Kentucky Law Journal

Volume 26 | Issue 4 Article 6

1938

# Constitutional Law--Amendments--Validity of Ratification by a State Which Had Previously Rejected

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# STUDENT NOTES

## CONSTITUTIONAL LAW—AMENDMENTS—VALIDITY OF RATIFICATION BY A STATE WHICH HAD PREVIOUSLY REJECTED.

On March 24, 1926, the General Assembly of Kentucky adopted a resolution[1] rejecting the so-called Child Labor Amendment to the Federal Constitution, which had been proposed[2] to the several states by the Sixty-Eighth Congress of the United States on June 2, 1924. On June 13, 1937, the Kentucky Assembly adopted a resolution[3] purporting to ratify the proposed Child Labor Amendment. At that time, more than one-fourth of the states, including Kentucky, had affirmatively rejected the proposed amendment. In a suit to enjoin the certification of copies of the resolution to the Secretary of State of the United States, the lower court sustained a demurrer to the petition. *Held*—Reversed. Although the governor had already certified the action of the legislature to the Secretary of State of the United States, the petitioners are entitled to relief by way of a declaration of rights under the local Declaratory Judgments Law.[4] The resolution in question is void because the state had exhausted its right to act on the proposed amendment by rejecting it previously; the right of the several states to ratify the proposed amendment had been exhausted by rejection of the amendment by more than one-fourth of the states; and because three-fourths of the states failed to ratify it within a reasonable time.[5]

It is believed that the Kentucky Court's ruling that a rejection of a proposed amendment is fatal to the validity of a later purported ratification, is not warranted by history, reason, or authority. It would seem that since the constitutional power of ratification is not qualified by any mention of the effect of a previous rejection, the action of one state legislative session in rejecting a proposed amendment may not prevent the further exercise of the federal power expressly conferred upon that body.[6] The Kansas Court so held,[7] such has been the view

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[1] Senate Resolution No. 12, Acts 1926, c. 345.

[2] 43 Stat. 670.

[3] Acts Fourth Special Session 1936-37, c. 30.

[4] Kentucky Codes Ann. (Carroll, 1927), Secs. 637, *et seq.*

[5] Wise, et al. v. Chandler, et al., 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

[6] Dodd, Amending the Constitution (1921), 30 Yale L. J. 321, 347: "On the other hand, it is perhaps clear that a state legislature has a continuing power of ratification until an amendment is adopted, or until such a long period has elapsed that a sort of statute of limitations may be said to have run against any power to ratify the proposal."

[7] Coleman, et al. v. Miller, et al., – Kan. –, 71 P. (2d) 518, 524 (1937): "It is generally agreed by lawyers, statesmen, and publicists who have debated this question, that a State Legislature which has

of a number of respectable writers,[8] and such is the tenor of historical precedent.[9] "Very often, the effect of history is to make the path of logic clear."[10] The State of West Virginia first rejected and later ratified the proposed Nineteenth Amendment in the same session, and contrary to the State rules of procedure. The Supreme Court of the United States refused to invalidate the ratification,[11] and stated in its opinion that the West Virginia Legislature had the power to adopt the resolution.[12] Such language may well be advanced as at least a strong indication of the Supreme Court's view of the problem at hand.

Obviously once it is clear that a prior rejection cannot preclude a subsequent valid ratification, the Kentucky Court's assertion that the proposed amendment had been exhausted because of rejection by more than one-fourth of the states, has no force. Conversely, if rejection by more than one-fourth of the states can be shown *not* to exhaust the proposed amendment, there would be difficulty in discovering how a prior rejection can be held to preclude a subsequent valid ratification. The Federal Constitution[13] declares an amendment to be valid ". . . when ratified by the legislatures of three-fourths of the several states . . ." The Kentucky Court would reach the strange result that should more than one-fourth of the states reject an amendment within however short a time after its proposal, the power of ratification vested in the remaining states would be thereby nullified, and an attempted exercise thereof a vain and useless gesture. It is submitted that the constitutional provision as it now stands manifests an attempt to submit a proposed amendment for the action or inaction of *all* the states, thus allowing it mature consideration by the country as a

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rejected an amendment proposed by Congress may later reconsider its action and give its approval, and that a ratification once given cannot be withdrawn."

[8] Burdick, The Law of the American Constitution (1922), Sec. 20; Dodd, Amending the Constitution (1921), 30 Yale L. J. 321, 347; Grinnell, Finality of State's Ratification of a Constitutional Amendment (1925), 11 Am. B. A. J. 192; Jameson, Constitutional Conventions (4th ed., 1887), 579, 625; Miller, Amendment of the Federal Constitution (1926), 60 Am. L. Rev. 181, 184; Orfield, Procedure of Federal Amending Power (1930), 25 Ill. L. Rev. 418, 439; 1 Willoughby, Constitutional Law of the United States (1929), 593; note (1937), 37 Col. L. Rev. 1201; note (1937), 25 Geo. L. J. 671, 676; note (1937), 47 Yale L. J. 148.

