TESTIMONY OF PHYLLIS SCHLAFLY

BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE COMMITTEE ON THE JUCICIARY

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My name is Phyllis Schlafly and I live in Alton, Illinois. I am National Chairman of STOP ERA, the organization that has led the opposition to the ratification of the Equal Rights Amendment. I thank the Chairman and the Members of the Subcommittee for hearing our reasons for opposing H.J. Res. 638, the bill to extend the deadline for ratification of the Equal Rights Amendment. Our reasons for opposing the bill have nothing to do with the arguments for or against the Equal Rights Amendment, and I will address myself solely to the issue of extension.

I.

If Congress now changes the time period for ratification of the Equal Rights Amendment, which was positively set at seven years in H.J. Res. 208, passed by the 92nd Congress on March 22, 1972, regretfully, millions of Americans will look upon this as an unfair attempt to tamper with the United States Constitution.

"Tamper" is the word used by the New York Times. The Washington Post calls it "tinkering." The New Republic predicts that people will feel ERA has been "snuck through." Dean Erwin Griswold calls it "a breach of faith." These words are only symptomatic of the intuitive feeling of the American people that the ERA proponents are trying to change our Constitution in an unfair way because they can't win if they obey the law.

The last few years have not exactly been good ones for public confidence in the institutions of our Government. Many Americans have been disillusioned by unfortunate acts of some persons in the Executive Branch and in the Congress, and by some decisions of the U. S. Supreme Court. But one institution of our

Government has remained sacred: the United States Constitution. If millions of Americans believe that the Constitution, too, has been tarnished, the fall-out will be worse than that from Watergate. No amount of legal verbiage will be able to justify something that the American people feel is fundamentally unfair.

Not only is the move to change the ERA time period unfair, but some of the arguments presented to this Subcommittee are dishonest. On November 1, 1977, Assistant Attorney General John N. Harmon, appeared before this Subcommittee to present a 51-page Justice Department brief in support of this bill. He stated on page 3, 5th and 4th lines from the bottom, that the 92nd Congress "stated in the proposing resolution that the States should have at least 7 years to consider ratification of the amendment." (emphasis added) On page 17, 4th and 3rd lines from the bottom, he referred again to "the express language of the limit . . ., namely, that the ERA will be viable for at least seven years." (emphasis added)

The fact is that the ERA resolution passed by Congress in 1972 did not say "at least seven years." It said "within seven years." This attempt to mislead the Subcommittee and the American people about the text of the 1972 ERA resolution is shocking.

The "express" language of H.J. Res. 208, the ERA resolution passed by Congress on March 22, 1972, reads as follows: "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 . . ." (emphasis added) Then followed the familiar three sections of ERA.

The Equal Rights Amendment is no longer in the hands of Congress; it is in the hands of the several states. It is no more legally possible for Congress to

change the wording of the above sentence than to change the wording of Sections 1, 2 or 3. Any attempt to change any of the wording now will result in prolonged and expensive litigation and a loss of confidence in our Government.

II.

The ERA Extension Bill should be defeated because it amounts to a misuse of the democratic process.

Ever since the democratic process was born, there has been one way that an organized minority can impose its will on the majority: bring the pressure group into the legislative body and demand that it vote again and again and again until, finally, enough people are compelled to leave to attend to other pressing business, or get tired and depart, or leave believing that the issue was disposed of. Then, in the eleventh hour, the organized minority demands another vote and declares its motion passed. Sometimes the acquiescence of those who remain is compelled by threats or other acts of intimidation.

This is what is happening to the Equal Rights Amendment. The 15 states that have not ratified ERA have been compelled to vote again and again and again for three, four, five, six, and now seven years. Appended to my testimony is a list showing that the 15 states that have not ratified ERA have been compelled to vote a total of 24 times in committees and 59 times on the floor. Now the ERA proponents are demanding that this exercise in futility be repeated for a second seven years.

There is just one reason why the ERA proponents are demanding seven more years of votes, and that is to give their malicious secondary boycott the chance to wreak its economic harm on more innocent people. The ERA proponents are bragging about the millions of dollars of financial losses they are deliberately causing to the Hilton, Marriott, Sheraton and other hotels, restaurants, retail

stores and taxicabs, in the 15 unratified states. This is part of their plan to throw thousands of waiters, maids, clerks, and other innocent people out of work -- people who have nothing whatever to do with the ERA controversy.

Passage of the ERA Extension Bill will not help the ratification of ERA, but it will significantly increase the power of the ERA proponents to cause unemployment and financial losses to innocent people. That is its true purpose.

III.

It is not "reasonable" to extend the time for ratification of ERA — using the word reasonable in the precise meaning of the Supreme Court holding in Dillon v. Gloss, 256 U.S. 368 (1921).

The purpose of the "reasonable time" rule is that there be a contemporaneous consensus, that is, that all the ratifications of the several states should have occurred sufficiently close together to reflect a consensus of three-fourths of the several states at a given point in time. In 1921, seven years was held to be a reasonable time. In our present era of instant mass electronic communication, and when legislatures remain in session many more months than they did a half century ago, a good argument can be made that even seven years is unreasonably long. No constitutional amendment, even in the days of pony-express communication, has taken as long as four years.

