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Should the E.R.A. 7-Year Deadline Be Extended?

Memorandum on the Constitutionality of a Proposed Resolution to Extend the Time for Ratification of the Equal Rights Amendment Submitted to the U.S. House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, November 1977.

by Grover Rees, III

When the 92d Congress proposed the Equal Rights Amendment in 1972, the proposal [H.J. Res. 208] included a provision to the effect that the amendment would become 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[.]" That seven-year period will end in March, 1979. A resolution proposed in the 95th Congress would extend the period within which states may ratify.

The proposed resolution is clearly unconstitutional --- or, perhaps more accurately, could not constitutionally be given the effect apparently desired by its proponents. If it met the formal requisites for a resolution proposing a constitutional amendment, such a resolution *would* have the effect of beginning a new period wherein states could ratify the E.R.A.; but states which ratified under the 1972 resolution could not be presumed (or forced) to acquiesce in the "extension."

This conclusion --- that Congress cannot, as an incident to its power to propose an amendment, retrospectively change the conditions under which the states were led to believe they were ratifying --- proceeds inevitably from the principles underlying Article V of the Constitution. A careful analysis of the somewhat confused jurisprudence construing Article V would also tend to support such a result.

1) **Principles of Construction of Article V.**

Article Five should be construed in light of the Framers' understanding of the Constitution as a compact among the states. Whatever the remaining utility of the concept of "independent sovereigns" in other areas of constitutional law, it is simply impossible to understand the amending process without resort to such a doctrine. The three numbers of *The Federalist Papers* dealing with constitutional amendments all speak of a compact between "distinct and independent sovereigns" (No. 40, Madison), or in similar terms (e.g., until all thirteen colonies agree to the Constitution, "no political relations can subsist between the assenting and dissenting States," (No. 43, Madison); "[t]he compacts which are to embrace thirteen distinct States in a common bond of amity and union," (No. 85, Hamilton). Thus, where Article V is silent, it is appropriate to apply contract law to analyze whether the *contemporaneous consent* of three-fourths of the states has been given to a proposed amendment. This is true not only because the Framers expected it, and probably left Article V so brief precisely because they expected it; but also because contract law is, after all, just a refined set of logical principles to determine whether parties have agreed to bind themselves. Authorities on constitutional amendments have frequently applied principles of contract law to the amending process: see, e.g., Jameson, *Constitutional Conventions* 629-33 (4th ed. 1887); Orfield, *Amending the Federal Constitution* 52 (1942).

It should also be remembered that the amending process was seen as an important bulwark against possible abuses of Federal power: "We may safely rely on the disposition of the State legislatures to erect barriers against encroachments of the national authority." (*The Federalist* No. 85, Hamilton). Thus, while Congress can reasonably be regarded as having implied power to prescribe rules of procedure in the amending process, such rules must necessarily be of the "housekeeping" variety, and cannot be used as a pretext for enlarging the substantive power of Congress as against the states. Congress cannot, for instance, apply a standard for discerning when a state has given its consent which is not genuinely calculated to detect such content. See Note, 85 Harv. L. Rev. 1612, 1617-18 (1972); Comment, 37 La. L. Rev. 896, 904 (1977).

Finally, experience has strengthened the view that the amending process should be used only infrequently, on issues on which a broad consensus exists. This suggests a canon of construction --- whether to comport with the intent of the Framers, or as a prudential means of protecting the Constitution from hasty alteration which might not reflect an enduring consensus --- under which ambiguities in Article V should be resolved in favor of the interpretation which would make amendment more difficult. See authorities cited in Comment, 37 La. L. Rev. 896, 898-900 (1977). It is important to remember that a rule prescribed with a "nice" amendment in mind will be a precedent for "bad" amendments in the future.

These principles of construction can be summarized by saying that ordinary contract law should almost always fill in any gaps in Article V; but that in any event, no construction is admissible which would artificially enhance the Federal role in the amending

process, or make the Constitution easier to amend than it would be under contract principles.

