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May 5, 1977

Honorable Donald Collins
Chairman, Committee on State Government
State House
Augusta, Maine

Honorable Peter J.Curran
Chairman, Committee on State Government
State House
Augusta, Maine

Dear Senator Collins and Representative Curran:

By letter of April 19, 1977, the State Government Committee has requested an opinion on questions which have arisen in the course of the Committee's consideration of L.D. 933, a bill which provides for an "Advisory Referendum on the Equal Rights Amendment." You have asked whether Maine has the power to rescind its ratification of the Equal Rights Amendment and whether the referendum called for in L.D. 933 could affect the Legislature's ratification of that Amendment.

Summary of Conclusion:

In our opinion, the question whether Maine or any other State has the power to rescind its ratification of a proposed constitutional amendment is not finally resolvable under present law. The sources available indicate that the question of power to rescind is an open one. The Constitution itself is not definitive, though an argument that the language is conclusive has been made. There is no relevant federal statutory law. The precedents tell us only that recissions have been made and that though they have not been given effect, Congress has never reacted by expressly denying power to rescind. We are persuaded that States reasonably should be able to rescind, though they are neither given nor denied that power expressly or by clear implication.

Unlike the question of power to rescind ratification, the question of the effect of a recission on the amendment process is answered conclusively by the Supreme Court in cases under Article V. The Court has held repeatedly that Congress holds entire authority under Article V for its interpretation and implementation and that Congress' decision as to the effect of States' action under the Article is within the scope of that authority and is conclusive on the courts. Putting aside the question of power to rescind, it is clear that Congress alone may decide the effect of a recission once made.

We answer in the negative the question of whether the referendum procedure called for in L.D. 933 could affect the Legislature's ratification of the Equal Rights Amendment. States may not use the referendum to ratify or reject a proposed amendment nor may they by referendum accept or reject the decision of the Legislature or convention. The L.D. 933 referendum, though labelled advisory, is directive in effect and in fact sends the legislative ratification to referendum. Further, under federal and Maine law, the action of a State Legislature in ratifying a proposed constitutional amendment is not a legislative act of the kind properly submitted to referendum. Finally, even if the question were appropriately referred to the people, the L.D. 933 referendum does not meet the requirements of the Maine Constitution for an ordinary referendum and there is presently no procedure in Maine law for an advisory referendum.

OPINION:

1. Recission:

The process by which the Federal Constitution may be amended is specified in its Article V. The Article reads:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Contitution, 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.

The question posed by L.D. 933 and your letter is whether the Maine Legislature, once having ratified the proposed 27th Amendment to the Constitution, has the power to rescind its ratification. It is our opinion that the question of a State's power to rescind its ratification is not resolvable under present law. Article V itself does not expressly answer the question, stating only that a proposed amendment becomes part of the Constitution "when ratified" by the requisite number of legislatures or conventions, whichever "Mode of Ratification" Congress may propose. There is at present no relevent federal statutory law. Precedents, that is, instances of recission,[1/] indicate only that States have rescinded and how Congress has reacted. They tell us nothing about the power or lack of power of a State to rescind, but only about the effect given by Congress to recissions once made.[2/]

1/ In the process by which the Fourteenth Amendment was adopted, the Ohio and New Jersey Legislatures first ratified and later withdrew their ratifications. Congress was advised by the Secretary of State that Ohio and New Jersey had passed withdrawing resolutions, that there was "doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual," and that if Ohio and New Jersey's ratifying resolutions were still in effect, the amendment had sufficient ratifications for adoption. Coleman v. Miller, 307 U.S. 433, 449 (1938) (citing 15 Stat. 706, 707). Congress' resolution declaring the the Fourteenth Amendment adopted listed Ohio and New Jersey as among the ratifying States, as did the Secretary of State's proclamation of amendment.

New York attempted to withdraw its ratification of the Fifteenth Amendment. The Secretary of State's proclamation of ratification both noted New York's withdrawal action and included the State in the list of States ratifying. New York's ratification was not needed to make up the requisite number for adoption of the amendment.

2/ See discussion infra.

Arguments from constitutional language and public policy have been made in denial of and in support of a State's power to rescind. In denial, it is said that the constitutional language is itself conclusive: Article V gives only the power to ratify, omitting to give that to rescind a ratification once given. In this view, the power to ratify remains viable until exercised, after which it is exhausted. Thus, a State may reject and subsequently ratify, but may not do the reverse. The converse argument is that implicit in the power to ratify as given in the Article is the power to not ratify. "Not ratifying" may result from refusal of a State Legislature to consider the proposed amendment, from the failure to pass of a resolution of ratification or from withdrawal of ratification.

It is a relevant truism that

> (the fact that) the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. Dillon v. Gloss, 256 U.S. 368, 373 (1920).

