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THE EQUAL RIGHTS AMENDMENT: WHY THE ERA REMAINS LEGALLY VIABLE AND PROPERLY BEFORE THE STATES*

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Thomas Jefferson wrote, "All men are created equal."[1] With regard to women, however, he qualified this statement, "[w]ere our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."[2] In the 219 years since Jefferson described women as second-class citizens, the United States Constitution has not specifically recognized the rights of women.[3] History suggests that laws lagging behind social change will remain on the legislative back burner until an Equal Rights Amendment

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1. DECLARATION OF INDEPENDENCE para 2 (U.S. 1776). "The U.S. Constitution was framed and adopted under the influence of the English Common Law which did not regard women as legal persons, but rather as the property of their fathers or husbands." VIRGINIA EQUAL RIGHTS AMENDMENT RATIFICATION COUNCIL, THE LEGAL STATUS OF WOMEN UNDER THE CONSTITUTION (Jan. 1, 1992).

2. MARTIN GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968).

3. While many argue that the Fourteenth Amendment protects women sufficiently and thus nullifies the need for an ERA, others point out that protection for women under the Fourteenth Amendment is not guaranteed:

> Not until 1971 was the Fourteenth Amendment protection extended to women, and since then only a handful of cases have done so . . . . [And] in all these cases the Fourteenth Amendment protection extended to women is far less broad than that extended when race or religion is the issue because sex has not been declared a 'suspect classification' by a majority of the members of the U.S. Supreme Court.

Flora Crater, *Women's Advocate, reprinted in* FEDERATION NOTES 15.

(ERA) establishes a constitutional demand for equality between the sexes.[4]

The ERA was first introduced nearly seventy-five years ago. Although some supporters have abandoned hope during the long struggle for ratification, many supporters have continued the fight for equality. The recent ratification of the 203-year-old Madison Amendment[5] gives these supporters new reason to believe that the ERA is still alive. Originally proposed without a time limit in 1789, the requisite thirty-eight states did not ratify the Madison Amendment until 1992.[6] This ratification suggests that amendments, such as the ERA, which do not contain a textual time limit, remain valid for state ratification indefinitely.[7]

Although Article V gives Congress the power to propose an amendment and to determine the mode of ratification, it is silent as to Congress' power to impose time limits and Congress' role after ratification by three-fourths of the states.[8] In *Dillon v. Gloss*,[9] a unanimous Supreme Court recognized Congress' Article V power to fix a definite time limit for ratification and pointed out that Article V states that an amendment becomes part of the Constitution once it is ratified by three-fourths of the states.[10] The Supreme Court reaffirmed Congress' power to fix a

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4. *See* Twiss Butler and Paula McKenzie, *21st Century Equal Rights Amendment Effort Begins*, NAT'L NOW TIMES, Jan. 1994, at 12. Butler and McKenzie point out:

> The Equal Rights Amendment is essential because, without clear acknowledgement of women's right to equal protection of the law, sex discrimination is not unconstitutional . . . . [H]ard-won laws against sex discrimination do not rest on any constitutional foundation and can be enforced fully, inconsistently, or not at all. Women seeking enforcement of these laws must not only convince the court that discrimination has occurred, but that it matters.

Id.

5. U.S. CONST. amend. XXVII. The "Madison Amendment," called such because James Madison proposed it in 1789 along with the Bill of Rights, provides that "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." *Id.*

6. Article V states that an amendment becomes a valid part of the Constitution when ratified by three-fourths of the states (currently 38 states). *See* U.S. CONST. art. V.

7. "Rep. Robert Andrews (D. N.J.) is leading the initiative to resurrect the ERA with House Resolution[s] which would require the House of Representatives to 'take any legislative action necessary to verify the Equal Rights Amendment as part of the Constitution' when three more states verify it." *ERA Summit Newsletter*, PRESS CONFERENCE: CPR FOR ERA (ERA Summit), Apr. 1995, at 1. In a parallel effort, Rep. Carolyn Maloney (D. N.Y.) has sponsored a joint resolution proposing the ERA using the original language. See H.R.J. Res. 66, 105th Cong., 1st Sess. (1997).

8. *See* U.S. CONST. art. V.

9. 256 U.S. 368 (1921).

10. *See id.* at 374-76.

reasonable time period for ratification in *Coleman v. Miller*,[11] but also determined that after three-fourths of the states ratify, Congress has the power to promulgate an amendment.[12] By recognizing congressional promulgation of amendments, the *Coleman* Court contradicted the *Dillon* Court, which had asserted that the amendment process is complete when the last state ratifies.

The recent ratification of the Madison Amendment suggests that any of several views regarding ratification may be correct and, therefore, the ERA remains legally viable and properly before the remaining states for ratification. First, time limits in a proposing clause are irrelevant because states ratify only the text of the amendment and not the proposing clause. Second, under a strict interpretation of Article V, a proposed amendment becomes part of the Constitution upon ratification by the thirty-eighth state and no congressional promulgation is necessary. Third, under a *Coleman* analysis, Congress has the power to determine the timeliness of the ERA after final state ratification, as it did with the Madison Amendment, and can extend, revise or ignore a time limit. According to either a strict interpretation of Article V or the Court's interpretation in *Dillon* or *Coleman*, the states retain the power to ratify the ERA.

II. A BRIEF LEGISLATIVE HISTORY OF THE EQUAL RIGHTS AMENDMENT

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.[13]

The proposed Equal Rights Amendment was initially introduced in Congress in 1923.[14] Thereafter, it was proposed in

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11. 307 U.S. 433 (1939).

12. *See id.* at 456.

13. *Infra* note 14 at § 1.

14. The complete text of the joint resolution proposing the Equal Rights Amendment reads 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 three-fourths of the several States within seven years from the date of its submission by the Congress:

every session of Congress through 1971, and finally submitted to the states for ratification on March 22, 1972, with a time limit in its proposing clause.[15] Propelled by a wave of political support for women's rights reform, the amendment passed Congress by an overwhelming majority, a number substantially in excess of the required two-thirds. "Within forty-eight hours of congressional passage, six states had ratified the ERA, and within nine months, twenty-two states had ratified it." [16] By 1972, both major political parties and many prominent political figures had endorsed the ERA as well.[17]

"By 1973, however, the ERA's momentum began to lag," and a "vocal opposition" emerged.[18] Eight more states ratified the ERA in 1973, but then only three states ratified in 1974, and only two more states ratified in 1975 and 1977. The decrease in the number of states ratifying was likely a result of unfounded fears raised by the opposition.[19]

Article -

SECTION 1. Equality of rights under the law shll 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.

Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). Justice Ginsburg has explained the ERA concisely: "The ERA is not a 'unisex' amendment. . . . [I]t does not require similarity in result, parity or proportional representation. It simply prohibits government from allocating rights, responsibilities or opportunities among individuals solely on the basis of sex." Ruth B. Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19, 21 (1978).

