The Phyllis Schlafly Report

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Federal Court Voids ERA Extension, Upholds Rescission

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
THE STATE OF IDAHO, et al,
Plaintiffs,
and
CLAUDE L. OLIVER, etc., et al,
Plaintiff-Intervenors,
-vs-
REAR ADMIRAL ROWLAND G. FREEMAN, III,
Administrator of General Services Administration,
Defendant,
and
NATIONAL ORGANIZATION FOR WOMEN, et al,
Defendant-Intervenors.

NOW, THEREFORE, IT IS ORDERED that " 'the plaintiffs' request for declaratory judgment should be GRANTED, and the Court declares that a state has the power and right to rescind a prior ratification of a proposed constitutional amendment at any time prior to the unrescinded ratification by three-fourths of the states of the United States properly certified to the General Services Administration; and declares that the ratification by Idaho of the twenty-seventh amendment was properly rescinded and such prior ratification is void, as is the ratification of any other state that has properly rescinded its ratification. The Court further declares that Congress' attempted extension of the time for the ratification of the twenty-seventh amendment was null and void...

DATED this 23rd day of December, 1981.

MARION J. CALLISTER, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

I. INTRODUCTION

...This proceeding calls into question the validity of Idaho's act of rescinding its prior ratification of the proposed "Equal Rights Amendment" to the Constitution of the United States, and the constitutionality of Congress' act in extending the time period in which ratifications may be received. The plaintiffs bringing this suit consisting of the State of Idaho, the leadership of the Idaho State Legislature, and individual legislators of that body; the State of Arizona, legislative leadership of both houses and individual legislators from the Arizona legislature. These plaintiffs are joined by the plaintiff-intervenors, legislators from the State of Washington. They seek from this Court a declaration that, as a matter of federal constitutional law, Idaho's act of rescinding its prior ratification is valid and effective; that Congress' extension of the seven-year time limitation in which to present ratifications is unconstitutional in that it violates the grant of power given Congress under article V of the Constitution, and that the running of the seven-year time limitation tolls and terminates any ratifications enacted by the states to that point. ...

II. BACKGROUND

In March of 1972 Congress passed a resolution proposing the "Equal Rights Amendment," as the twenty-seventh amendment to the Constitution of the United States, and submitted it for ratification to the legislatures of the states:

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

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:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification.

...From the advent of the amendment and until 1978, 35 of the requisite 38 state legislatures took action ratifying the amendment and sent official certifications of their actions to the General Services Administrator. ... But, in that same time period five states, Nebraska, Tennessee, Idaho, Kentucky, and South Dakota, while initially assenting to ratification, passed resolutions of rescission withdrawing their prior consent. The original seven-year ratification restriction set in the resolution proposing the "Equal Rights Amendment" would have expired on March 22, 1979, had not Congress taken action to extend the time period.

On October 6, 1978, an extension resolution, House Joint Resolution 638, was presented to Congress for consideration. It read:

Joint Resolution

Extending the deadline for the ratification of the Equal Rights Amendment.

Resolved by the Senate and House of Representa-

tives 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 all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.

While a majority of both Houses favored the extension resolution, proponents of the measure could not generate a two-thirds concurrence as had been the case when the original time period had been enacted. Therefore, the House acting by a vote of 253 to 189 and the Senate acting by a vote of 60 to 36 enacted the extension resolution by a simple majority. The resolution was later signed by the President. ...

III. POLITICAL QUESTION

Defendant maintains that ... the case is barred from consideration by this Court because it presents a non-justiciable "political question."... The defendant argues that the whole of this case is barred from judicial consideration because the Congress is granted exclusive and plenary control over all phases of and questions arising out of the amendatory procedure. A three-judge court in *Dyer v. Blair*, 390 F. Supp. 1291 (1975) addressed this proposition. Judge Stevens (now Justice Stevens) wrote:

> "There is force to ... [this] argument since it was expressly accepted by four Justices of the Supreme Court in *Coleman v. Miller*. ... But since a majority of the Court refused to accept that position in that case, and since the Court has on several occasions decided questions arising under article V, even in the face of 'political question' contentions, that argument is not one which a District Court is free to accept." ...

Furthermore, a review of article V reveals that the judiciary, while only dealing with article V in a handful of cases, has nevertheless dealt with virtually all the significant portions of that article. These decisions considered and interpreted the following underlined portions of article V:

> "The Congress, *whenever two thirds of both Houses shall deem it necessary, shall propose Amendments* to this Constitution, ... *which ... 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.*" ...

