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FILE NO. S-455

CONSTITUTION:
Ratification of Federal amendments -
Restrictions on General Assembly

Honorable Esther Saperstein
State Senator
Chairman
Commission on Status of Women
State Capitol
Springfield, Illinois 62706

Dear Senator Saperstein:

I have your recent letter wherein you state as follows:

"As you know, the United States House approved a proposed amendment to the United States Constitution on October 12, 1971, and the United States Senate approved the same proposed amendment on March 22, 1972. In order for it to become the 27th Amendment to the United States Constitution, a total of 38 states must ratify it within the next seven years.

The Illinois General Assembly has traditionally acted immediately upon proposed United States

constitutional amendments once they are submitted by Congress for ratification. The recent constitutional convention, in submitting the new Constitution, apparently wished to change this procedure because the new Constitution includes Article XIV, Section 4, which states in part that 'The General Assembly shall not take action on any proposed amendment to the Constitution of the United States submitted for ratification by legislatures unless a majority of the members of the General Assembly shall have been elected after the proposed amendment has been submitted for ratification.'

The section goes on to say, however, that 'The requirements of this Section shall govern to the extent that they are not inconsistent with requirements established by the United States.' The Congressional resolution which proposed the amendment includes a deadline of seven years in which states have to act.

Since the first part of Article XIV, Section 4, in effect shortens this Congressionally-imposed time to act by almost a full year---since the General Assembly could not consider the proposed amendment until 1973---I am writing to ask your opinion as to whether the latter part of Article XIV, Section 4, would govern and the amendment could be submitted to the current session of the General Assembly?

I also inquire as to whether there is any constitutional question as to whether the State Constitution can properly restrict the apparent broader powers given in the United States Constitution. For instance, the new State Constitution not only requires an election of the majority of legislative members before any proposed United States

constitutional amendment can be considered, but it also requires a three-fifths vote of the members."

Section 4 of Article XIV of the Illinois Constitution of 1970 provides as follows:

"The affirmative vote of three-fifths of the members elected to each house of the General Assembly shall be required to request Congress to call a Federal Constitutional Convention, to ratify a proposed amendment to the Constitution of the United States, or to call a State Convention to ratify a proposed amendment to the Constitution of the United States. The General Assembly shall not take action on any proposed amendment to the Constitution of the United States submitted for ratification by legislatures unless a majority of the members of the General Assembly shall have been elected after the proposed amendment has been submitted for ratification. The requirements of this Section shall govern to the extent that they are not inconsistent with requirements established by the United States."

Article V of the United States Constitution 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 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 it's equal Suffrage in the Senate."

Your questions relate to restrictions placed on the power of the General Assembly to ratify a proposed amendment to the United States Constitution. There are two such restrictions found in section 4 of Article XIV of the Illinois Constitution of 1970:

> (1) Action on a proposed amendment to the United States Constitution must be delayed until a majority of the legislature has been elected after the amendment is submitted to the state for ratification.
>
> (2) An affirmative vote of three-fifths of the members of each house of the General Assembly is necessary to ratify a proposed amendment to the United States Constitution.

The issue thus is one of power. Can the people of the State of Illinois, through their State Constitution, restrict or regulate the ratification of amendments to the United States Constitution by the General Assembly.

The Federal Constitution is primarily a grant of power whereas a State Constitution is not a grant, but is a limitation, of power. (Bradley v. Case, 4 Ill. 585, 604; R. R. Trainmen v. Term. R.R. Ass'n., 379 Ill. 403, 408-409, aff'd. 318 U.S. 1; Herb v. Pitcairn, 392 Ill. 138, 145.) See, also, 16 C.J.S. Const. Law, sec. 68 (1956). The Federal Constitution is the supreme law of the land. McCulloch v. Maryland, 4 Wheat. 316; U. S. Const., Art. VI.

The power of the people of a state, through their State Constitution, to regulate the method by which an amendment to the United States Constitution can be ratified was the main issue of Hawke v. Smith, 253 U.S. 221.

In the Hawke case, the State of Ohio had amended their constitution in 1918 to provide as follows:

> "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States. * * *"

On January 7, 1919, the Senate and House of Representatives of the State of Ohio adopted a resolution ratifying the proposed eighteenth amendment to the United States Constitution and ordered that certified copies of the Joint Resolution of ratification be forwarded by the Governor to the Secretary of State at Washington, D. C. On January 29, 1919, the eighteenth amendment was proclaimed ratified by the Secretary of State of the United States. Ohio was listed as one of the ratifying states. Shortly thereafter, the Secretary of State of Ohio began to have ballots prepared for the referendum that was made mandatory by the amendment to the Ohio Constitution. Plaintiff sought an injunction to prevent the Secretary of State from spending public funds for this referendum on the grounds that it would be a waste of money because the eighteenth amendment had already been ratified.