15. *See* Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, 4 WOMEN'S RTS. L. REP. 209, 209 (1979).

16. The vote was 354 to 24 in the House of Representatives and 84 to 8 in the Senate. *See* 117 CONG. REC. 35,815 (1971), 118 CONG. REC. 9598 (1972). Jean Witter states that "[t]he power of this support seemed to defy the political obstacles which ERA advocates had encountered during the previous fifty years." Witter, *supra* note 15, at 209.

17. *See* S. REP. No. 689; Witter, *supra* note 15, at 209-10.

18. Witter, *supra* note 15, at 210. The right-wing campaign of fear and falsehoods slowed the ERA's momentum. *See* Chris Morehouse, *On Reviving the ERA*, WASH. POST, Mar. 1, 1994, at A18. The opposition's fear campaign incorrectly preached that the ERA would result in unisex toilets, homosexual marriages, and mothers in combat. *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986). Members of the Right-wing continue to argue such falsehoods in the 1990's. Pat Robertson has "warned that an ERA would lead women 'to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians.'" Cynthia Terrell, *Time to Reconsider ERA*, THE CHRISTIAN SCI. MONITOR, Aug. 17, 1993.

19. *See* Witter, *supra* note 15 at 210.

As the March 22, 1979 deadline approached, the ERA was still three states short of ratification. On October 2, 1978, Congress adopted a resolution amending the ratification deadline to June 30, 1982.[20] By extending the ERA's initial time limit, Congress demonstrated that it had the authority to change an amendment's time limit to maintain its vitality. To date, only three additional state ratifications are needed to add the ERA to the United States Constitution.[21]

III. THE MADISON AMENDMENT AND ITS IMPLICATION FOR THE ERA

The ERA is properly before the states for ratification in light of the recent ratification of the Madison Amendment, which was introduced 203 years before its addition to the Constitution. The Madison Amendment (also know as the Congressional Pay Amendment) was proposed in 1789 and submitted to the states for ratification with the Bill of Rights. Michigan became the thirty-eighth state to ratify on May 7, 1992, and the Archivist of the United States proclaimed the amendment to be the Twenty-seventh Amendment to the Constitution on May 18, 1992.[22] Congress concurred by adopting separate resolutions on May 20, 1992.[23] Upon the thirty-eighth state's ratification, however, questions arose regarding the a Amendment's validity. Some

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20. *See* H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978).

21. The following states have not ratified the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, South Carolina, Oklahoma, Utah, and Virginia. More recently, several states including Virginia and Illinois have reintroduced the ERA in their state legislatures.

22. *See* 57 Fed. Reg. 21,187 (1992). The Archivist acted pursuant to his power under 1 U.S.C. § 106(b), which provides:

> Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Consitution of the United States.

1 U.S.C. § 106(b) (1994). One commentator pointed out that "[t]he National Archivist . . . apparently thought the views of Congress immaterial," because he "certified the amendment as part of the Constitution one day before the House was scheduled to debate a 'sense of Congress' resolution asserting the amendment's validity." The Archivist was, however, "acting on the legal advice of executive branch attorneys in the Department of Justice." Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677, 680 (1993).

23. The House adopted H.C.R. 320 (by a vote of 414-3) and the Senate adopted S.C.R. 120 and S. Res. 298 (by a vote of 99-0).

critics assert that the Amendment "died" sometime between its proposal in 1789 and its final ratification 203 years later.[24] The Amendment's proponents argue that it became valid because the 102d Congress concluded such in a declaratory resolution.[25] To date, forty-one states have ratified the Amendment.[26]

A. *Dillon and Coleman: Setting the Stage for Ratification of the Madison Amendment.*

The Madison Amendment is the first of the old unratified amendments proposed without a deadline to be ratified by three-fourths of the states. However, some legal commentators have argued that the Madison Amendment was no longer before the states for ratification when the last state ratified because it had not been ratified by three-fourths of the states within a sufficiently contemporaneous time frame.[27]

In defining the constitutional amendment process, Article V gives Congress the power to propose an amendment and determine the mode of ratification.[28] Although Article V does not explicitly require ratification within a reasonable time frame, the Supreme Court stated in *Dillon*[29] that an amendment to the

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24. *See* Don Phillips, *Proposed Amendment, Age 200, Showing Life*, WASH. POST, Mar. 29, 1989, at A23 (quoting Professor Walter Dellinger and Linda Rogers-Kingsbury, Head of Citizens to Protect the Constitution). *See also* Richard L. Berke, *1789 Amendment is Ratified but Now the Debate Begins*, N.Y. TIMES, May 8, 1992, at A1, A21.

25. *See* 138 CONG. REC. S6949-02 (1992). *See* Paulsen, *supra* note 22, at 679-81 (1993) (discussing both views and the fact that "nobody seems to agree on *why* the Twenty-seventh Amendment should be regarded as valid and *who* gets to make that determination").

26. CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, *Ratification Issues Raised by the Congressional Pay Amendment*, (May 28, 1993) [hereinafter CRS Report].

27. *See* Phillips, *supra* note 24, at A23; Paulsen, *supra* note 22, at 684-85.

28. Article V of the United States Constitution states:

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

U.S. CONST. art. V.

29. 256 U.S. 368 (1921). For more information regarding *Dillon*, see *infra* notes 62-66 and accompanying text.

Constitution should be ratified within a "sufficiently contemporaneous" time frame as "to reflect the will of the people in all sections at relatively the same period."[30] In *Dillon*, the Court held that Congress may impose reasonable time limits for ratification.[31] The Court stated, "We do not find anything in [Article V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective."[32]

The Court determined that the proposal and ratification processes of a constitutional amendment under Article V are not unrelated acts but rather a single act that should not be significantly separated in time.[33] Moreover, the Court reasoned that when proposed, amendments are to be "considered and disposed of presently" because the amendment process is presumably triggered by a perception of "necessity" in regards to an amendment's topic.[34] Therefore, the Court concluded that

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30. *Id.* at 374-75. Although this argument seems logical, under Article V an amendment is valid when ratified. Because no time period is specified in Article V, there is no basis in the text of Article V for a requirement of "contemporaneus consensus." Article V explicitly states certain formal requirements; therefore, "there is no basis for inventing [another requirement] where Congress has declined to impose one." Paulsen, *supra* note 22, at 694. Certainly "[w]hen the Framers wanted a time limitation to govern certain activity, they knew how to say so [explicitly]." *Id.* at 694 n.54. *But see id.* at 687 & n.28 (stating that "[c]learly, then, the absence of any constitutional rule in Article V forbidding time limits for ratification gives Congress, as the proposer of the amendment, free rein in this regard").

31. *See* 256 U.S. at 375-76.

