hughes' opinion] more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to Congress in the nature of an advisory opinion, given wholly without constitutional authority." 307 U.S. 459-460.

5/ The other four considerations set out by the Court in Baker are: (1) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion, (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (3) an unusual need for unquestioning adherence to a political decision already made; and (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 208-234.

As the Court noted in Baker, the political question doctrine is primarily founded upon the separation of powers within the Federal Government. Baker v. Carr, 369 U.S. 186, 210 (1962); see also Powell v. McCormack, 395 U.S. 486, 518 (1969); O'Brien v. Brown, 409 U.S. 1, 11 (1972) (Douglas dissenting). Thus, when the Constitution specifically provides for a decision to be made which is legislative rather than judicial in nature, Congress has sole and absolute authority to act to the exclusion of the other two coordinate branches. 6/

Court decisions subsequent to Baker have relied primarily on the "textually committed" category and the "lack of judicially manageable standards" category in ruling on the existence of political questions which the courts will not decide.

In Consumer Union of United States v. Periodical

6/ In Dyer v. Blair, 390 F.Supp. 1291 (1975), Judge (now Justice) John Paul Stevens, writing for a three Judge District Court, discussed the distinction between justiciable and non-justiciable questions along these same lines. The Dyer case involved a suit by several Illinois State legislators challenging a provision in the Illinois Constitution and the rules of the legislature, both of which required a three-fifths vote for ratification of proposed constitutional amendments. Justice Stevens stated his agreement with the rulings in Dillon v. Gloss, 256 U.S. 368 (1921) and Coleman v. Miller, 307 U.S. 433 (1937), that questions of the placing of the restrictions upon the ratification process or the determination of the vitality of a state's ratification are non-justiciable political questions properly left to Congress, which is equipped to deal with the social, economic and political considerations involved. He noted, however, that a determination of the validity of Illinois' three-fifths rule turned on an interpretation of a term of the Constitution, the word "ratification". The considerations required in interpreting the Constitution, Justice Stevens pointed out, were judicially manageable (unlike those involved in determining the reasonableness of time limitations). Accordingly, he found the question of the validity of Illinois' three-fifths rule to be justiciable.

Correspondents' Assoc., 515 F.2d 1341 (D.C. Cir. 1975), plaintiffs challenged the authority of Congress to exclude certain publications from press gallery privileges pursuant to duly promulgated Congressional rules. Noting that Art. I, §5, cl. 2 of the Constitution provided that "[e]ach House may determine the rules of its proceedings ..." the Court held that the question was textually committed to the Congress and, thus, Congress' authority to promulgate rules of procedure was absolute and unreviewable. 515 F.2d at 1343, 1351.

Similarly, in Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) (a case predating Baker) the Supreme Court ruled that a dispute arising out of a Congressional investigation into the propriety of a Senatorial election was non-justiciable in light of Art. I, §5, cl. 1, which states in part: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members...." 7/

Just as Art. I, §5, cl. 2, and Art. I, §5, cl. 1 textually commit the decision-making process in their respective areas exclusively to Congress, so Article V makes Congress the sole Federal authority to propose amendments, to determine the mode of ratification, or determine whether ratification has effectively occurred. Art. V, Constitution of the United States. Neither the President, 8/ nor the Judiciary has any role in that process, 9/ since it is textually committed to Congress.

7/ Roudebush v. Hartke, 405 U.S. 15 (1972) and Powell v. McCormack, 395 U.S. 486 (1969), which strictly construed Art. I, §5, cl. 1, in no way diminished the vitality of Baker and its set of categories.

8/ Hollingsworth v. Virginia, 3 Dall. [3 U.S.] 378 (1798).

9/ Coleman v. Miller, 307 U.S. 433 (1939); Baker v. Carr, 369 U.S. at 210; Chandler v. Wise, 307 U.S. 474 (1939).

Other judicial decisions holding that Congress has sole authority to act due to the legislative nature of an issue and a concommitant lack of judicially manageable standards are:

Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971) (constitutional propriety of means by which Congress has chosen to ratify and approve military operations in Southeast Asia is a political question). 10/

Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (legality of Cambodian bombing was non-justiciable since basic changes in the Southeast Asian war involved questions of military and diplomatic expertise not vested in the judiciary).