The legal issue that was presented to the Ohio courts was whether or not the Ohio Constitution conflicted with Article V of the United States Constitution. The Ohio courts said "no" and ordered the referendum to take place. Plaintiff appealed to the United States Supreme Court. The Supreme Court, through Mr. Justice Day, held that the Ohio Constitution did conflict with Article V.

Mr. Justice Day reasoned, in part, as follows:

> "The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. McCulloch v. Maryland, 4 Wheat. 316, 402. The States surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.
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> * * *
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> "The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. Dodge v. Woolsey, 18 How. 331, 348.

The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

* * *

"The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this - ratification 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.

* * *

"It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

Hawke v. Smith, supra, holds that the people of the United States, in ratifying the United States Constitution, relinquished certain powers; specifically, the power to control the amending process of the United States Constitution. They delegated to Congress the power to propose amendments to the United States Constitution and to choose the method of ratification of proposed amendments, i.e., state legislatures or state conventions. Once the state legislature is chosen by Congress as the method of ratification, said legislatures have the power, delegated by the people of the United States, to ratify or reject said proposed amendments. As Mr. Justice Day pointed out in his opinion, the people of the United States could have reserved to themselves the power to ratify United States constitutional amendments but they chose instead the method outlined in Article V. (Hawke v. Smith, 253 U.S. 221.) Thus, we have emerging via Hawke v. Smith, supra, the notion that the legislature, when ratifying a proposed amendment to the United States Constitution, is carrying out a federal function wholly unrelated to state legislative functions. The legislature, when ratifying a proposed

amendment, is not subject to regulation or restriction by the people of the state.

Edward J. Brundage, Attorney General of the State of Illinois (1917-1924) recognized that the people of the State of Illinois did not have the power to place restrictions on the legislature's ratification of proposed amendments. See, 1919-1920 Ill. Att. Gen. Op. 972.

Charles E. Woodward, President, Constitutional Convention of 1920 wrote to Attorney General Brundage asking his opinion on the constitutionality of proposal No. 382, which read as follows:

> "Whenever the Congress of the United States shall by appropriate resolution propose an amendment to the Federal Constitution, such resolution shall be filed and remain in the office of the Governor until after the members of the next General Assembly shall have been elected.
>
> "When pursuant to law and this election, the General Assembly shall have been organized, the Governor shall present such resolution and proposed amendment for consideration."

Attorney General Brundage answered that "there is at least a strong probability that said proposal is repugnant

to the Constitution of the United States (1919-1920 Ill. Att. Gen. Op. 974.) Citing Hawke v. Smith, supra, as authority Brundage reasoned as follows:

> "* * * The evident purpose of this proposal is to afford the people of this State an opportunity to consider such proposed amendment and to choose the members of their Legislature in view of the impending question of ratification thereof, which such members must consider.
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> "The practical effect of this proposal, should it become part of the State Constitution, is that the people of Illinois prohibit their Legislature existing at the time of the passage of the act of Congress proposing such amendment, from ratifying or even considering the same. The Federal Supreme Court holds that the power to ratify is not conferred by the people of the State but by the Constitution of the United States. It seems reasonable to conclude that this power of ratification cannot be restricted in any way by the people of the State, and the proposal here in question does, in substance and effect, restrict the power of the Legislature conferred upon it by the Federal Constitution. I think it may be strongly argued on the basis of the opinion in the Hawke case, that the Constitution commits to the Legislature itself the power to determine for itself, and free from restriction or limitation imposed by State authority, what consideration, and the time and manner thereof, it shall give to a proposed amendment to the Federal Constitution, or to a resolution of Congress proposing the same." 1919-1920 Ill. Att. Gen. Op. 972, 973-974.

Both Tennessee and Florida have constitutional provisions, similar to section 4 of Article XIV of the Illinois Constitution of 1970, which call for a delay in action on a proposed amendment until a new legislature has been elected.

Section 32 of Article II of the Tennessee Constitution of 1870 reads as follows:

> "* * * No convention or general assembly of this state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states; unless such convention or general assembly shall have been elected after such amendment is submitted."

Section 1 of Article X of the 1968 revision of the Florida Constitution of 1885 reads as follows:

> "The legislature shall not take action on any proposed amendment to the Constitution of the United States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification."

Tennessee legislatures have twice ignored the command of section 32 of Article II of the Tennessee Constitution of 1870. The Tennessee legislature ratified the nineteenth and twenty-sixth amendments to the Federal Constitution without

waiting for a new legislature to be elected. See, respectively, U. S. Const., Amend. XIV to end, U.S.C.A. 569 (1961) and U. S. Const., Amend. XIV to end, U.S.C.A. (supp. pamphlet) 455 (1972).