32. *Id.* at 374. The Court "[did] find that which strongly suggests the contrary . . . [but concluded] that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal." *Id.* at 374-75. The time limit had been disputed in the Congress proposing the amendment; however, ultimately, the Court said:

> Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt . . . . 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.

Id. at 375-76.

33. *Id.* at 374-75. This is imprecise as a legal argument. Simply because Article V requires concurrent enactments (proposal and ratification) by separate legislatures (Congress and the States) adopted successively in a "single endeavor" does not mean that closeness in time is required. The text of Article V does not prescribe closeness in time and there are valid reasons to refuse to read such a requirement.

34. *Id.* at 375. Paulsen states, however:

> This 'reasonable' implication does not follow from the factual premise. That an amendment is thought necessary does not mean that states must ratify it *immediately* or not at all; the factual premise of necessity could just as well

Article V implicitly requires that the ratification of a proposed constitutional amendment by thirty-eight states must occur within some "reasonable" period of time after its submission to the states.[35]

During the congressional debate regarding the Madison Amendment, many members recognized the need for contemporaneous consensus in the constitutional amendment process but also acknowledged that *Dillon's* articulation of that principle was merely dicta.[36] Congress, therefore, relied upon the Supreme Court's decision in *Coleman* to justify its promulgation of the Madison Amendment. In *Coleman*, the Court considered the validity of Kansas' ratification of the Child Labor Amendment,[37] which did not contain a time limit for ratification. The Amendment had been pending before the states for more than twelve years without the necessary ratifications, and as a result, the Kansas legislators argued that it was no longer timely.[38] In a decision in harmony with the reasoning asserted in *Dillon*, the Kansas Supreme Court, however, stated that the Amendment was contemporaneous to the needs of the day and therefore still before the states.[39]

On appeal, the Supreme Court held that Congress, not the Court has the power to determine the issue of timeliness.[40] The Court recognized that when a time limit has not been fixed in advance, Congress has the authority to determine the contemporaneity of an amendment based on a variety of political, social, and economic factors.[41] Therefore, the Court in *Coleman*

> justify allowing the ratification process to take as long as the perceived need for the amendment proposal remained.

Paulsen, *supra* note 22, at 690.

35. 256 U.S. at 375; *see also* CRS Report, *supra* note 26, at 2-3. *But see supra* note 30.

36. *See* 138 CONG. REC. S6500 (daily ed. May 12, 1992) (statement of Sen. Byrd); 138 CONG. REC. S6500 (daily ed. May 12, 1992) (statement of Sen. Kasten). Some members stated that their action regarding the Madison Amendment was an exception to the viable and worthwhile principle of contemporaneous ratification. 138 CONG. REC. H3397 (daily ed. May 19, 1992) (statement of Rep. Edwards).

37. *See* H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).

38. *See* 307 U.S. at 436.

39. *See id.* at 451.

40. *See id.* at 456. The Court refused to decide the issue of timeliness because it was a "political question." *Id.* at 457 (Black, J., concurring).

41. *See id.* at 453-54. Chief Justice Hughes wrote that Congress is uniquely equipped to decide the timeliness question because of its "full knowledge and appreciation . . . of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." *Id.* at 454. Jean Witter points out that Congress is in the unique position "to obtain expert advice from sociologists, economists, political scientists, and others to assist its members in determining what would constitute a reasonable time

held that Congress, upon receiving notification that three-quarters of the states have ratified an amendment, determines whether the amendment has been ratified in a reasonable period of time.[42]

B. Acceptance of the Madison Amendment Implies That There is No Requirement of Contemporaneous Consensus.

Whether an amendment must be ratified within a "sufficiently contemporaneous" time frame is now questionable in light of the treatment of the Madison Amendment.[43] Acting upon legal advice from the Department of Justice, the National Archivist certified the Madison Amendment as part of the Constitution one day before the House was scheduled to debate its validity.[44] The Department of Justice reasoned that "the formal proposal by a two-thirds majority of both houses of Congress and the formal ratifications of thirty-eight state legislatures is sufficient to make the amendment valid as law, no

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period for the ratification of the ERA, or other proposed amendments." Witter, *supra* note 15, at 222.

42. *See* Coleman v. Miller, 307 U.S. 443 (1938). To the contrary, Walter Dellinger says that Congressional promulgation is not a necessary feature of Article V. In the history of the amendment process, Congress has promulgated only two amendments — the Fourteenth and the Twenty-Seventh Amendments — following the final state ratification. *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 400 (1983); *see supra* note 23 and accompanying text. Dellinger, a Professor of Law at Duke University, claims that in holding congressional promulgation a necessary step in the amendment process, the Court in *Coleman* ignored the earlier unanimous decision in *Dillon*. *See id.* at 402-03. Professor Dellinger maintains that the Court in *Coleman*, in proclaiming Congress' power after ratification, rather than the Court's, therefore, "manufactured" the anticipated event of congressional promulgation. *Id.* at 403.

43. Congressional approval (and state ratification) of the Madison Amendment implies that there is no requirement of contemporaneous constitutional ratification. If there was to be a court challenge to the contemporaneity of the state ratification of the Madison Amendment, the Supreme Court would probably consider the issue non-judiciable under *Coleman*. As the Court in *Coleman* suggested, where there is no time limitation for ratification, Congress can consider the reasonableness of the State ratification when the Archivist promulgates the adoption of the amendment. In *Colemen*, the Supreme Court asserted:

> 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. The decision by the Congress, in its control of the action of the Secretary of State [now Archivist of the U.S.], of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.

307 U.S. 433, 454 (1939).

44. *See* Paulsen, *supra* note 22, at 680.

matter how far spaced out over time."[45] According to the Department of Justice, "[t]here is no requirement of contemporaneous ratification, and there is no requirement of congressional approval."[46]

Nevertheless, Congress believed that it had the authority to assess the reasonableness of the Madison Amendment in accordance with the Court's decision in *Coleman*, and it did not suggest that this reasoning applied only in situations in which no initial time limit was imposed.[47] In congressional hearings, Senator Byrd recognized that in the absence of a time limit, Congress may determine whether an amendment has been ratified in a reasonable period of time after thirty-eight states have ratified.[48] Some members also stated that Congress has the authority to assess whether an amendment has lost its vitality through lapse of time pursuant to *Coleman*.[49] They said that according to the Supreme Court, Congress was free to conclude that the Madison Amendment had been validly ratified and that 203 years was "reasonable."[50] Similarly, after ratification by the thirty-eighth state, Congress may also conclude that the ERA has been validly ratified.