2) **A Contract Analysis of the Proposed Resolution.**

Under contract principles, the original resolution proposing the E.R.A. was an offer by Congress to the state legislatures, which by its terms would only become binding (as a modification of the original "compact" among the states) when accepted by 38 states by March, 1979. A number of states have accepted that offer. The proposed resolution to extend the deadline, however, would vary the terms of the offer which has been accepted by the previously ratifying states. It therefore amounts only to a new offer, which may be accepted according to its own terms (i.e., by three-fourths of the states before the new deadline), but *is not binding* on the states which accepted the prior, different offer.

This application of contract principles is not mere sophistry. First, it is entirely reasonable to suggest that the seven-year limitation in the Congressional proposal actually *induced* some doubtful state legislators to vote for ratification, or at least that the absence of such a limitation would have deterred them from voting for the E.R.A. Ratification by state legislatures is not just a formality; it is part of the process for gauging the breadth of the consensus behind an amendment. If one legislature voted to ratify only because some of its members had been led to believe that the ratification would be a nullity after 1979, then Congressional power to make that ratification something more than a nullity amounts to a power to trump up a paper consensus where there is no real consensus.

Also, it is important that the requirement for a valid contract --- that there be a "meeting of the minds" --- is a precise analogue of the Article V requirement of a contemporaneous consensus manifested by three-fourths of the states, according to reasonable procedures prescribed by Congress.

3) **The Source of the Congressional Power to Define a "Reasonable Time".**

The power of Congress to define a "reasonable time" in which an amendment may be ratified can be seen as simply a function of the rule that the greater right (proposing an amendment) includes the lesser (limiting the proposal). See 37 La. L. Rev. 896, 911-12 (1977). If this were strictly true, Congress could set any time limit it wished, and need not set any time limit at all.

The Supreme Court, however, announced a different rationale for the "reasonable time" limitation in *Dillon v. Gloss*, 256 U.S. 368 (1921). The Court held that in order for a proposed amendment to become part of the Constitution, there *must* be a contemporaneous consensus among the states; thus the "reasonable time" limitation would exist even if Congress did not specifically set such a time. The *Dillon* Court held that Congress could define a "reasonable time," as long as the time set was *actually* reasonable; and that seven years was reasonable.

The *Dillon* rationale finds some support in *The Federalist* No. 85 (Hamilton): "[W]henever [three-fourths of the] States, were united in the desire of a particular amendment, that amendment must infallibly take place." Arguably, Congress need not be *required* to set a time limit in order to ensure that there be no amendment without consensus, since any state which has ratified yet no longer favors the amendment could be allowed to rescind its ratification. The rescission issue, however, is hotly debated; and in any case it might be reasonable to presume after a certain number of years that a ratification has been left outstanding due to neglect rather than to continuing enthusiasm for the proposed amendment.

In *Coleman v. Miller*, 307 U.S. 433 (1939), a plurality of the Court recognized a right in Congress to designate a "reasonable time" *after* some ratifications had occurred. It should be noted, however, that *Coleman* involved a proposed amendment for which Congress had *not* previously designated a time limit, so no state legislature could possibly have been misled. Moreover, *Coleman* was rendered by a sharply divided Court which could not muster a majority on any of the theoretical questions in the case; it was widely criticized at the time, and its reasonable time holding rested not on any Article V power in Congress, but on a very broad view of the "political questions doctrine" which almost certainly would be overruled by the Supreme Court today in light of *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969). For a recent decision in the constitutional amendment area which followed *Powell* and avoided applying *Coleman*, see *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975), written by Justice Stevens before he came to the Supreme Court. See also 37 La. L. Rev. 896 (1977).

4) **Would an Extended Time for the E.R.A. Be "Reasonable in Fact"?**

Even assuming that Congress could somehow constitutionally vary the terms of its proposal and thereby bind the previously ratifying states to a proposal they did not actually accept, the proposed extension of time might be unconstitutional under *Dillon*.