Of the states that have ratified ERA, 30 ratifications took place within the first year. To say that those 30 ratifications can be "reasonably" cumulated with additional ratifications during a fourteenth year, is to make a farce of the Dillon v. Gloss requirement of "contemporaneous consensus." And when many states have reversed themselves and rescinded their ratifications in the interval, any attempt to reconcile the time gap with the Dillon v. Gloss holding approaches the absurd.

The ERA proponents argue that Dillon v. Gloss said that Congress has the power to set the time limit for ratification. That is true, so long as the time limit is reasonable. But Dillon v. Gloss did not say that, after Congress had fixed the time limit and ratifications had proceeded on that basis, then Congress could change the time limit seven years later. That is an entirely different matter.

The ERA proponents argue further that Coleman v. Miller, 307 U.S. 433 (1937) held that, in the case where Congress had not set a time limit in advance, Congress could set a reasonable time limit after some ratifications had taken place. This case is not applicable here because Congress did preset the ERA time limit at seven years. Coleman v. Miller did not say anything at all about changing the time limit after states had ratified on the basis of the preset time limit.

Furthermore, Coleman v. Miller was grounded on the political question doctrine which few lawyers today believe is still viable after Baker v. Carr and Powell v. McCormick. Dean Griswold pointed out in his testimony that Coleman v. Miller can't even be considered a "decision" at all; it is only a "case" because there was no Court majority on anything; the Court merely decided to keep hands-off because of the political question doctrine.

IV.

The ERA Extension Bill violates fundamental principles of contract law. When Congress passed ERA in 1972, it was an offer to the states that would become binding when accepted by the states according to the terms of the offer. States which accept (ratify) under terms of the original offer cannot be cumulated with states that accept under the terms of a different offer. To attempt to hold them to it is another aspect of the fundamental unfairness of the time extension.

The offer that Congress made to the states was, substantially, as follows: Here is a proposed amendment which will become part of the Constitution if ratified by 38 states within seven years. If Congress makes a new offer changing the time limit to 14 years, it cannot lock in the states that ratified under the original offer. Any attempt to do so would result in lawsuits by dozens of states to vindicate their right not to be bound by the terms of a contract to which they never agreed.

If you make an offer to sell your property to two persons provided both accept by Tuesday, and one accepts on Monday and one accepts on Wednesday, nobody is bound to the contract because the seller's terms were not met. In order to bind the Monday buyer, the property must be reoffered and reaccepted.

The states that ratified under the original ERA resolution cannot be fairly or legally bound if its terms are clearly changed. This is why Sections 1, 2 or 3 cannot now be amended by the addition of any qualifying clause, even though it is now clear that amendments to those sections would greatly facilitate ratification.

The so-called "Madison Principle" referred to in the Justice Department brief on pages 30-31 does not support the ERA Extension Bill at all, but instead is strong support for its rejection. The issue presented by that problem was whether New York could ratify the Constitution <u>on condition</u> that certain amendments be adopted. James Madison correctly wrote: "Compacts must be reciprocal, . . . The Constitution requires an adoption <u>in toto</u> and <u>for ever</u>. It has been so adopted by the other States."

That is exactly our point. The relationship between the Federal Government and the states is that of a compact (contract), and the Constitution can only be amended (as the original Constitution was adopted) by a "reciprocal" and "in toto" adoption by the Congress and a sufficient number of ratifying states.

The language in the Madison letter in which he says that "an adoption for a limited time would be as defective" does not apply here. Nobody is suggesting that ERA be adopted only "for a limited time." We quite agree that, if ERA is ever ratified, it will be "forever" (unless repealed like the Prohibition Amendment). The relevant Madison language is his prohibition against adding any subsequent "condition" to the Amendment after it has been submitted to the states. That is what the ERA Extension bill does and, under the Madison Principle, it is impossible.

The ERA proponents argue that they can change the seven-year rule because it is in the ERA resolution and not in the three Sections that will actually go into the Constitution. But it is all part of the same resolution, even part of the same sentence. And the legislative history proves that the intent was that the seven-year rule be just as binding, no matter in which paragraph it was placed.

Every amendment to the Constitution added in the last 50 years has had the seven-year limitation. The Twenty-third Amendment was the first time that the seven years was placed in the resolving clause, rather than in the portion which was ultimately added to the Constitution. The legislative history of the Twenty-third Amendment shows that this change was made in order to make a more elegant Constitution, uncluttered by obsolete language after the ratification process had been completed. The change was made on the basis of a letter from Professor Noel Dowling of Columbia Law School who wrote to Senator Kefauver that placing the time limitation in the resolution rather than in the text "will be equally effective" and will prevent "an unnecessary cluttering up of the Constitution." (Hearing on S.J. Res. 8, Senate Judiciary Subcommittee, 84th Cong., 1st Sess., 1955, at page 34.)