Theoretically, a proposed constitutional amendment remains an effective Act of Congress even if no state has ratified it. Although "[i]t does not have the legal status or force of a constitutional provision . . . it still has the force of law as a proposed constitutional amendment. It is a proposal that remains outstanding, waiting for thirty-eight concurrent state ratifications . . . ."[51] As it remains outstanding, contemporaneous consensus may not be required of its ratification. As commentator Michael S. Paulsen noted, "[t]he history of the Twenty-seventh Amendment challenges *Dillon's* assumption that if an amendment

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45. *Id.* (citing Memorandum to C. Boyden Gray, Counsel to the President, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel (Nov. 2, 1992)).

46. *Id.*

47. *See* 138 CONG. REC. S6500 (daily ed. May 12, 1992) (statement of Sen. Kasten); 138 CONG. REC. S6505 (daily ed. May 12, 1992) (statement of Sen. McCain); 138 CONG. REC. H3397 (daily ed. May 19, 1992) (statement of Rep. Fish); 138 CONG. REC. S6940 (daily ed. May 20, 1992) (statement of Sen. Grassley).

48. *See* 138 CONG. REC. S6507 (daily ed. May 12, 1992) (statement of Sen. Byrd). *See* Coleman v. Miller, 307 U.S. 433 (1939).

49. *See supra* note 34.

50. The Court in *Dillon* specifically addressed the contemporaneity of two amendments proposed in 1789, one of which was the Madison Amendment, and found that such amendments should be considered waived since they were not sufficiently contemporaneous. *Dillon*, 256 U.S. at 375. However, *Dillon's* dicta is non-binding in light of the Madison Amendment's ratification and acceptence.

51. Paulsen, *supra* note 22, at 680.

is deemed important, states necessarily will approve it sooner rather than later."[52] As with the Madison Amendment, which remained open for ratification for 203 years, the ERA, after only twenty-five years, remains open for final state ratification.

IV. TIME LIMITS IN THE PROPOSING CLAUSE ARE INCONSEQUENTIAL

> *[T]he following article . . . shall be valid . . . when ratified by the legislatures of three-fourths of the several states within seven years . . . .*[53]

Although Article V does not address the availability or legitimacy of time limits on ratification, Congress' power to impose reasonable time limits within the text of an amendment has been well recognized since 1921.[54] The first time limit imposed on the ratification of a constitutional amendment was in the text of the Eighteenth Amendment (Prohibition). In debates regarding the purpose of the time limit, legislators expressed concern about proposed amendments without a time limit "floating around in a cloudy, nebulous, hazy way."[55] However, without extensive discussion about the particular length of time, Congress specified seven years for ratification of the Eighteenth Amendment.[56]

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52. *Id.* at 691.

53. H.R.J Res. 208, 92d Cong., 2d Sess. (1972) (the proposing clause of the ERA).

54. In *Dillon v. Gloss*, the Supreme Court upheld Congress' ability to fix a definite time period for ratification, pursuant to its Article V power to determine the mode of ratification. 256 U.S. 368, 375-76 (1921). *See infra* part IV.A. Walter Dellinger is the only scholar who suggests differently. He argues that Congress' power to determine the mode of ratification is merely the power to decide *who* shall ratify — legislatures or conventions. *See* Dellinger, *supra* note 42, at 408 n.120.

55. Ruth B. Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX L. REV. 919, 920 (1979) (quoting 55 CONG. REC. 5556 (1917) (statement of Sen. Ashurst)). "Senator Ashurst said: '10, 12, 14, 16, 18, or even 20 years,' might be reasonable period for ratification, but Congress should provide a check against handing down to posterity proposals submitted to the states many decades earlier." *Id.*

56. *See id.* at 921 n.7 (citing 55 CONG. REC. 5648-49, 5666 (1917)). Ginsburg points out that "[d]ebate centered on the constitutionality and wisdom of any congressionally imposed time limit." *Id.* (citing 55 CONG. REC. 5649 (1917) (remarks of Sen. Borah) (time limit is inconsistent with Article V); *cf. id.* at 5651 (remarks of Sen. Johnson) (time limit for a specific amendment is compatible with the Constitution); *cf. id.* at 5651 (remarks of Sen. Cummins) (Article V, absent amendment, does not allow Congress to set a deadline, but a court, if properly presented with the question, would likely rule that the Constitution, as it is, requires ratification within a reasonable time, and "[w]hat that reasonable time may be would differ with each case").

Congress subsequently placed seven-year time limits in the text of the Twentieth, Twenty-first and Twenty-second Amendments. When Congress began to place ratification time limits within the proposing clause of amendments rather than in the actual text, Congress retained this same seven-year time limit without significant debate. Consequently, Congress proceeded to place time limits in the proposing clause of the Twenty-third, Twenty-fourth, Twenty-fifth, and Twenty-sixth Amendments. Thus, after significant debate regarding the imposition of any time limit, Congress submitted the ERA to the states with the standard seven-year time limit in its proposing clause.[57]

In 1994, Virginia's Deputy Attorney General, Walter S. Felton, Jr., issued the only formal opinion concerning the validity of the ERA in light of its "expired" time limit.[58] In 1994, Felton stated that the ERA was not currently before the states for ratification because its original and extended time limits had expired.[59] Referring to the Eighteenth Amendment, Felton pointed out that the Supreme Court upheld time limits in the resolution proposing the Eighteenth Amendment. The seven-year time limit in the Eighteenth Amendment, however, is in the Amendment's text. As the time limit was a part of the amendment itself, proposed by Congress and ratified by the States, the Supreme Court had no choice but to uphold the ratification.[60] When the time limit is in the proposing clause, however, as with the ERA, it is not a part of the amendment and is not ratified by the States when they ratify the amendment.[61] A time limit in the proposing clause has never been contested in the courts.

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57. To the contrary, the Nineteenth Amendment (Woman's Suffrage) was sent to the states without a time limit and, similarly, the Madison Amendment had no time limit. A proposal to limit the ratification period of the Nineteenth Amendment to seven years was rejected without debate. *See* 58 CONG. REC. 81, 93 (1919). The Child Labor Amendment proposed by Congress five years later, was also submitted to the states without a time frame for ratification. *See* 43 STAT. 670 (1924).

58. Letter from Walter S. Felton, Jr., Deputy Attorney General, *Commonwealth of Virginia*, to The Honorable Robert G. Marshall, Delegate, *Virginia House of Delegates* (Feb. 3, 1994) [hereinafter Letter]. The Commonwealth's Deputy Attorney General incorrectly stated that "because the Equal Rights Amendment was not ratified within either the original or the extended time limit established by Congress for its ratification, it is no longer before the states for ratification, and any action by the General Assembly to ratify it now would be a nullity." *Id.*

59. *Id.*

60. *See also infra* notes 63-66 and accompanying text.

61. Deputy Attorney General Felton did not acknowledge the distinction between a time limit in the text of an amendment and the proposing clause of an amendment in his letter. *See* Letter, *supra* note 58.