National Indian Youth Council, Intermountain Indian School Chapter v. Bruce, 485 F.2d 97 (10th Cir. 1973), cert. denied, 417 U.S. 920 (1974) (Federal courts are without jurisdiction when confronted with non-justiciable political questions such as determining status of Indian tribes, an area over which Congress has exclusive plenary legislative authority).

DeKosenko v. State of New York, 427 F.2d 351 (2d Cir. 1970), aff'g. 311 F.Supp. 126 (S.D. N.Y. 1969) (problems of delay in state courts lack judicially discoverable and manageable standards for resolution).

10/ The Court in Orlando specifically noted that "the form which Congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions". Orlando v. Laird, supra. at 1043-1044.

In each of these cases, the Courts were called upon to make what was tantamount to a legislative determination. In each case, the Court refused to make such a determination, ruling instead that legislative issues are within the province of Congress and not the Courts. As the Court noted in Coleman, questions involving "political, social and economic conditions" (such as whether a proposed constitutional amendment retains vitality despite the passage of time) are better and more properly decided by "the Congress with the full knowledge and appreciation ascribed to the national legislature". 307 U.S. at 454.

In summary, questions involving the appropriateness of a prescribed time period within which ratification must occur or the period within which states may effectively ratify an amendment, as well as questions of whether an effective ratification had occurred, are questions to be decided by the Congress, not by any other coordinate branch of the Federal Government. Coleman v. Miller, 307 U.S. 433 (1939); Dillon v. Gloss, 256 U.S. 368 (1921). Subsequent development of the doctrine of the non-justiciability of political questions, as set forth in Baker v. Carr, 369 U.S. 186 (1962), lends support to this conclusion. Since it is within Congress' unreviewable discretion to determine the time frame within which ratification may occur, it follows that Congress may amend a period which it originally prescribed for ratification whenever it determines that political, social, and economic considerations justify an extension.

II. Congress Can Extend The Ratification Period By Majority Vote

The precise issue of the type of majority vote requirement for establishing the period for state ratification of a Constitutional Amendment has never before arisen. However, in view of the of the plain meaning of the Constitution, Congressional precedents,

as well as the procedural nature of the time limitation as set forth in the proposed Equal Rights Amendment, a simple majority vote of the members present in each House [11] is sufficient to extend the ratification period. [12]

11/ The Supreme Court has ruled that the vote required to propose an amendment is two thirds of the members present (assuming a quorum is present), not two thirds of the entire membership of each House. National Prohibition Cases, 253 U.S. 350, 386 (1920).

12/ Congress' procedures provide three methods by which it may act to extend the ratification period for the Equal Rights Amendment. Congress can pass a bill, a joint resolution, or a concurrent resolution. While the Constitution does not dictate the manner in which Congress may choose to express its will in carrying out its responsibilities under Article V, the most appropriate of the three methods appears to be the joint resolution because constitutional amendments are proposed initially by joint resolutions. Jefferson's Manual, §223. The use of a bill would be inappropriate, bills being used exclusively for enacting statutes. Moreover, bills must be signed by the President. Constitution, Art. 1, §7, cl. 2; Jefferson's Manual, §397. The President has no role in the ratification process. Hollingsorth v. Virginia, supra. Since it is doubtful that concurrent resolutions retain their vitality after the term of the Congress which passed them, the use of such a procedure would be certain to generate unnecessary litigation. See generally, "Concurrent Resolutions", prepared by Congressional Research Service, Library of Congress (dated June 9, 1976). Joint resolutions are treated as laws of the land and, accordingly, clearly have a life beyond the term of the adopting Congress. Jefferson's Manual, §397. The signature of the President would not be required on a joint resolution extending the ratification period since the President does not participate in the ratification process. Hollingsworth v. Virginia, supra. In this regard, it should also be noted that the joint resolutions which declared the Fourteenth and Fifteenth Amendments to be ratified (15 Stat. 709; 16 Stat. 1131), which resolutions are analogous to a resolution extending the ratification period, were not signed by the President. (Continued)

A. The Constitution And Past Congressional Procedural Rulings Demonstrate That Matters Of Procedure Pertaining To Prospective Amendments Are Subject To Simple Majority Votes