Finally, as will be pointed out later, giving plenary power to Congress to control the amendment process runs completely counter to the intentions of the founding fathers in including article V with its particular structure in the Constitution. Therefore, in accordance with the holding in *Dyer* and the overwhelming precedent established in the case law arising under article V, the position taken by the defendant that the Congress is empowered to decide all issues concerning the amendment process is clearly foreclosed. ...

The states ... have complete and exclusive power over the process of determining actual consent. They determine whether or not sufficient local consensus exists and the process by which that consensus is determined. It is this allocation of exclusive control over the actual process of ratification, or determination of actual consensus, that creates the "barrier to national encroachment" that the founding fathers saw as a necessity. The recognition of this local barrier to encroachment has been recognized in two areas, the procedure the states may follow in determining consent, and the actual determination of consent itself. For example, in *Dyer v. Blair, supra*, a three-judge district court was presented with the question of whether Congress or the states control the determination of a requisite majority in a state's vote of ratification. After noting that article V fails to indicate one way or the other who should determine the voting requirement, the court wrote:

> "We think the omission more reasonably indicates that the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself."...

It has been unquestioningly determined that a state's assessment of local consensus is binding and beyond reproach. It has been recognized that the official certification to the national government of the state's action with regard to the proposed amendment is binding on both the national government or its representative, and the courts thus creating that impregnable barrier which was intended. ...

It is evident from the balance struck between the two participants in the amendment process that the framers did not intend either of those two parties to be the final arbiter of the process. It seems more logical that the courts, as a neutral third party, and having the responsibility of "guardian of the Constitution" decide these questions raised under article V because the amending power was split between Congress and the states. The question of whether or not a rescission of a prior ratification is a proper exercise of a state's power under article V is one that is not committed to Congress, and should not be, but is appropriate for judicial interpretation under the Court's authority to "say what the law is." Furthermore, while the question of the reasonableness of the ratification period is one committed to Congress, such is not the question presented here. Rather, the question presented to the Court is one of procedure under article V and these procedural questions have been held to be ones which the Court must decide. ...

The question of the state's ability to rescind and the propriety of changing an established time limitation are ones which should not be answered "in different ways for different amendments." Rather, it is clear that these questions are such that they "must be interpreted with the kind of consistency that is characteristic of a judicial as opposed to political, decision making." To subject these questions to a variety of inconsistent interpretations or approaches would create an incurable uncertainty regarding the validity of the acts of the participants, severely crippling the amendment process. Such a result would violate the Supreme Court's articulated purpose for the application of the political question doctrine, "a tool for maintenance of governmental order will not be so applied as to promote only disorder." *Baker v. Carr*, ...

If the Court is to look to congressional handling of the question of the effect of a rescission, a brief review of the full history of congressional decision making regarding this issue makes it clear that Congress has consistently refused to render a final decision. Thus it would be impossible for this Court to find a clear decision by the political branch on the question of the effect of a rescission to which it would be appropriate to defer. ...

The *Coleman* court was not presented with the question as to the effect of a rescission. Since the question was not before the court, any discussion regarding that issue would clearly be dicta and have only the force of its underlying analysis to persuade subsequent courts to follow. ...

From a review of the history of the proceedings surrounding the Civil War Amendments which served as the basis for the holding in *Coleman* and the subsequent actions of Congress regarding the amendment process, the Court is

persuaded that, in fact, no decision has been made by a political branch which would necessitate the Court's deferral of its constitutional function of intepreting the Constitution. ...

It is plain that Congress has not come to any conclusion regarding the question of rescission. The fact that congressional action could be viewed at best as equivocal would indicate that even if the Court felt compelled to defer to a decision made by Congress, it would be impossible to do so. Therefore, the application of the political question limitation in this situation is not mandated by prudential considerations; furthermore, its application would be highly inappropriate in that it would work to further confusion in an area where stability should be considered a premium. ...

From the Court's review of all the ramifications of the "political question" doctrine, there does not appear to be any compelling reasons for it to withhold its jurisdiction with regard to the questions presented. ...

IV. RESCISSION

The first approach to be considered contends that whatever action is initially taken by the state, whether rejection or ratification, exhausts the state's power under article V making any subsequent act to reverse the prior action a nullity. This approach was argued in *Wise v. Chandler* ... (1937) before the highest state court of Kentucky and was defended on the grounds that the power of a state legislature to ratify cannot be any greater than its alternative, the state convention. Since a convention exhausts its authority by its initial action, whatever that action may be, it would be consistent to view a legislature as having only the same amount of authority. Advocates of this position also argue that treating both acceptance and rejection as conclusive would lend a consistency and concreteness to the system which would benefit an already difficult process. Furthermore, this approach would arguably be consistent with the notion that when a state acts under its power to ratify, it is not legislating but exercising a ministerial or constituent function. The *Chandler* case was appealed to the Supreme Court and the Court granted certiorari but dismissed the case because it determined that the issues presented were moot. Therefore, the Court did not approve or disapprove this approach.