A. *Dillon and Coleman: Congress has the Power to Impose Textual Time Limits in Constitutional Amendments*

In *Dillon*, the Supreme Court first considered the validity of congressionally imposed time limits for ratification of a constitutional amendment.[62] In that case, a convicted bootlegger challenged the validity of the Eighteenth Amendment because it contained a seven-year time limit for ratification in its text.[63] The petitioner argued that the time limit itself rendered the amendment invalid.[64] A unanimous Court upheld Congress' ability to establish a definite time limit, and stated that Congress derived its power to set a time limit from its Article V power to determine the mode of ratification.[65] The Court also stated that the Constitution speaks in general terms, thus "leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require."[66] Eighteen years later, in *Coleman*, the Court relied on *Dillon* to reaffirm Congress' power to fix a reasonable time period for ratification.[67]

When promulgating the Madison Amendment in 1992, Congress believed that it had the authority to assess whether the amendment had lost its vitality through lapse of time. While praising the Madison Amendment, however, Senator William Roth (R - Delaware) emphasized the procedural ambiguity resulting from the adoption of the Madison Amendment. If Congress has the ability to ratify an amendment that scholars believed dead for two centuries, Roth questioned, "why cannot the States ratify even the expired amendments — those which failed ratification before a congressionally imposed deadline — in the hope that Congress would later extend the deadline?"[68] When Congress proclaimed the Madison Amendment validly ratified by the states, it opened the door to a host of timeliness and reasonableness issues. Under a *Coleman* analysis, Congress has the power to

62. 256 U.S. 368 (1921).

63. *See id.* at 370-71. The petitioner also claimed that the amendment was not in effect at the time of his arrest. *See id.*

64. *See id.*

65. *See id.* at 376.

66. *Id.*

67. *See* 307 U.S. 433, 456 (1939). The *Coleman* Court held that Congress, in its powers to promulgate a constitutional amendment, has the power to determine whether a constitutional amendment is sufficiently contemporaneous and thus valid or whether "by lapse of time its proposal of the amendment had lost its vitality." *Id.*

68. 138 CONG. REC. S6950 (daily ed. May 20, 1992).

determine the timeliness of the ERA after final state ratification, as it did with the Madison Amendment.[69] Even though the ERA contains a time limit in the proposing clause, which the Madison Amendment did not have, the ERA would be subject to the same contemporaneous and reasonableness requirements as the Madison Amendment was during congressional review.

B. Time Limits in the Proposing Clause Are Susceptible to Change.

In the Twenty-third Amendment, Congress omitted the time limit from the text and for the first time included it only in the amendment's proposing clause. One reason offered for this change was an attempt to avoid "cluttering up" the Constitution with provisions that would serve no purpose once the amendment was ratified.[70] In addition, Harvard Law Professor Laurence Tribe suggested that time limits are not basic enough to be included in the Constitution and are not intended to be binding the way that constitutional language is and should be.[71] Transferring a time limit from the text of an amendment to its proposing clause indicates that there is a substantial difference between the significance of time limits in an amendment and the significance of time limits in a proposing clause.[72] By separating the time limit from the body of the amendment, Congress retains the authority to review the limit.[73]

In 1970, ERA supporters argued against a time limit for the proposed ERA. They argued that, similar to the Nineteenth Amendment, the ERA should not have a time limit for ratification.[74] In order to compromise with those who opposed the amendment's introduction without any time limit, however, congressional proponents of the ERA accepted the seven-year limit in the proposing

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69. During debate on the ERA, Senator Cook called attention to the argument that *Coleman* "stands for the proposition that a 7-year time limit would not vitiate a constitutional amendment. Congress itself has the final determination whether by lapse of time its proposal to amend the Constitution has lost its vitality." 116 CONG. REC. 35959 (1970).

70. *See Equal Rights Amendment Extension Hearings, 1977-78: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong. 35, 1st. & 2d Sess. (1977-78) [hereinafter *Extension Hearings*] (remarks of Rep. Butler); *id.* at 104 (statement of Erwin N. Griswold); *see also* 124 CONG. REC. 34284-90 (1978) (remarks of Sen. Garn).

71. *See Extension Hearings*, *supra* note 70, at 42.

72. *See id.* at 35 (remarks of John Harmon); *see* Ginsburg, *supra* note 55, at 923.

73. *See id.* at 13 (testimony of John Harmon).

74. *See* Ginsburg, *supra* note 55 at 921.

clause because "[t]hey thought the stipulation innocuous, a 'customary' statute of limitations, not a matter of substance worth opposing."[75] The Ninety-second Congress, in both Houses, passed the resolution with very little discussion of the time limit. Only in a debate regarding an earlier version of the Amendment did Congress substantially discuss the advisability of introducing the ERA to the states without a time limit for ratification.[76] "The legislative history reveals no reason for inclusion of the deadline provision other than that such a provision had become customary and several influential Members of both Houses objected to its absence enough that it was eventually added."[77]

Although the Court held in *Dillon* that the time limit located within the text of the Eighteenth Amendment was valid,[78] it has never considered whether a time limit in the proposing clause of an amendment is valid.[79] With regard to the time limit in the ERA, Justice Ruth Bader Ginsburg has said that "setting a time limit for ratification [in the proposing clause] entails a determination qualitatively different from agreement on the substantive content of an amendment."[80] A time limit in the proposing clause is not part of the amendment itself; therefore the States that ratify the text of the amendment do not ratify the proposing clause, rendering it susceptible to change.[81]

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75. *Id.* When asked why the proposing clause included a period of seven years for ratification, Representative Martha Griffiths, principal House proponent of the ERA, responded:

> This is customary. However, this [absence of a time limitation] was one of the objections last year.
>
> I am well aware . . . there is a group of women who are so nervous about this amendment that they feel there should be unlimited time during which it could be ratified.
>
> Personally, I have no fears but that this amendment will be ratified in my judgment as quickly as was the 18-year-old vote.
>
> I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever. But I may say I think it will be ratified almost immediately.

Id. at 921-22 n.14 (quoting 117 CONG. REC. 35814-15 (1971) (remarks of Rep. Griffiths)).

76. *See* Witter, *supra* note 15, at 215-16.

77. H.R. REP. 95 No. 1405, at 4 (1978); *see also* Ginsburg, *supra* note 55, at 921.

78. *See* 256 U.S. 368, 376 (1921).

79. *See supra* note 61 (explaining that the Commonwealth of Virginia's Deputy Attorney General Felton did not make a clear distinction when he wrote that *Dillon* involved a time limit in a proposing clause).

80. Ginsburg, *supra* note 55, at 923.

81. *See Extension Hearings*, *supra* note 70, at 63 (statement of Thomas Emerson); *see also* Dellinger, *supra* note 42, at 408 n.120. To the contrary, a time limit in the text of a proposed amendment cannot be changed after submission to the states because such a change would alter the character of the amendment that some states may have already voted upon. *Extension Hearings*, *supra* note 70, at 42-43 (statement of Laurence Tribe).