Article V of the Constitution provides, in pertinent part, that:

> 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.... (Emphasis added)

This Constitutional language specifically requires Congress to act by a two-thirds vote in only two matters when it acts under Article V: (1) when Congress proposes an amendment to the Constitution and (2) when Congress, upon the application of the legislatures of two-thirds of the States, calls a convention which will propose constitutional amendments and submit them to the States. Equally clearly, Article V places in the sole hands of Congress, but without specifying that Congress must act by more than a majority vote, the authority to determine whether the amendments submitted to the states have been "ratified by the legislatures of three-fourths of the several states, or by conventions of three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress".

Past Congressional procedural rulings have been in keeping with this literal interpretation of Article V. It has been

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12/ (Cont'd) Moreover, the Supreme Court has held that the actions and procedures of Congress in declaring, by joint resolution, that the Fourteenth and Fifteenth Amendments were ratified are binding consitutional precedents. Coleman v. Miller, 307 U.S. at 350.

repeatedly held that the two-thirds vote requirement applies only to the vote on the final passage of the amendment. See V Cannon's Precedents, §§7029-7039. Thus, as to votes taken within a Committee of the whole, or votes to amend a proposed Constitutional Amendment, only a simple majority vote is required. V Cannon's Precedents, §§7031, 7033. From these precedents it is clear that procedural steps taken prior to the actual vote on final passage of the proposal to the states for ratification require only a simple majority vote. There is no cogent reason why procedural steps taken by the Congress subsequent to the proposal of an amendment to the states (so long as the text of the amendment voted upon by the states is not affected) should be treated differently.

As stated above, Article V of the Constitution requires a two-thirds vote only for the proposal of amendments, [13/] and leaves to the Congress the matters of detail pertaining to the mode of ratification. Coleman v. Miller, 307 U.S. 344 (1939). One such matter of detail to be filled in by Congress is the time period to be allowed for ratification. Coleman, supra., Dillon v. Gloss, 256 U.S. 368 (1921); Cf. Baker v. Carr, 369 U.S. 186 (1962).

Congress' extension of the time within which ratification of the Equal Rights Amendment may occur is also a procedural detail. Such an extension would not affect the text of the amendment which Congress submitted to the states since the time limitation is

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13/ The Constitution, in a number of Articles, prescribes supermajority votes by the Congress. See Art. 1, §5 (voting to expel a member of Congress); Art. 1, §3 (impeachment); Art. 1, §7 (override of veto); Art. 2, §2 (Senate's ratification of treaties); 14th Amendment, §3 (removal of disability of members of Congress). If the framers had intended that all aspects of the amending process be subject to a supermajority, it is reasonable to suppose that they would have expressly so provided.

contained in the "resolved" clause of the joint resolution and not in the proposed article of amendment itself. Therefore, the states which considered the proposed article of amendment did not have to consider any aspect of the seven year limitation in deciding whether to ratify the amendment. Hence, Congress' extension of the ratification period, would not prejudice any state which previously ratified the amendment and would not affect the validity of any prior ratification.

The history of other amendments (especially when considered in light of the Coleman and Dillon decisions) also indicates that the time provision is merely a procedural and legislative detail that Congress filled in.

The first seventeen amendments ratified by the states and the Nineteenth Amendment contained no time restrictions. See letter of Prof. Thomas I. Emerson, published at 116 Cong. Rec. 35959 (1972). The Eighteenth (40 Stat. 1050), the Twentieth (47 Stat. 745), the Twenty-First (47 Stat. 1625), and the Twenty-Second Amendments (61 Stat. 959) contained a seven year time limitation within the proposed article of Amendment. The Twenty-Third, Twenty-Fifth, and Twenty-Sixth Amendments, like the proposed Equal Rights Amendment, contained a seven year time limitation in the "resolved clause". 14/ The legislative history concerning the seven year limitation in the proposed Equal Rights Amendment indicates that the time designation was inserted only as a "customary" provision. 116 Cong. Rec. 35959 (1970); 117 Cong. Rec. 35814-5 (1971) (Cong. Griffiths).