The purpose of the "reasonable time" requirement (which both *Dillon* and *Coleman* recognized as an absolute requirement, not merely a function of Congressional power to propose) is to ensure that all ratifications have occurred sufficiently close in time to reflect a consensus of three-quarters of the state legislatures *at a given point in time*. The facts are, however, that the E.R.A. achieved almost all of its ratifications within a short time after its proposal in 1972. Only Indiana has ratified recently, despite constant attention to the E.R.A. by its proponents and by the news media. The rescissions by three states, whatever their legal effects, certainly are conclusive evidence that some states which were part of the 1972 consensus cannot reasonably be regarded as part of the 1977 consensus. Indeed, the very need to consider a resolution extending the time for ratification casts doubt on the vitality of any consensus. It is even more obvious that a state which might ratify in 1986, Congressional resolution or none, would not be manifesting its approval *contemporaneously* with the states which ratified in 1972.

5) **The Relationship of the Extension and Rescission Questions.**

The absurdity of the view that Congress has unlimited power to extend the "reasonable time" for ratification is highlighted when this assertion is juxtaposed with the possibility that states may be denied the right to rescind their ratifications of an amendment. If a state which ratified in 1972 is denied *both* the right to manifest formally the withdrawal of its acceptance, *and* the previously granted assurance that its acceptance will terminate in 1979, that state is truly being "dragged, kicking and screaming, into an artificial constitutional consensus." (See 37 La. L. Rev. 896, 925 (1977)).

It should be noted, however, that even if states do have the right to rescind their ratifications, no ratification of the 1972 Congressional proposal, containing the

seven-year limitation, should be presumed to continue after 1979 merely because the state could have rescinded and did not. The new proposal is still a different one, and a ratification of the old proposal will become a nullity in 1979 absent some explicit manifestation of a contrary intention by the ratifying state.

6) **The Effect of the Location of the Seven-Year Limitation.**

If the seven-year limitation were in the text of the proposed amendment itself, it is difficult to imagine anyone suggesting that Congress could now change the text and thereby bind states which had previously ratified the amendment to the new language. The time limit is, however, located in the preamble, or "resolving clause."

Since Congress presented its entire resolution to the states, the location of the time limit should make no difference. The seven-year provision was on the bargaining table, so to speak, when the states indicated their assent. The location should only make a difference if the legislative history affirmatively suggests that the states had reason to know that the seven-year limitation was *not* binding on Congress, and could be changed at will. There is not a trace of any such evidence in the history of the E.R.A. or of constitutional amendments generally; indeed, there is affirmative evidence to the contrary. It is clear that the location of the time limit in the resolving clause was purely a matter of form, to which no substantive importance was attached by those who drafted and voted on the E.R.A.

Interestingly, the location of the seven-year limitation seems to have been the work of Senator Ervin, an E.R.A. opponent. When the amendment was introduced in the 91st Congress, it contained no time limit at all. During debate on the resolution, Senator Ervin introduced an amendment which, among other things, imposed a seven-year limit. He said it "would require" that ratification occur within seven years for the E.R.A. to be valid, adding:

> Certainly, any proposed amendment to the Constitution of the United States for which there is any real demand can be ratified by the legislatures of the required number of States within 7 years after the date of its submission. [116 Cong. Rec. 36302 (1970)]

Senator Dole added that the "provision requiring that the amendment be ratified within 7 years has been included in amendments proposed by Congress commencing with the 18th, and will prevent an anomaly amendment from lingering in limbo for an indefinite number of years." Id. 36450. That proponents of the limitation intended it to have the same effect as similar clauses in *prior* amendments is significant, since until the 23rd Amendment, these clauses were all contained in the text of the amendments themselves.