C. *The ERA Extension Establishes That Time Limits in Proposing Clauses Are Matters of Detail Open to Congressional Revision.*

In October 1978, Congress adopted a legislative resolution extending the ERA ratification deadline.[82] During the ERA extension hearings, opponents argued that Congress loses its power over an amendment once it proposes the amendment and designates the mode of ratification.[83] Opponents of the ERA suggested that once Congress designates the mode of ratification, the process is entrusted entirely to the states. Extension opponents also argued that Congress may not change the time frame after submitting an amendment to the states, just as it may not change the wording of the text or the mode of ratification.[84] However, the view that only the Congress that

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82. H.R.J. Res. 638, 95th Cong., 1st Sess., 92 Stat. 3799 (1978). The extension resolution states:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to the legislatures of three-fourths of the several States not later than June 30, 1982.

Id.

83. *See* 124 CONG. REC. 25, 33155 (1978) (statement of Sen. Bartlett quoting Sen. Ervin); 124 CONG. REC. 25, 33151 (statement of Sen. Helms).

84. In *Idaho v. Freeman*, the United States District Court for the District of Idaho determined that Congress' attempted extension of time for ratification of the ERA was null and void. 529 F. Supp. 1107, 1151 (D. Idaho 1981), *cert. before judgment granted*, 455 U.S. 918, *vacated sub nom.* NOW v. Idaho, 459 U.S. 809 (1982). In attempting to establish that recission of its ratification was valid, the State of Idaho argued that Congress need not establish any time limit when it proposes an amendment, but when it does set a time limit, extension is impermissible. *See id.* Further, Idaho asserted that even if an extension were permissible, it could be accomplished only by a two-thirds majority vote as established in Article V and not by a simple majority that actually occured with the ERA extension. *See id.* The defendant in the case asserted "substance/procedure dichotomy" and contended that since the time limit is part of the proposing clause it is proper for reconsideration where if it were part of the amendment itself, it would not be. *Id.* In finding for Idaho, the court relied on the fact that in *Dillon*, the Supreme Court had the opportunity to address the substance/procedure dichotomy when the Eighteenth Amendment was challenged on grounds that its time limit was unconstitutional. *See id.*

However, because the time limit involved in *Dillon* was in the text of the amendment and no amendment to date had been introduced with a time limit in the proposing clause, there was no reason for the Court to address time limits in the proposing clause or to distinguish them from limits in the text. Furthermore, in accordance with *Coleman*, the ratification process is nonjusticiable. *See supra* note 43 and accompanying text. "By the time the case reached the Court, however, the extension had expired, thus rendering the issue (in the Court's eyes) moot." Eric J. Beste & Stewart Dalzell, *Is the Twenty Seventh*

proposes an amendment has any power over that proposal, and even then only until the moment of proposal, is shortsighted.[85] When a time limit is not fixed by the text of an amendment, a subsequent Congress has the power to determine the reasonableness of the time limit after the amendment is submitted to the states.[86]

John Harmon, Assistant Attorney General of the Office of Legal Counsel for the Department of Justice, testified at the Extension Hearings that Congress did have the power to extend the ERA's ratification period.[87] Harmon cited *Dillon* in support of his conclusion that Congress has the ability to impose and extend reasonable time limits because they are subsidiary matters of detail.[88] Harvard Law Professor Laurence Tribe and Yale Law Professor Thomas Emerson also cited *Dillon* in support of their opinions that the period of ratification is a matter of detail, which Congress may determine and change incident to its power under Article V to determine the mode of ratification.[89] Professor Emerson further suggested that a time limit was a matter of procedure, not substance, and therefore, reviewable and subject to revision.[90]

During debates concerning whether the time limit was fixed, Congress focused on the fact that legislators who drafted the Amendment placed the ERA's time limit in the proposing clause, rather than in the actual text. Significantly, another type of time limit was incorporated in the text of the ERA — the statement that the proposed amendment would not become effective until two years after ratification.[91] Because this two-year provision is

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Amendment 200 Years Too Late?, 62 GEO. WASH. L. REV. 501 n.21 (1994) (discussing the denial of certiori in *NOW v. Idaho*, 459 U.S. 809 (1982)).

85. Ginsburg, *supra* note 55, at 925. Such a view is shortsighted in light of *Coleman*'s contemporaneous consensus requirement and Article V's silence on the subject. *See infra* notes 95-102 and accompanying text.

86. *See* Coleman v. Miller, 307 U.S. 433, 453-54 (1939).

87. *Extension Hearings*, *supra* note 70 at 5-38.

88. *Id.* at 35; *see* Dillon v. Gloss, 256 U.S. 368, 376 (1921).

89. *Extension Hearings*, *supra* note 70, at 39-41, 62-65. Tribe also expressed his support for congressionally imposed time limits around the time of the ratification of the Madison Amendment. Laurence H. Tribe, *The Rule of the 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15. Professor Tribe, however, recently changed his opinion in an article about the 27th Amendment, regarding the need for contemporaneous consensus of an amendment. He stated that Article V specifies that a valid constitutional amendment need only be ratified by three-fourths of the states and therefore there is no requirement of contemporaneous consensus. *See id.*

90. *Extension Hearings*, *supra* note 70, at 63, 73.

91. This two year limit was designed to give federal and state legislatures time to conform their laws to the sex equality principle. Ginsburg, *supra* note 55, at 923 n.23.

part of the text, as opposed to the seven-year limit for ratification, which is part of the proposing clause, it is a part of the "Article of Amendment." As such, the states that ratified the ERA also approved the two-year provision in its text. As the states ratified the two-year provision, subsequent alteration by Congress is impermissible. On the other hand, Congress proved, by extending the ERA's time limit, that a time limit within the proposing clause is merely legislative, and therefore, revisable.[92]

As the proposing clause is merely legislative, the time limit can be changed if Congress exercises its power to adjust, amend, or extend its own legislative action with new legislative action.[93] A legislative seven-year limit is more flexible than one proposed as an integral part of an amendment because it should not be binding on future Congresses.[94] When Congress passed the ERA time extension for ratification, it demonstrated that a time limit in the proposing clause is separate from the amendment itself, and therefore, it can be treated as flexible. Furthermore, by authorizing the time extension, Congress expressed its own interpretation of its power under Article V.