Each of the proposed arguments based on constitutional language is "reasonably implied." In our view, these arguments are equally compelling.

In further support of the power to rescind, it is pointed out that the methods of proposal and adoption of a constitutional amendment were designed to measure the assent of the people to changes in their fundamental governing document. Hawke v. Smith, 253 U.S. 221, 226-27 (1919); Dillon v. Gloss, supra, at 373-75 (discussing assent in relation to the question of the time in which an amendment must be adopted. Though the Court's conclusions as to "reasonable time" have been criticized, Coleman v. Miller, 307 U.S. 435 (1938), concurring opinion of Black, J., its remarks on assent remain valid.) Thus, adoption presumes a consensus favorable to the amendment at some point in time. If no State may rescind ratification once given, then one State could compel adoption of an amendment no longer approved of by sufficient, or any, other States. Suppose the case in which a proposed amendment lacked but one ratification for adoption, but before the final ratification all previous

ratifying States indicated they no longer favored adoption. With the final ratification, the amendment would be adopted, notwithstanding the lack of consensus for it at that time. The converse argument here is that defeat of a proposed amendment in States which have once ratified should be sought through the Article V procedures. That is, State Legislatures or conventions may be persuaded to not ratify in the first instance; otherwise, opponents must seek proposal, ratification and adoption of a counter-amendment altering or voiding the first.

Though in our opinion no definitive answer emerges from these arguments, we find persuasive the view that ratification ought not result from the vote of one State where support from all others has crumbled. If ratification is the "expression of the assent of the State to a proposed amendment," 253 U.S. at 229, and "ratification by. . . three fourths of the States shall be taken as decisive expression of the people's will," 256 U.S. at 374, then all actions taken pursuant to Article V by a properly constituted legislature or convention are properly to be considered in taking the measure of assent and will. That is, until such time as the Congress declares an amendment adopted, the States ought to be able to act and act again so that the measure of assent is most accurate and timely. Our conclusion is that States reasonably ought to have the power to rescind ratification, though it is not expressly given and because it is not expressly denied. We reiterate our belief that the question of a State's power to rescind is not resolvable in any absolute sense under the law as it now stands.

There can be no doubt that the Congress has the power to provide, through legislation[3/] or other Congressional action, a specific answer to the question of the State's power to rescind.

3/ For a proposal of such legislation, see J. William Heckman, Jr., "Ratification of a Constitutional Amendment: Can a State Change its Mind?" 6 Conn. L. Rev. 28 (1974). We regard as one among several possible interpretations the author's views that Congress' action on instances of recission to date expresses its view that once a State ratifies, its power under Article V is exhausted. The Maine Court has expressed the same opinion in dictum in Opinion of the Justices, 118 Me. 544, 107 A. 673 (1919).

The Supreme Court has held repeatedly that within the limitations specified in the Article itself,[4/] the authority given Congress to implement and control the Article V process is complete. White v. Hart, 13 Wall. 646 (1871); Hawke v. Smith, supra; Dillon v. Gloss, supra; Leser v. Garnett, 258 U.S. 130 (1921); and particularly Coleman v. Miller, supra (summing previous cases). As noted above,[5/] Congress has exercised that authority with respect to the question of recission. Of the meaning of these instances, the Court has said:

> We think that. . . the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment. 307 U.S. at 450. See also concurrence of Black, J., 307 U.S. at 456.

It should be pointed out that in none of the instances in which Congress has dealt with a State's recission has Congress expressly denied that a State has power to rescind, though it has always had notice of recissions and on at least one occasion has had the question of power specifically raised to it.[6/] Congress has simply denied effect in the specific instances to the recissions.[7/] Congress is of course not bound to act as it has acted, unless choosing to regard itself as bound. Thus

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4/ As to modes of proposal and ratification, effect of ratification, the 1808 limitation, and amendments depriving a State of equal representation in the Senate.

5/ See footnote 1.

6/ Id.

7/ Some authorities equate the denial of effect with the denial of power. See footnote 3.

Congress is presently free, as it has been in the past, to decide the effect to be given to the actions of a State under Article V.8/

2. Referendum:

Article V of the Federal Constitution is the source of the ratifying power of the State Legislatures:

> . . . the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution. . . . 258 U.S. at 137

See also Hawke v. Smith, supra; Opinion of the Justices, supra; Tate v. Sevier, 62 S.W.2d 895, 897 (1933). The manner in which the "federal function" of ratification is to be performed is dictated by Article V and "transcends any limitation sought to be imposed by the people of a State." 258 U.S. at 137. Performance of the "federal function" of ratification is to be carried out by legislatures or conventions as Congress, pursuant to Article V, directs, 253 U.S. at 227; 118 Me. at 548, and may not by State law be redelegated to the people to be performed in a referendum. 253 U.S. at 227; 253 U.S. at 386; 258 U.S. at 137; 118 Me. at 549; Opinion of the Justices, 132 Me. 491, 498, 167 A. 176 (1933).