Senator Ervin's amendment to the E.R.A. resolution passed, over the opposition of Senator Bayh and other leading E.R.A. proponents (Senator Bayh expressing his opposition to other parts of the Ervin amendment, and not mentioning the time limitation). The E.R.A. was not passed by the Senate in the 91st Congress, but when it was introduced in the 92d Congress, it contained the time limitation exactly as worded by the Ervin amendment. The Ervin language remained in the resolution as approved by the Senate Judiciary Committee. The committee report, submitted by Senator Bayh, noted under "Legislative History" that the time limit had been included as a result of the Ervin amendment in the 91st Congress [Sen. Report No. 92-689, 92d Cong., 2d Sess. 1972 at 4-5]. The report also stated: "The proposed Equal Rights Amendment *reads as follows:* . . . the following article . . . 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 . . . ." Id. at 1-2 (emphasis added). The report added:

> This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people. It has been included in every amendment added to the Constitution in the last 50 years. It is interesting to note that the longest period of time ever taken to ratify a proposed amendment was less than 4 years. [Id. at 20]

Not a word in the legislative history of the E.R.A. indicates that Senator Ervin, who proposed the time limitation, or the Senate Judiciary Committee, who reported it favorably, or anyone in Congress or in the state legislatures, intended the limitation to have any different substantive effect because of its location in the resolving clause rather than in the text. The obvious reason is that language in the resolving clause does not actually become part of the Constitution when the amendment is ratified, whereas a limitation in the text would "clutter up" the Constitution with language which had become ineffective. That no substantive distinction was drawn is underlined by the committee report's casual inclusion of the resolving clause in what purports to be a recital of the text of the Amendment. Moreover, the numerous references to similar language in past amendments imply that the E.R.A. provision was intended to have the same effect as the previous limitations, most of which had been contained in the text of the amendments, and which therefore clearly could not have been tampered with by Congress after some states had ratified.

It is instructive to examine the first instance in which Congress placed the time limitation in a resolving clause, rather than in the text of a proposed amendment which ultimately became part of the Constitution. The 23rd Amendment, granting the Presidential vote to residents of the District of Columbia, was proposed by S.J. Res. 39 in the 86th Congress. This resolution originally contained no language about the D.C. vote at all, but was instead a resolution, favorably reported by the Senate Judiciary Committee, to propose a constitutional amendment providing for emergency interim appointments of members of the House of Representatives. The Senate added the D.C. language, and then the House kept the new language and deleted the original language about House appointments. The resolution itself, however, had a long and well-documented legislative history, with particular reference to the seven-year time limitation for ratification.

The committee report on S.J. Res. 39 [Sen. Report No. 86-561, 86th Congress, 1st Sess.], says the resolution was "identical in text" to S.J. Res. 8, which had passed the Senate in the 84th Congress. S.J. Res. 8, when introduced by Senator Kefauver in the 84th Congress, contained a time limitation *in the text* of the amendment. Prior to committee hearings on the resolution, Kefauver apparently wrote to a number of con-

stitutional law scholars, asking for suggestions on the language of the amendment. Only one response of those printed in the record of the hearings recommended a chance in the location of the seven-year limitation. Professor Noel Dowling of Columbia Law School drafted an entire new version of the resolution, noting:

> The 7-year limitation is put in the resolution rather than in the text of the amendment. There is no doubt about the power of Congress to put it there; and it will be equally effective. The usual way, to be sure, has been to write the limitation into the amendment; but we hope such an unnecessary cluttering up of the Constitution can be ended. [Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 84th Cong., 1st. Sess., on S.J. Res. 8 (1955), at 34]

The committee substituted Dowling's language for the original. In response to a question from Senator Russell in Senate floor debate, Senator Kefauver stated:

> The general idea was that it was better not to make the 7-year provision a part of the proposed constitutional amendment itself. It was felt that that would clutter up the Constitution. Sometimes that is done. We wanted to put the 7-year limitation in the preamble. So the intention of the preamble is that it must be ratified within 7 years in order to be effective. [101 Cong. Rec. 6628 (1955)]

In response to Senator Russell's continued questioning, Senator Kefauver agreed to an amendment, which was then passed by the Senate, to insert the word "only" before "if ratified . . . within 7 years" in the resolving clause. Senator Kefauver made it clear that he and the Judiciary Committee staff felt the addition of the word would not change the effect of the limitation. Id.