The legality of the ratification of the nineteenth amendment by the Tennessee Legislature was challenged in Leser v. Board of Registry, 139 Md. 46 and in Leser v. Garnett, 258 U.S. 130.

In Leser v. Board of Registry, supra, petitioner, Oscar Leser, challenged the legality of the registration of certain woman voters. One of the bases for his challenging the right of women to vote in Maryland was that the nineteenth amendment was not ratified by three-fourths of the states. Specifically, petitioner claimed that it was never validly ratified by the States of Tennessee or Missouri because under the constitutions of those states their legislatures were without power to ratify the amendment.

The Missouri constitutional provision in controversy reads as follows:

> "Local self-government not to be impaired. That Missouri is a free and independent state, subject only to the Constitution of the United States; and as the preservation of the states and the maintenance of their governments are necessary to an indestructible union, and were intended to co-exist with it, the Legislature is not authorized to adopt, nor will the people of this state ever assent to any amendment or change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this state." Leser v. Board of Registry, 139 Md. 46, 68; aff'd. 258 U.S. 130.

The Tennessee constitutional provision (Tenn. Const., Art. II, sec. 32) is quoted above.

The Court of Appeals of Maryland denied petitioners claim and reasoned as follows:

> "It being conceded that the Legislature of Tennessee which ratified the amendment was elected before it was proposed, the question is whether these constitutional provisions are valid limitations upon the amending power created by the Fifth Article of the Constitution of the United States.
>
> "Here again the question which we are called upon to consider has already been answered by the highest court authorized to deal with the matter, which has decided that the people of

any one of the several states cannot impose any limitations upon the amending power of the Constitution, and in our opinion the conclusion there reached was in obvious accord with the purpose and intent of the Fifth Article. That article provides that an amendment of the Constitution, when proposed by two-thirds of the members of each branch of the Congress of the United States, shall be adopted whenever ratified by the legislatures or conventions called to consider the question of three-fourths of the states. If, however, the people of the several states could by state constitutions take away or limit the rights of such legislatures or conventions to so ratify a proposed amendment to the Constitution, then they could by the exercise of that power nullify and destroy the power of amendment conferred by the Fifth Article, which is a part of the Constitution, and so could by such action amend it in one of its most important and vital elements in a manner not provided by it. Such a conclusion ignores the fundamental distinction between the rights and privileges of the people of the United States in the enactment of legislation in the respective states of which they may be citizens in respect to matters peculiar to the local government of such states, and their rights and privileges when dealing with legislation affecting the people of all the states. The power in the one case is derived from the people of the state, and is an inherent attribute of its sovereignty, while in the other it is drawn from the Federal Constitution. The power of the people of the United States in their relation to it is limited and defined by the express grants of the Constitution, while their power in their relation

> to governments of the states of which they are citizens is the residuum which is found, after subtracting the powers granted in the Federal Constitution by the people of the state to the Federal Government, from the sum of the powers possessed by the people of the state in their collective character as a sovereign state. The right to amend the laws and constitutions of the several states possessed by the people thereof is natural and inherent and is incident to the sovereignty of the states, but the right to amend the Constitution of the United States rests solely upon the provisions of the Constitution of the United States.
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> "Having granted the power to amend that constitution to the people of all the states, manifestly the people of the several states cannot, acting separately, exercise the very power they have granted away."

Petitioner, Leser, appealed to the United States Supreme Court. There he again argued that the nineteenth amendment had never been legally ratified by three-fourths of the states. Again, he pointed to the Tennessee Constitution and complained that the Tennessee legislature was without power to ratify the XIX amendment. Leser v. Garnett, 258 U.S. 130, 135; Hughes, Can A State Prescribe A Breathing Spell Before Its Legislature Acts Upon A Proposed Amendment to the Federal Constitution? 14 Va. L. Rev. 191, 197 (1928).

Mr. Justice Brandeis answered this attack on the power of the Tennessee legislature to ratify the nineteenth amendment as follows:

> "The second contention is that in the constitutions of several of the thirty-six States named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State. Hawke v. Smith, No. 1, 253 U.S. 221; Hawke v. Smith, No. 2, 253 U.S. 231; National Prohibition Cases, 253 U.S. 350, 386." Leser v. Garnett, 258 U.S. 130, 136-137.

Several scholars have stated that provisions in state constitutions that delay action on a proposed amendment are unconstitutional.

> "A long-mooted question concerning the right of a state to require that action on a proposed amendment be delayed until a new legislature has been elected was answered in Leser v. Garnett.