When Congress acts to extend the period for ratification it would be acting within its constitutionally mandated

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14/ The resolutions proposing these amendments are found at 75 Stat. 847, 78 Stat. 1117, 81 Stat. 983, and 85 Stat. ____, respectively.

responsibility of filling in the details as to the mode of ratification. Dillon v. Gloss, 256 U.S. 368, 376 (1921). Since Congress is fulfilling the same procedural functions, whether it be prior to the proposal of an Amendment to the States or after its proposal, the vote required to perform that function should be no different. A simple majority, therefore, is sufficient to extend a ratification period.

B. Questions Of The Validity Of State Ratifications Have Been Resolved By Congress By Simple Majority Votes

Congress has acted affirmatively on two occasions to resolve disputes concerning the ratification of amendments. In each instance, the votes taken were simple majority votes. Since Congress' action in these instances was analogous to the prescribing or extension of a ratification period, it must be concluded that only a simple majority vote would be required to extend the period within which the ERA may be ratified by the States.

During the ratification process for the Fourteenth Amendment, the legislatures of Ohio and New Jersey had ratified the proposed amendment and then subsequently passed rescinding resolutions. During this same period, Georgia, North Carolina, and South Carolina had rejected ratification resolutions. However, Congress restructured the governments of these three states (14 Stat. 428, March 2, 1867) and their reconstituted legislatures then ratified the proposed amendment.

At this point, the Congress directed the Secretary of State to report the number of states which had ratified the proposed amendment. The Secretary's report noted that serious doubt had been expressed as to the validity of the ratifications of Ohio and New Jersey (which had ratified and then rescinded) but that if these states were deemed to have ratified, then the

proposed amendment would have been accepted by the requisite three-fourths of the states. 15 Stat. 706, 707 (1867). On the following day, Congress adopted, by voice vote, a joint resolution listing Ohio, New Jersey, Georgia, North Carolina and South Carolina as states which had ratified and declared that the requisite three-fourths of the states had accepted the proposed amendment. 15 Stat. 709 (1867). The Fourteenth Amendment was then declared by the Secretary of State to be a part of the Constitution.

Similar events occured in the ratification process of the Fifteenth Amendment. New York, after having first voted to ratify the amendment, subsequently passed a resolution rescinding its ratification. Once again,the Secretary of State listed New York as a state which had ratified the amendment. 16 Stat. 1131. While New York's vote was not necessary to meet the three-fourths requirement, as had been the votes of Ohio and New Jersey with respect to the Fourteenth Amendment, the Congress nevertheless adopted, by voice vote, the Secretary's report, listing New York as a state which had ratified the Fifteenth Amendment. Cong. Globe, 41st Cong., 2d Sess. 1477, 1479 (1870); 16 Stat. 1131.

Both joint resolutions were passed by simple majority votes, a fact which is readily apparent from a comparison of the two resolutions with the joint resolutions which proposed the Fourteenth and Fifteenth Amendments to the States. While the joint resolutions proposing the Amendments [15/] stated <u>on their face</u> that two-thirds of House and Senate concurred in the resolutions, the joint resolutions which declared those Amendments to have been ratified contained <u>no</u> such indication. Similarly, the

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15/ The resolution proposing the Fourteenth Amendment is at 14 Stat. 358. The resolution proposing the Fifteenth Amendment is at 15 Stat. 346.

presiding officers in both the House and Senate indicated in the record of the proceedings, as was the custom whenever a two-thirds vote was required, that the resolutions proposing the respective Amendments passed by the two-thirds vote. 16/ In contrast, the proceedings with respect to the resolutions declaring the amendments to be ratified were silent as to the majority attained. If a two-thirds vote had been thought necessary, the Congressional record would certainly have noted that such a majority was achieved or not achieved and the subject of the vote disposed of accordingly. 17/

The precedent of the vote on acceptance of the reports of the Secretary of State regarding ratification of the Fourteenth and Fifteenth Amendments by simple majority strongly implies that the acceptance of ratification is an incident of Congress' power to designate the mode of ratification, requiring only a majority vote. Indeed, the Supreme Court, by following these Congressional precedents, 18/ has implicitly concluded that the constitutionally

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16/ With respect to the Fourteenth Amendment see Cong. Globe, 40th Cong., 1st Sess., pp. 3042, 3149. With respect to the Fifteenth Amendment, see Cong. Globe, 41st Cong., 2d Sess., pp. 1346, 1428, 1564.