Professor Dowling's letter, and the subsequent exchange on the Senate floor, are the only evidence of legislative intent behind the location of the time limit in the resolution that eventually became the vehicle for ratification of the 23rd Amendment --- the apparent model for subsequent proposed amendments which include the limit in the resolving clause. They indicate that the change was made purely in the interest of a more elegant Constitution, and with no intention of altering the substantive effect of the time limitation so as to allow Congress to modify it after ratification by a number of states.

7) **Procedural Questions.**

The proposed resolution is so clearly unconstitutional that it may be misleading to discuss the procedure by which it might be enacted. However, to be even arguably valid, the resolution would require the assent of two-thirds of the members of each House of Congress, and quite possibly the signature of the President.

Article I, § 7 of the Constitution requires that the President sign every Congressional act having the force of law; it is very broad in its terms, and there is no reason to believe that the Framers intended any exceptions at all. However, in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Supreme Court held that the President's signature was not necessary on a constitutional amendment, and this ancient precedent has been followed ever since. Professor Charles Black, however, argues persuasively that the clear language of the Constitution requires that *Hollingsworth* be limited to its facts, and that other Congressional action dealing with the amending process does require a Presidential signature. Black is particularly contemptuous of the idea that, if there is such a requirement, it can be obviated by using a different form of Congressional resolution:

> Can it be thought that Article I, Section 7, can be evaded by mere *nomenclature* --- by merely calling something a "Concurrent" rather than a "Joint" Resolution? [Black, *Amending the Constitution: A Letter to A Congressman*, 82 Yale L.J. 189, 208 (1972)]

The same can be said of the attempt to deal with the two-thirds vote requirement, merely by using one sort of resolution rather than another. The facts are these: in 1970, Senator Ervin proposed some language *limiting* the E.R.A. resolution. It was generally supported by Senators who were relatively unenthusiastic about the E.R.A., and opposed by Senator Bayh and other E.R.A. proponents. This language was kept in the 1972 resolution, presumably because proponents were willing to accept this limitation in exchange for the resolution's increased chances of passage thus limited. It is entirely reasonable to believe that some Senators voted for the limited resolution, who might not have voted for a resolution with no time limit, or with an eight-year time limit. The resolution, with the limiting Ervin language, passed with a two-thirds vote in each House, as is required by Article V of the Constitution. It is just nonsense to argue that *fewer* than two-thirds of the Senators can go back and take out that limiting language.

Again, the argument that the limiting language was in the resolving clause holds no water. It was not the "text" of the amendment, but the resolution proposing the amendment, which needed and got a two-thirds vote. Congress might have been free to pass such a resolution with a longer time limit; but it is impermissible to suppose that such a resolution would have received the requisite two-thirds vote.

Congress has tried and failed in the past to use nomenclature to evade constitutional limitations on its power. In the *Powell* case, mentioned above, the House sought to "exclude" Powell by a majority vote. The Supreme Court held this was just a ruse for "expelling" him, which constitutionally requires a two-thirds vote. Significantly, Powell was declared entitled to his seat despite the fact that the motion to "exclude" actually had received a two-thirds vote, because the Court would not accept the assumption that the required two-thirds vote would have been obtained had the motion been put as an "expulsion" rather than an "exclusion."

8) **Conclusion.**

A Congressional resolution to extend the time for ratification of the E.R.A. would be of doubtful effect, and would almost certainly result in extensive litigation and resulting uncertainty as to the status of the amendment. Should a total of 38 states eventually ratify under the 1972 resolution and the proposed "extension," the existing doubt over the effects of rescission would be compounded by the debate over whether ratifications under the two resolutions could be "cumulated" or must be counted separately. Should the Supreme Court rule that the Constitution has been amended, by some combination of an anti-rescission rule and a Congressional right to "extend," it will give rise to justified skepticism about the neutrality of the procedures for determining "consensus." Should the Court rule the amendment not ratified, its proponents would almost certainly argue that the Court had "stolen" the amendment, perhaps provoking a crisis in relations among the coordinate branches of the government. A Court ruling that the matter is a "political question" --- very unlikely after *Powell v. McCormack* --- would only enlarge the sense of frustration among those who would feel the rules had been unconstitutionally changed in the middle of the game.

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