Though performed by the legislature, the ratifying function is not legislative in character.

> . . . (R)atification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment. 253 U.S. at 229.

8/ In this regard it is interesting to review the Court's listing of factors relevant to a decision of what is a "reasonable time" in which an amendment may be adopted. The factors apply equally to questions other than reasonable time. The Court's point is that the factors listed are peculiarly appropriate for Congressional evaluation. The list is a strong argument for such an evaluation as part of the amdnement process, particularly when the process takes place over a long period of time.

See also 118 Me. at 549. Because not legislative in the sense of the making of laws, acts in exercise of the power to ratify are not within the scope of the referendum clause of the Maine Constitution. That clause

> . . . applies only to legislation, to the making of laws, whether it be a public act, a private act or a resolve having the force of law. Moulton v. Scully, 111 Me. 428, 448 89 A. 944 (1914).

A resolution ratifying a proposed constitutional amendment is

> . . . neither a public act, a private act nor a resolve having the force of law. It [is] in no sense legislation. . . It [is] simply the ratifying act of the particular body designated by Article V of the Federal Constitution to perform that particular act. 118 Me. at 550.

Clearly, a referendum which placed before the people the question whether to ratify a proposed amendment would be invalid under both federal and Maine law. The referendum called for by L.D. 933 is similarly invalid. Though it does not in terms compel a direct vote by the people on the question of ratification, the intended effect of its passage would be to eradicate the Legislature's previous ratification and require a new legislative vote.[9/] Such a result would be a limitation sought to

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9/ L.D. 933 submits to referendum the question: "Shall the 108th Maine Legislature meet at the second regular session to reconsider its ratification of the proposed 27th amendment to the United States Constitution, the so-called Equal Rights Amendment?" According to House Speaker John Martin, under the Legislative Rules, the directive to reconsider would place before the Legislators the question, "Whether this body votes to ratify the proposed 27th Amendment to the federal constitution." A motion and vote to rescind the previous ratification would not be necessary or even in order.

be imposed by the people of a State on the Maine Legislature's federally-derived power to ratify. Further, the effect of L.D. 933 is to submit the Legislature's ratification to referendum, albeit in a circuitous manner.[10/]

Even if L.D. 933 called for a referendum on a subject properly placed before the people, there is in Maine law no constitutional or statutory mechanism for its submission and decision. The designation "advisory referendum" in the bill appears to be a recognition both of the prohibition on ratification by referendum and of the fact that the people's opinion in this instance cannot be sought under the referendum clause of the Maine Constitution, Article IV, Part Third, Section 17,[11/] because of virtually complete noncompliance with the procedural requisites of that clause. Further, the constitutional referendum procedure is mandatory[12/] and

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10/ The term "advisory" appears a misnomer. Though the purpose of L.D. 933 is undoubtedly to advise the Legislature of popular sentiment on the 27th Amendment, the referendum question is itself directive.

11/ Article IV, Part 1, Section 1, of the Maine Constitution provides that ". . . the people reserve to themselves the power to . . . approve or reject at the polls any Act, Bill, Resolve or Resolution passed by the joint action of both branches of the Legislature. . . ." This section provides no procedure for approving or rejecting the subject legislative actions. The procedure is supplied by Article IV, Part 3, Section 17.

12/ Article IV, Part 3, Section 19, provides that "Any measure referred to the people and approved by a majority of the votes given thereon shall . . . take effect and become a law. . . ." What would "become a law" with passage of L.D. 933 would be the directive to the Legislature to reconsider.

therefore unsuited to submission of a question which purports to be advisory only.

Finally, there is at present no provision in Maine law for an advisory referendum. See the opinion of this office of December 19, 1973. Undoubtedly, provision could be made by statute or by constitutional amendment for such a procedure. It is our opinion that if it were truly advisory - that is, entirely nonbinding on the Legislature - such a procedure probably could be utilized by the Legislature to measure "assent" and "popular will" prior to legislative action on a proposed amendment.[13/] As discussed, however, there is at present no such procedure available in Maine. If one were available, the L.D. 933 question, because of its mandatory effect, would be inappropriately submitted under it.

We note in passing that L.D. 933 has substantial technical problems, most notably in its usage interchangeably of the terms "act," "resolution," and "constitutional amendment." We hope that this opinion is responsive to the Committee's concerns and would be pleased to provide any further assistance you might need.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

JEB/ec

13/ But see National Prohibition Cases, 253 U.S. 350, 386 (1919): "The referendum provisions of state constitutions cannot be applied, consistently with the Constitution of the United States in the ratification or rejection of amendments to it." The precise question of the propriety and effect of a wholly nonbinding advisory referendum has not been put to the Court.