The second approach postulated would condone only the act of ratification, and the negative expressions of rejection or rescission would be treated as a nullity. This approach was relied upon by the State Supreme Court of Kansas in adjudicating the issues in *Coleman v. Miller* ... (1937). This approach is premised on a literal reading of article V which speaks only of ratification. The argument follows that because the article does not confer upon the states the specific power to reject or rescind, but only to ratify, any of these negative acts cannot be recognized. Advocates of this position argue that greater efficiency would be given to the amendment process and lead to less confusion in that only positive acts would be counted towards final ratification. The United States Supreme Court had an opportunity to consider this approach when it reviewed the decision of the Kansas court. From the Supreme Court's opinion in the *Coleman* matter it appears that this approach found little approval. In the "Opinion of the Court" Justice Hughes wrote that they found "no reason for disturbing the decision of the Supreme Court of Kansas ... its judgment is affirmed *but upon the grounds stated in this opinion.*"... Thus they rejected the approach of the Kansas court and chose to base their decision on other criteria. ...

Considering that an amendment cannot become part of the Constitution until a proper consensus of the people has been reached and it is the exclusive role of the states to determine what the local sentiment is, it logically follows that the subsequent act of rescission would promote the democratic ideal by giving a truer picture of the people's will as of the time three-fourths of the states have acted in affirming the amendment. To allow a situation where either the first act of a state is irrevocable or where a rejection can be changed by a ratification, but not permit rescission, would permit an amendment to be ratified by a technicality — where clearly one is not intended — and not because there is really a considered consensus supporting the amendment which is the avowed purpose of the amendment procedure. Furthermore, an irrevocable ratification prior to the time that three-fourths have acted would completely disassociate the democratic notion of a considered consensus from the ratification procedure and create the very real possibility that an amendment could become part of the Constitution when the people have not been unified in their consent.

The only apparent criticism of the approach which would recognize a rescission after a ratification is that to allow a change after a ratification would create confusion and uncertainty and essentially paralyze the process. This objection has little merit when it is realized that all Congress or its designate must do is count the state's most recent official certification to determine whether or not three-fourths have ratified. In addition a brief review of amendatory history reveals that as a standard practice, questions regarding ratifications have usually been viewed in favor of disqualification and have caused little, if any, confusion. For example, in the process of ratifying the twelfth amendment, a question arose as to the validity of New Hampshire's ratification. If New Hampshire's ratification would have been considered valid, they would have been the last state necessary for a three-fourths majority. Rather than proclaim the amendment part of the Constitution, the national government waited until another state ratified thus obviating the need for a resolution of the question. In the promulgation of the fifteenth amendment, two states changed their votes. Resolutions were offered in Congress to resolve the questions of validity but the measures were buried in committee. The Secretary of State, who had the responsibility of counting the states' ratifications, withheld proclaiming the amendment part of the Constitution until sufficient votes were received so that a declaration could be made without the need of counting the disputed ratifications. A similar approach was taken in the nineteenth amendment. Again, two states changed their votes and again additional votes were accumulated in order to promulgate the amendment. Thus, uniformly where ratifications have been rescinded, the rescissions have been dignified by the national government by waiting and collecting additional ratifications to offset them. Parenthetically, no great confusion has been manifest. ...

V. EXTENSION

The question of whether it is a proper exercise of congressional authority under article V to alter a previously proposed time limitation for ratification, and if so by what majority, presents for the Court a question of constitutional interpretation of congressional authority, and an inquiry into the procedural aspects of exercising that power. Thus, the Court's inquiry is two-fold: First, does Congress under its power to "propose" the "Mode of Ratification" have the power to change its proposal once it has been made and sent to the states; second, if the initial proposal can be subsequently changed, may Congress act by less than a two-thirds majority. ...

It, therefore, appears compelling that in order to fulfill the purposes for fixing a time limitation for ratification as outlined in *Dillon* — "so all may know and speculation ... be

avoided" — the congressional determination of a reasonable period once made and proposed to the states cannot be altered. If Congress determines that a particular amendment requires ongoing assessment as to its viability or monitoring of the time period, it can do so, not by defeating the certainty implied by the *Dillon* case, but by not setting a time period at the outset and reserving the question until three-fourths of the states have acted.