[9] Congress by joint resolution declared the Fourteenth Amendment adopted, including North Carolina and South Carolina as ratifying states although they had at first rejected it. 15 Stat. L. 709-710, (1868). In the case of the Fifteenth Amendment, Ohio and New Jersey first rejected, then ratified. Those two states were included in the list of ratifying states and constituted part of the number necessary for adoption. It should also be noted that North Carolina first rejected and later ratified the Constitution itself; see Trenholme, The Ratification of the Federal Constitution in North Carolina (1932), 180, 237.

[10] Cardozo, "The Nature of the Judicial Process", p. 51.

[11] Leser v. Garnett, 258 U. S. 130 (1922).

[12] *Id.*, at 137.

[13] Article V.

whole, and not subjecting it to a possibility of an early death through the hasty rejection by only thirteen states. It is submitted that the Kentucky case can be supported only by adding to Article V ". . . unless rejected by more than one-fourth of the states". Concededly this cannot be done.

The Kentucky Court's analogy between an offer to enter into a contract and the proposal of an amendment by Congress to the states, seems to fail for want of similarity between the subjects dealt with by those two conceptions. The contract offer arises from the ever-changing expectations of the business world, and is accordingly short-lived. The proposed constitutional amendment has its origin in the needs of a nation, expressed through its representatives, and is undoubtedly entitled to more mature consideration. It would seem that a proposed amendment should be held to be before the states so long as the exigencies exist which prompted the action of Congress in proposing the amendment,[14] the current social, political, and financial structure receiving consideration. Furthermore, it is submitted that the action or inaction of the various state legislatures over a period of time, though admittedly indicative, should not be determinative of the public view as to the necessity of the amendment.[15] The Supreme Court has said:[16] "We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal." The determination of what is a reasonable time thus does not seem to warrant the analogy drawn from contract law.

The question as to plaintiffs' capacity to sue was lost on appeal for failure to file a special demurrer.[17] However, should the United States Supreme Court, for any one of several good reasons, desire to avoid a decision on the validity of the ratification in question, it seems that

[14] *Cf.*, Jameson, Constitutional Conventions (4th ed., 1887), 585.

[15] The attempt of Congress to solve the child labor problem under the commerce clause was declared unconstitutional in Hammer v. Dagenhart, 247 U. S. 251 (1918). Likewise an attempt under the taxing power, Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922). Considering this together with the agitation over the child labor amendment since its proposal, the Kansas Court held invalid a contention that the proposed amendment has lost its potency by old age. The Kansas legislative rejection took place in 1925, the ratification in 1937. Coleman v. Miller, supra, n. 7.

[16] Dillon v. Gloss, 256 U. S. 368, 375 (1921).

The Kentucky Court's reasoning from the decision in Dillon v. Gloss, sustaining a Congressional limitation of seven years within which the Twentieth and Twenty-first amendments could be adopted, is not convincing, in reaching the conclusion that seven years is regarded by Congress as being a reasonable time within which the states must act. Logically the absence of a limitation clause in the proposed child labor amendment would seem to indicate Congressional opinion that seven years is *not* a reasonable time.

[17] L. & N. R. R. v. Herndon's Admr., 126 Ky. 589, 104 S. W. 732 (1907); Kentucky Codes Ann. (Carroll, 1927), Sec. 92-2.

such action would be possible on the theory of plaintiffs' lack of interest sufficient to maintain a suit.[18]

It seems that counsel for appellees in the Kentucky case were correct in their contention[19] that since the governor's certification to the Secretary of State of the United States is *fait accompli*, the case is moot to the extent that the court can grant no effective relief, even though it should proceed under the local Declaratory Judgments Law.[20] The certification is merely evidentiary, and it would seem that the validity of the ratification does not depend upon the certification,[21] since the action of the state legislature might well be proven in some other manner. Furthermore, it is doubtful whether interference by the court with an essentially legislative process can be countenanced under the doctrine of separation of powers.[22] Nor would it seem that mandamus would lie against the United States Secretary of State to compel him to announce a rejection, since the statute under which he acts imposes no such duty upon him.[23]