The Senate Committee accepted Professor Dowling's language, and Senator Kefauver confirmed the intent in floor debate: "The general idea was that it was better not to make the seven-year provision a part of the proposed constitutional amendment. It was felt that that would clutter up the Constitution. ... The intention of the preamble is that it must be ratified within seven years in order to be effective." (emphasis added) (101 Cong. Rec. 6628, 1955)

There is absolutely nothing in the legislative history of ERA to indicate that the placing of the seven-year limit in the resolution had any different purpose from the legislative history of the Twenty-third Amendment, or that it was to be one whit less binding than if it were in the text that would ultimately be in the Constitution.

V.

The whole idea of allowing states to change their minds from no to yes over a 14-year period, but denying the states the right to change their minds from yes to no even once, is so contrary to American concepts of fairness as to be rejected out of hand by the American people. Yet that is the double standard of the ERA proponents.

Four states have rescinded their previous ratifications: Nebraska, Tennessee, Idaho, and Kentucky. It is grievously unfair to try to deny those states the right to change from yes to no, while allowing other states such as Indiana and North Dakota (which had previously rejected ERA) to change from no to yes.

The argument in favor of allowing the states to change their minds either way becomes an imperative when considered in the context of extending the time from seven to 14 years.

There is nothing in the U.S. Constitution, in any Federal statute, or in any holding of the U.S. Supreme Court that denies a state the right to rescind

its ratification of a constitutional amendment. The only arguments presented by the ERA proponents are the Coleman v. Miller case, whose inherent inconsistencies plus the obsolescence of the political question doctrine make it inapplicable today, and Congressional action on the matter of the Fourteenth Amendment, in which the matter of rescission became moot because enough states ratified so that the rescissions could be ignored. The Supreme Court has often shown that even valid Court precedents will not be allowed to stand in the way of correcting fundamental unfairness, and those historical examples cited by ERA proponents cannot even be called "precedents."

VI.

Additionally, it is unfair to attempt to pass H.J. Res. 638 by a majority vote instead of by the two-thirds vote that Article V of the Constitution specifies for constitutional amendments. When a motion requires a two-thirds vote, it may usually be amended prior to passage by a majority vote. But after passage, a body cannot amend or change by a majority vote the motion that required a two-thirds vote for passage.

The attempt to pass H.J. Res. 638 by a majority vote would be just like attempting to pass by a majority vote the amendments to the Panama Canal Treaty after it had been passed by a two-thirds vote.

The ERA proponents say the time period is a matter of procedure rather than substance. But Article V makes no difference between procedure and substance. It is all one and the same.

VII.

Regretfully, I feel constrained to point out that the opponents of ERA have not been accorded equal rights by this Subcommittee. In the three days of hearings last fall, the Subcommittee heard from seven lawyers. Six were pro-ERA. Five were pro-Extension, one spoke on both sides of Extension, and

only one of the seven took a clearcut position against Extension. The Subcommittee specifically refused to hear any lawyer recommended by the ERA opponents.

When the hearings were resumed this month, we were told that the legal authorities were heard last fall, and the purpose of the current hearings is to hear "groups" and state legislators instead of lawyers. One constitutional law professor of our choice was finally contacted, but he was told that he could testify only if he confined himself to discussing the status of women under current law, rather than the constitutional and legal issues involved in the ERA Extension Bill. He did not appear because he did not care to submit to that kind of prior restraint in testimony on H.J. Res. 638.

In the current hearings, there appears again to be an unequal division of those pro and con the Equal Rights Amendment.

Yet, despite the unequal treatment rather consistently meted out to ERA opponents, and despite the fact that we have found ourselves pitted against the lawyers and the lobbyists of the Executive Branch of the Federal Government (who are given no powers by Article V to interfere in the adoption of constitutional amendments), the momentum is all going against the Equal Rights Amendment. The decisive rejection of a state ERA in a New York State referendum by more than 400,000 votes in November 1975 was the start of a mightyswing against ratification. Trying to extend the time for ratification will do nothing to enhance its chances.

STATE	HOUSE	SENATE
Alabama		1 floor vote
Arizona	3 committee votes 1 floor vote	2 committee votes 4 floor votes
Arkansas	1 floor vote	1 committee vote
Florida	3 floor votes	1 committee vote 3 floor votes
Georgia	1 committee vote 1 floor vote	1 floor vote
Illinois	6 floor votes	1 committee vote 5 floor votes
Louisiana	4 committee votes 1 floor vote	2 floor votes
Mississippi		3 committee votes
Missouri	2 floor votes	1 committee vote 2 floor votes
Nevada	2 floor votes	3 floor votes
North Carolina	1 committee vote 3 floor votes	2 floor votes
Oklahoma	6 floor votes	1 floor vote
South Carolina	3 floor votes	1 floor vote
Utah	1 floor vote	1 floor vote
Virginia	2 committee votes 1 floor vote	4 committee votes 2 floor votes
TOTALS	11 committee votes 31 floor votes	13 committee votes 28 floor votes

Summary Analysis

Only three states have had no floor vote in both houses.
Only two states had had no floor vote in either house.
Nine states have had at least five committee and/or floor votes.
Seven states have had at least six committee and/or floor votes.
Six states have had at least seven committee and/or floor votes.
Eight states have had at least four floor votes.