D. Ratification of the ERA After the Time Limit Expires Is Not Invalid Per Se.

In *Coleman* the Supreme Court asserted that when a time limit is not fixed in advance, Congress may determine whether three-fourths of the states have ratified within a "reasonable time."[95] According to the Court, when the proposing Congress sets a fixed time limit, a later Congress may also determine whether a reasonable time has elapsed in light of societal changes.[96] The later Congress may determine whether the amendment is "no longer responsive to the conception which inspired it."[97]

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92. *See Extension Hearings*, *supra* note 70, at 42 (testimony of Laurence H. Tribe), 58 (remarks of Rep. Heckler).

93. *See* Witter, *supra* note 15, at 222. U.S. CONST. Art. I, § 8, cl. 18. The "necessary and proper" clause establishes Congress' power to make any laws needed to enforce its Article V powers. *See id.* at 219.

94. Future Congresses cannot be bound by the legislative action of a previous Congress. *See* MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 22(6) (1989) ("[N]o meeting of a legislative body can bind a subsequent one by irrepealable acts or rules of procedure. The power to enact is the power to repeal.").

95. Coleman v. Miller, 307 U.S. 433, 453-54 (1939).

96. *See id.* at 453.

97. *Id.* The ERA still remains responsive to the conception which inspired it. Discriminatory laws remain on the books and the courts have had difficulty deciding cases under such laws. In addition, "[t]he laws which are presently used to combat

Therefore, when ratification occurs within a reasonable time and public sentiment in support of the amendment still exists, Congress has the authority to determine the validity of the ratification based on *Coleman's* criteria. According to *Coleman*, Congress must evaluate the amendment in light of political, social, and economic conditions.[98] Thus, ratification after the ERA extension expired is not invalid.[99]

Regardless of whether the seven-year limit in the proposing clause is considered an impermissible condition or a reasonable procedure, under Article V, states still have the power to ratify the ERA.[100] If the seven-year limit is an impermissible restriction on the amending process, then the ERA has no time limit and can be ratified for an indefinite period of time.[101] On the other hand, even if the seven-year limit was a reasonable legislative procedure, a ratification after the time limit expired can still be reviewed and accepted by the current Congress under the *Coleman* criteria.[102]

V. THE POWER OF RECISSION AND RATIFICATION AFTER REJECTION

Article V of the Constitution addresses only the positive terms of ratification of a proposed amendment, thus giving the states the power to ratify proposed amendments, but not the power to reject proposed amendments.[103] Under a literal interpretation of Article V, a state that has rejected an amendment is still free to reconsider and ratify it. However, a state that has ratified an amendment may not rescind that ratification.[104] The basis for the determination that a state may not rescind a ratification is that a ratification or rejection by one state may encourage a subsequent ratification or rejection by another. However, if a

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discrimination can be overturned at any time. Only a Constitutional Amendment can ensure equality for women and men under the law." NOW, LEAFLET, EQUAL RIGHTS AMENDMENT.

98. *See* Witter, *supra* note 15, at 224-25.

99. *See id.* The Madison Amendment contained no time limitation, however, its addition to the Constitution shows that Congress will not ignore a late ratification.

100. *See id.* at 220.

101. *See id.* at 224.

102. Jean Witter said that Congress' extension measure represented a "crucial communication to the states" because state legislatures were unlikely to ratify the ERA after its expiration date, despite Congress' power to validate post-March 1979 ratification. *See id.* at 224 n.174.

103. *See* U.S. CONST. art. V.

104. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the 27th Amendment*, 61 FORDHAM L. REV. 497, 548 (1992).

state that has previously rejected a proposed amendment subsequently decides to ratify, its decision to ratify does not undercut the basis for later states' actions.[105] Permitting the rescission of state ratifications of constitutional amendments would confuse the amending process' orderly functioning.[106]

The *Coleman* Court raised the question of rescission with regard to the adoption of the Fourteenth Amendment.[107] The Georgia, North Carolina, and South Carolina legislatures rejected the Fourteenth Amendment in 1866, but later ratified it under the direction of new state governments in 1868.[108] Meanwhile, Ohio and New Jersey ratified the Amendment, only to withdraw their consent in an attempt at rescission.[109] When Congress asked the Secretary of State to make a list of the states that ratified the Fourteenth Amendment, he included Ohio and New Jersey in the list.[110] Secretary Seward proclaimed ratification of the Fourteenth Amendment by twenty-eight states including North Carolina, South Carolina, Ohio and New Jersey, even though Ohio and New Jersey had since passed resolutions withdrawing their consent.[111] Secretary Seward expressed doubt as to whether the attempted rescissions were valid, concluding that if the Ohio and New Jersey ratifications were effective despite the states' attempted withdrawals, the Amendment had become part of the Constitution.[112] On the following day, Congress declared that three-fourths of the states ratified the Fourteenth Amendment, including North Carolina, South Carolina, Ohio, and New Jersey, and pronounced that the Fourteenth Amendment was part of the Constitution.[113] Thus, during the promulgation of the Fourteenth

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105. According to Richard Bernstein, a law professor at the University of New York Law School, "[a] state should be free to change its mind about rejecting an amendment if other states' actions demonstrate that the amendment has general popular support." *Id.* at 497, 548.

106. Dellinger, *supra* note 42, at 421-27. One commentator points out that:

> A state has the right to reject ratification as many times as it likes, but once an amendment is ratified, the state is committed. Otherwise, think of the constitutional chaos. Some of this country's greatest constitutional advances (including due process and equal protection) might not have survived had rescissions been recognized. In the final tally, states that had rescinded their votes were counted as ratifying states.

Letter to the Editor, THE WASH. POST, Mar. 1, 1994, at A18.

107. *See* 307 U.S. 433, 448 (1939) (citing 14 Stat. 710 (1868)).

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* at 449.

112. *See id.*

113. *See id.*

Amendment, Congress determined that both previous rejections and attempted withdrawals were invalid.[114]

The issue of rescission and previous rejection has been the subject of much debate between scholars. Those scholars who favor permitting states to rescind prior ratifications argue that "contemporaneous consensus" requires recognition of a state's most recent expression of opinion.[115] Deeming ratification to be final, however, has the advantage of providing "a fixed terminus to the amendment process."[116] Other scholars have suggested that states may not take the ratification process as seriously if the possibility of rescission exists.[117] According to Walter Dellinger:

> although the promulgation of the Fourteenth Amendment is not firm precedent for the invalidity of rescission, nearly 200 years of experience under article V — years that had seen ratification of twenty-six constitutional amendments — had produced no instances in which an authorized decision-maker had given effect to a purported rescission.[118]

In *Idaho v. Freeman*,[119] the State of Idaho and the leadership of the Idaho legislature, among others, brought an action seeking a declaration that Idaho's rescission of its prior ratification of the ERA was valid and effective. The Idaho District Court held that Idaho's ratification of the ERA was properly rescinded and therefore that its prior ratification was void.[120] When an appeal

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114. *See id.*

115. *See* Dellinger, *supra* note 42, at 422.