As heretofore pointed out,[24] it seems that Congress by its action has treated the question as to the effect of a prior rejection upon the power to subsequently ratify, as being political in nature. The absence of decisions on this point may well be the result of a feeling on the part of attorneys and prospective litigants that the question is not a proper one for judicial determination. The principle that the courts will not decide political questions has been applied in a number of situations,[25] and has been set out in varying language.[26] Political ques-

[18] Borchard, Declaratory Judgments (1934), pp. 26–62; see note (1937), 37 Col. L. Rev. 1201, 1202, where it is cogently suggested that ". . . in view of the uncertainty of ratification by the requisite number of states and the fact that the amendment itself does not limit, regulate or prohibit child labor, but only gives Congress such powers, it is highly unlikely that any plaintiff could show that the threatened injury was reasonably certain and impending." See also State of Ohio v. Cox, 257 Fed. 334 (S. D. Ohio, 1919), denying relief in a suit to enjoin a governor of a state from submitting a proposed amendment to a state legislature, on the ground that plaintiff failed to show an impending injury since there was no assurance that the amendment would ever be adopted.

[19] 108 S. W. (2d) 1024, 1034 (1937).

[20] Kentucky Codes Ann. (Carroll, 1927), Secs. 637, et seq.

[21] U. S. ex rel. Widenmann v. Colby, 265 Fed. 998 (App. D. C., 1920), affd. 257 U. S. 619 (1921).

[22] O'Reilly v. Mills, 30 Colo. 362, 70 Pac. 322 (1902).

See Note (1937), 37 Col. L. Rev. 1201, 1203: "In order to attack the validity of an amendment, it seems necessary to wait until its apparent ratification. Thus this case [Wise v. Chandler] seems to be no more than an advisory opinion to the United States Secretary of State."

[23] 5 U. S. C. A. title 5, sec. 160.

[24] Supra, n. 9.

[25] Cf. Field, The Doctrine of Political Questions in the Federal Courts (1924), 8 Minn. L. Rev. 485. See also Dodd, Non-Enforcible Provisions of Constitutions (1931), 80 U. Pa. L. Rev. 54, 84; Finkelstein, Judicial Self-Limitation (1924), 37 Harv. L. Rev. 338; Finkel-

tions would seem to be those committed to other than judicial organs of government, not in terms excluding judicial control, but with respect to issues so distinctly political in character that a court should regard it as improper to seek to exercise control.[27] Essentially it seems that the action of a state legislature in passing upon a proposed constitutional amendment is governed by considerations of public policy and expediency, and may be political *per se.* At any rate, the refusal of the United States Supreme Court to look behind the certification in *Leser* v. *Garnett,*[28] and the fact that Congress has heretofore taken upon itself the task of determining such questions,[29] lend weight to a position that the Kentucky Court decided a political question in the principal case.

It is submitted that the Kentucky case[30] cannot be supported (1) because historical precedent, reason, and authority show that a rejection of a proposed amendment cannot preclude a subsequent valid ratification, (2) *a fortiori* rejection by more than one-fourth of the states cannot operate to withdraw the amendment from the states, (3) the proposed amendment was still before the states, no reasonable time having passed since its proposal, (4) the decision was gratuitous, certification of the ratification being *fait accompli* and merely evidentiary, and the Secretary of State of the United States not being subject to mandamus, and (5) the question is one primarily political, and therefore not properly subject to judicial determination.

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## HOMESTEADS—INVOLUNTARY CONFINEMENT IN ASYLUM OR PENITENTIARY AS CONSTITUTING AN ABANDONMENT.

In a recent Kentucky case,[1] the Court of Appeals handed down a decision to the effect that a homestead acquired under the homestead laws was not abandoned by enforced confinement in the penitentiary.

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stein, Further Notes on Judicial Self-Limitation (1925), 39 Harv. L. Rev. 221; Weston, Political Questions, 38 Harv. L. Rev. 296.

[26] 3 Willoughby, Constitutional Law of the United States (1929), 1326; see also Dodd, supra, n. 24; Weston, supra, n. 24.

[27] Dodd, Non-Enforcible Provisions of Constitutions (1931), 80 U. Pa. L. Rev. 54, 85.

[28] 258 U. S. 130 (1922).

[29] Supra, n. 9.

[30] Wise, et al. v. Chandler, et al., 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

[1] Clolinger v. Callahan, 204 Ky. 33, 263 S. W. 700 (1924)—Defendant and his son were convicted of killing A, and sent to the penitentiary. A's widow and children sued defendant under Sec. 4, Ky. Stat., and garnisheed B bank in which defendant had some money. A alleged that the money was the proceeds from the sale of his homestead. Held, defendant had the right to sell his homestead and reinvest the proceeds in another homestead, and his homestead rights were not abandoned by his enforced confinement in prison.