The Court's conclusion that Congress cannot change the ratification period once it is set also finds support from the form in which it is presented to the states. While the setting of a time period for ratification has been described as a "subsidiary matter of detail," pursuant to Congress' power to propose the mode of ratification, if the Congress chooses to fix a time period by making it part of its proposal to the states, that determination of a time period becomes an integral part of the proposed mode of ratification. Once the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. Once the proposal is made, Congress is not at liberty to change it.

In any event, while the general power of Congress to change its prior proposal may be argued, it is more than clear that in this instance Congress' promulgation of the extension resolution was in violation of the constitutional requirement that Congress act by two-thirds of both Houses when exercising its article V powers. Since Congress can act only within the authority given it by article V, and in none other, when proposing amendments or the mode of ratification, arguments relating to acceptable parliamentary order or procedure have little bearing in determining what voting requirement is necessary for Congress to alter a proposed time limitation on ratification. This is because such an argument presumes Congress is functioning in a legislative capacity when exercising its powers under article V. To determine in what manner Congress must act in utilizing its authority under article V, reference must first be made to the Constitution itself. If it is silent, then the courts can leave Congress to decide its own procedural requirements. Article V grants Congress only one power which can be exercised with regard to two separate considerations. Congress has the power to "propose." It can "propose" the text of the amendment and it can "propose" the mode of ratification. When acting in its function of proposing the amendment itself, article V has given the term "Congress" a particular definition. Article V states, "The Congress, *whenever two thirds of both Houses shall deem* it *necessary*, shall propose Amendments...." Within its powers to propose the mode of ratification, however, no specific reference is made by what concurrence of both Houses, or even if both Houses must act, in order for the mode of ratification to be proposed and sent to the states. Article V only provides that ratification be "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 Congress*...." The defendant argues that this failure of the drafters to designate by what majority the power to propose the mode of ratification indicates that it should be left to Congress to set its own procedure. But this argument overlooks the fact that the word "Congress" has been specifically defined earlier in the same sentence. Rather than give the word "Congress" two different meanings within the same provision, it seems more logical to give it a consistent interpretation throughout. This conclusion seems even more reasonable when it is considered that what is being dealt with is the same power — the congressional power to "propose."...

Therefore, the Court is persuaded that the congressional act of extending the time period for ratification was an improper exercise of Congress' authority under article V. While Congress is not required to set a time period in advance of the requisite number of states acting to ratify, if it chooses to do so to remove uncertainty regarding the question, it cannot thereafter remove that certainty by changing the time period. In addition, since it is clear that Congress must act by a two-thirds concurrence of both Houses when acting pursuant to its authority under article V, and because the extension resolution was enacted by only a simple majority, the extension resolution is an unconstitutional exercise of congressional authority under article V. ...

VI. SUMMARY

In summary, the Idaho plaintiffs have standing to bring this action. The matter is ripe for determination and the Court has jurisdiction and properly should determine the issues presented.

The clear purpose of article V of the United States Constitution is to provide that an amendment properly proposed by Congress should become effective when three-fourths of the states, at the same time and within a contemporaneous period, approve the amendment by ratification through their state legislatures.

To allow an amendment to become effective at any time without the contemporaneous approval of three-fourths of the states would be a clear violation of article V of the Constitution. It follows, therefore, that a rescission of a prior ratification must be recognized if it occurs prior to unrescinded ratification by three-fourths of the states. Congress has no power to determine the validity or invalidity of a properly certified ratification or rescission.

Congress, when acting as an amending body under article V, may, by two-thirds vote of both Houses, propose an amendment and the mode of ratification. Congress has no power to propose either an amendment or a mode of ratification except by a two-thirds vote of both Houses.

As part of the mode of ratification, Congress may by a two-thirds vote of both Houses set a reasonable time limit for the states to act in order for the ratification to be effective. When this time is set, it is binding on Congress and the states and it cannot be changed by Congress thereafter.

Accordingly, the Court declares that Idaho's rescission of its ratification of the twenty-seventh amendment effectively nullified its prior ratification and Idaho may not be counted as a ratifying state. The same is true for any other state which has properly certified its action of rescission to the Administrator of the General Services.

The Court further declares that the majority action of Congress in attempting to extend the period for ratification of the twenty-seventh amendment is void and of no effect.

Dated this 23rd day of December, 1981.

MARION J. CALLISTER, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

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