The fact that the Constitution of Tennessee required such postponement was cited in support of the argument that the purported ratification of the Nineteenth Amendment by the Legislature of that State was a nullity. Instead, the Supreme Court held that this constitutional provision was of no effect, since the power to act on a proposed amendment to the Federal Constitution is derived from the latter document."

Corwin & Ramsey, The Constitutional Law of Constitutional Amendments, 26 Notre Dame Lawyer, 183, 206-207 (1951)

"* * * Clearly, also, a state constitution has no authority to impose the limitations found in the constitutions of Florida and Tennessee, that no convention or legislature of the State shall act upon any amendment to the Constitution of the United States unless such convention or legislature shall have been elected after the amendment is submitted."

Dodd, Amending the Federal Constitution, 30 Yale L.J. 321, 344 (1921)

"* * * Moreover, since all of the people have delegated the power to ratify to their respective legislatures, the people of an individual state may not claim the right to a referendum on the question of that state's ratification, or even insist that a legislative election intervene between the time of submission and ratification.

* * *

"The test of the 20th (Lame Duck) Amendment as approved by the House on February 16, 1932, contained a provision that 'ratification shall be by legislature, the entire membership of at least one branch of which shall have been elected subsequent to such date of submission.' As the amendment was finally proposed the words in italics were omitted, but an interesting problem was at least suggested. The Supreme Court, in Leser v. Garnett, declared a similar provision in the Tennessee Constitution invalid, and has remarked that 'it is not the function of legislative bodies, national or state, to alter the method which the Constitution has fixed.' Virginia ratified the 20th Amendment on March 4, 1932, without waiting even for official notification from the State Department, much less an intervening election. Supposing the above provision had been left in, would Virginia's ratification have been invalid? It would seem not, in view of the Leser Case. * * *

* * *

"* * * The Supreme Court of the United States, however, in addition to holding that ratification is not a legislative power but a delegated Federal function, defined a legislature as understood at the time the Constitution was adopted as 'the representative body which made the laws of the people.'

"The legislature in office at any time is the one meant by Article V. In an attack upon the 19th Amendment it was argued that Tennessee's ratification was void because the legislature had disregarded the provision for an intervening

> election above referred to, but the court held that the ratifying power 'transcends any limitations sought to be imposed by the people of a State.'"
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> Platz, Article V of the Federal Constitution, 3 Geo. Wash. L. Rev. 17, pp. 28, 34-35 (1934)

Even delegates to the recent Illinois Constitutional Convention (Sixth Illinois Constitutional Convention) had their misgivings about the constitutionality of delaying action on a proposed amendment until a new legislature is elected. (See, 6th Ill. Const. Convention, Verbatim Transcript, No. 29, March 26, 1970, p. 167). Likewise, the Committee on Style and Drafting placed the last sentence into section 4 of Article XIV of the Illinois Constitution of 1970 because that committee was aware of the strong possibility that portions of section 4 would conflict with federal law. The last sentence of section 4 bears repeating at this time:

> "The requirements of this Section shall govern to the extent that they are not inconsistent with requirements established by the United States."

Wayne Whalen, Chairman, Committee on Style and Drafting, explained the purpose of the above sentence as follows:

> "DELEGATE WHALEN: The purpose, Mr. Whalen, (sic) is to forestall the possibility that all of Section 3 (new section 4) would be declared unconstitutional by a court because it was inconsistent with the directions of the United States Congress for State Legislatures in approving the amending process. And we want to insure that any court would just take out of the section only that part which they found to be unconstitutional, if they determined that it is unconstitutional." (Parenthetical material added)
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> 6th Ill. Const. Convention, Verbatim Transcript, No. 100, Aug. 5, 1970, p. 57.

I am of the opinion that the second sentence of section 4 of Article XIV of the Illinois Constitution of 1970 which requires a delay in consideration of the proposed twenty-seventh amendment to the United States Constitution (the "Women's Rights" Amendment) is contrary to Article V of the United States Constitution.

" . . . The function of a state legislature in ratifying a proposed amendment to the Federal Constitution,

like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state." (Leser v. Garnett, 258 U.S. 130, 137). This principle and the principles of law enunciated in Hawke v. Smith, 253 U.S. 221, necessitate the further conclusion that the requirement of a three-fifths vote of each house of the General Assembly to ratify is also contrary to the federal constitution.

In your letter, you point out that Congress, in its Joint Resolution (HJR 208, 92nd Congress, U. S. Code, Congressional and Administrative News, p. 835) submitting the proposed amendment for ratification by the state legislatures provided that the amendment must be ratified, if at all, within seven years from the date of its submission. In view of my opinion that the second sentence of section 4 of Article XIV of the Illinois Constitution of 1970 is contrary to the federal constitution, I find it unnecessary

to comment on whether that sentence is in conflict with the seven year proviso.

Very truly yours,

ATTORNEY GENERAL