17/ It is also significant to note that a role call vote was not taken on the latter joint resolutions. It was the custom at that time to take roll call votes on matters pertaining to the amending process which required a two-thirds vote. Statement by Speaker Colfax, Cong. Globe, 40th Cong., 3d Sess., p. 245.

18/ In Coleman v. Miller, 307 U.S. 433, 450 (1937), the Supreme Court expressly held that the historical precedents of Congress' acceptance of the ratification of the Fourteenth and Fifteenth Amendment were dispositive of the question of whether Congress had exclusive authority to determine the effectiveness of a state's ratification in light of its previous action to reject or its subsequent action to rescind a proposed amendment. Such matters, the Court held, were political questions and not justiciable by the courts.

mandated two-thirds vote required to submit a proposed amendment to the states is not required when Congress determines the effectiveness of a ratification. There is, accordingly, no reason why a Congressional determination to extend the period within which ratification may occur should require any greater majority than its determination that a State has effectively ratified an amendment. The two matters, after all, are substantially analogous to one another.

C. Other Congressional Precedents Support The View That Congress Can, By A Simple Majority Vote, Set Or Change The Time Period For Ratification By The States

Currently, 1 U.S.C. §106(b) provides that the General Services Administration shall receive notice of state ratifications of a proposed Constitional amendment and shall certify and publish the amendment when the requisite number of states have submitted ratifications. This statute, delegating authority to the GSA, 19/ was passed as a part of an ordinary bill, requring only a majority vote of the members present of each House. 65 Stat. 710.

In 1967, former Senator Sam Ervin introduced a bill to establish a procedure for states to call for a convention for the purpose of proposing constitutional amendments. 20/ S.2307, 90th Cong., 1st Sess. (1967). Four years later, the bill (then S.215, 92d Cong., 1st Sess.) was passed by the Senate but it died in the House Judiciary Committee.

The bill set forth a detailed procedure for states to

19/ Formerly, this responsibility was delegated to the Secretary of State.

20/ All previous amendment proposals have been initiated by the Congress rather than by a convention.

request a convention, the mechanics of such a convention and the actions of Congress in the overall process. Section 215 of S.215 is relevant here because it would have established a specific time period for the states to act in requesting the convention and for the convention to present its amendments to the states. §215, S.215, 92d Cong., 1st Sess. (1971). As noted, this bill was simple, statutory legislation. Although the Senate passed the bill by a wide margin, the Senate treated it as ordinary legislation which required only a simple majority for passage. 21/ If Congress can, by majority vote, limit the period within which states may request a constitutional convention, it follows that Congress can, by majority vote, enlarge the period of time within which the states may effectively ratify a proposed amendment.

Conclusion

The foregoing discussion shows that Congress has the unreviewable discretion, under Article V of the Constitution, as interpreted by the Supreme Court, to determine in advance the time within which a proposed amendment must be ratified, to determine (in the absence of any advance prescription) whether a proposed amendment has lost its vitality through lapse of time, and to extend the period within which ratification may occur if it deems that such extension is warranted in view of relevant political, social, and economic conditions. 22/ Congress'

21/ This proposed legislation was severely criticized by scholars. See "Amending the Constitution", 85 Harv. L. Rev. 1612; 72 Yale L.J. 957. It is important to note, however, that no one challenged the authority of Congress to set, by simple majority vote, the time limits for state action.

22/ In other words, Congress could determine that the issues addressed by the proposed constitutional amendment are still "live".

authority to determine the time within which ratification may take place is not reviewable by the Courts because it is an incident of Congress' power to designate the mode of ratification which is textually committed to Congress by the Constitution. In addition, Congress' action in setting or modifying the ratification period is not reviewable because the factors which must be considered in reviewing such action are non-justiciable. The language of Article V itself, the Supreme Court decisions interpreting that article, the Congressional precedents, and the procedural nature of the time limitation, which is set forth in the preambular portion of the Joint Resolution proposing the Equal Rights Amendment rather than the proposed amendment itself, all indicate that a simple majority vote of Congress is sufficient to extend the ratification period.