116. *Id.* (citing CONG. REC. S32, 612 (daily ed. Sept. 29, 1978) (Herbert Wechsler, Columbia Law School)).

117. *See Extension Hearings*, *supra* note 70, at 138 (testimony of Prof. William Van Alstyne, Duke Law School). William Van Alstyne testified as follows:

> I think that [permitting rescissions would be] profoundly ill-advised constitutional policy . . . . No state ought to consider an amendment to the Constitution under the misimpression from [Congress] that it may do it with some sort of celerity or spontaneity because it will always have this interval of additional years while other States are looking at it to reconsider. That, in my view, is an atrocious way to run a Constitution. The policy that the States may consider [ratification] at several times . . . but that when done, it is done irrevocably, is terribly important, it seems to me, to the integrity of the role of Congress and the States.

Id.

118. Dellinger, *supra* note 42, at 423. Dellinger also states that "[a]n amendment process that conditions adoption of an amendment proposed by Congress on affirmative acts of assent by thirty-eight legislatures is stringent enough. We need not make the adoption of amendments still more difficult by extending official recognition to resolutions of rescission." *Id.* at 424.

119. 529 F. Supp. 1107 (D. Idaho 1981).

120. *See id.*

was brought before the Supreme Court, the Court instructed the district court to dismiss the complaints as moot because the extension time limit had lapsed.[121] The Court, however, did not give an opinion as to the validity of the rescission.

The district court in *Idaho v. Freeman* held that the "political question" doctrine did not bar it from considering the state's power to rescind.[122] In doing so, the Idaho District Court contradicted the Supreme Court in *Coleman*. In *Coleman*, the Court stated that "the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."[123] In other words, the Supreme Court held that courts are barred from considering the validity of state ratifications because it is a political question.

Since Congress passed the ERA in 1972, four states have attempted to rescind their prior ratifications.[124] However, "every state legislature that passed a resolution rescinding a prior ratification of the ERA did so under the cloud of an express opinion that such an action would be a legal nullity."[125] In addition, Congress has previously found that rescissions and attempted withdrawals are invalid.[126] Therefore, it is unlikely that the attempted rescissions of the ERA by these states will be effective.

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121. *See* 459 U.S. 809 (1982).

122. *See* 529 F. Supp. 1107, 1135-39 (D. Idaho 1981).

123. 307 U.S. 433, 450 (1939).

124. *See* George Will, *Changing the Rules*, BALTIMORE SUN, Feb. 14, 1994, at 7A. Although Will reports that five states rescinded their ratifications, in fact, only four states did so. Will includes Kentucky in his total of five rescinding states, however, the Kentucky legislature's rescission resolution was validly vetoed by the Lieutenant Governor. H.J.R. 20, 1978 Regular Session of the General Assembly of Kentucky; Letter from the Office of the Kentucky Attorney General to The Honorable David K. Karem (March 29, 1978); *see* Ginsburg, *supra* note 55, at 941 n.135.

125. Brenda Feigen Fasteau & Marc Feigen Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?*, 1 HARV. WOMEN'S L.J. 27, 37 n.45 (1978) (collection of opinions of attorney generals).

126. *See* Coleman, 307 U.S. 433 (1939); *see supra* notes 106-11, 120 and accompanying text.

VI. CONCLUSION

"When the ERA was proposed, Congress had no fine crystal ball to forecast the political, social, and economic conditions prevailing in the ensuing years."[127] While women enjoy more rights today than they did in 1923, the need for a federal ERA remains apparent.

Despite a guarantee of equal protection under certain state constitutions,[128] gender discrimination remains quasi-suspect without a federal ERA. In *Regents of the University of California v. Bakke*,[129] Justice Powell wrote that "the Court has never viewed [gender-based] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis."[130] Therefore, without an ERA women are not afforded full federal protection against gender discrimination.

When Congress proposed the ERA, it placed the seven-year time limit in the proposing clause rather that in the text of the amendment. By doing so, Congress suggested that the time limit is not a substantive part of the amendment, and therefore, is subject to revision.[131] Because the time limit in the ERA is not part of the amendment, it has not been ratified by the states that ratified the text of the amendment, and it is susceptible to further review.

As there is no mention in Article V of Congress' power to review the States' ratification, congressional promulgation of an amendment is not essential for an amendment to become effective. The date of the final state ratification is the determinative point of the amendment process and therefore, subsequent congressional promulgation is a mere formality.[132] Whether subject to a strict interpretation of Article V or subsequent congressional action under a *Coleman* view, the ERA remains valid before the states for ratification.

During congressional debate over the Madison Amendment, members of Congress relied on the Supreme Court's decision in *Coleman* to assess the contemporaneity of the Amendment. By

127. Ginsburg, *supra* note 55, at 925.
128. *See, e.g.*, VA. CONST. of 1971, art. I, § 11.
129. 438 U.S. 265 (1978).
130. *Id.* at 303.
131. *See Extension Hearings*, *supra* note 70, at 13 (testimony of John Harmon).
132. *See* Witter, *supra* note 15, at 223.

proclaiming the Madison Amendment to be contemporaneous with the needs of the day, Congress declared this 203-year-old Amendment validly ratified by the states. An adjusted time limit for the ERA would be proper in light of the Madison Amendment's ratification, and necessary in light of the continued prevalence of discriminatory laws. The *Coleman* Court said that an amendment should be fully "responsive to the conception which inspired it,"[133] and the ERA remains so.

As established by history, one cannot rely on our national and state legislatures to do a thorough clean-up job without the prod of a federal ERA.[134] Because the Supreme Court uses the Constitution in its interpretation of discriminatory law, women will remain disadvantaged without an Equal Rights Amendment. Historically "[t]he Supreme Court [has] firmly resisted the invitation to compensate for legislative foot-dragging."[135] While the Court has taken "significant steps in a new direction" since 1971, it has generally done so "insecurely, with divided opinions, and without crisp doctrinal development."[136] For women to receive equal treatment under the law, the law must provide for equal rights and the Supreme Court must give lower courts firmer guidance.

The ERA remains a necessary and important tool for achieving sexual equality. Justice Ginsburg has said:

> With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and all women are created equal.[137]

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133. 307 U.S. 433, 453, (1939).

134. *See* THE NEW YORKER, May 22, 1978, at 25-26.

135. Ginsburg, *supra* note 55, at 936.

136. Ruth B. Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 464-67 (1978). "For an indication of the Court's unsettled mind, compare Justice Powell's statement in *Bakke* that 'the perception of racial classification as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share,' with Justice Blackmun's Opinion for the Court in *Matthews v. Lucas* (sex, like race, is an 'obvious badge'; 'historical legal and political discrimination against women and Negroes' has been severe and pervasive)." Ginsburg, *supra* note 55, at 937 n.106 (citations omitted).

137. Ginsburg, *supra* note 13, at 26.