

# Correspondence

## On Article I, Section 7, Clause 3—and the Amendment of the Constitution

To the Editors:

At this writing, Congress is considering whether to extend the time for ratification of the Equal Rights Amendment.<sup>1</sup> I have recently come from a hearing of a House Subcommittee,<sup>2</sup> at which I testified that, in my opinion, due to the expressly conditional linkage, in the original proposal, between (1) the sheer *validity* of the Amendment and (2) its ratification within seven years, the original two-thirds majorities in Congress voted to “propose” such conditional validity and could have voted for nothing else.<sup>3</sup> The result seems to me to be that any modification in the stated condition to validity must be approved by two-thirds majorities in the House and Senate. I do not wish just now to argue the merits of this opinion. My concern at the moment is with the general loosening-up of attitudes toward questions concerning the proper procedure to be followed in the amendment process, and with another specific sort of looseness that may now threaten.

It became clear to me, through the colloquy, that some members of Congress are coming to believe that all questions concerning the amendment process are “political,” in the sense that Congress, and not the judiciary, is to resolve them finally. I think it may also be the thought (and the unfortunate word “political” invites such a construction) that these questions are “political” in the colloquially more normal sense—that all questions concerning the lawfulness of the amendment process are to be settled in each particular case on general prudential grounds sounding in the circumstances surrounding the particular proposal. This attitude, insofar as it exists, is a deadly menace to the bedrock legitimacy of the amending process, a process as to which, if anywhere in the law, square corners should be cut. Argument could proceed as to whether this loose attitude is gaining currency. Such argument would, I think, be fruitless; even if I am wrong

1. H.R.J. Res. 638, 95th Cong., 1st Sess., 123 CONG. REC. H11,631 (daily ed. Oct. 26, 1977); H.R.J. Res. 667, 95th Cong., 1st Sess., 123 CONG. REC. H12,750 (daily ed. Dec. 6, 1977).

2. *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 95th Cong., 1st Sess. (1977).

3. The language of the resolution was:

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.

about it, then the following points, if not pressingly needful to be made, are at least harmless, and may be usefully cautionary for the future.

It has recently been convincingly shown that there is little firm support for the notion that all questions about the legitimacy of a claimed amendment are “nonjusticiable,” or for the corollary that the judgment of Congress on these questions is final.<sup>4</sup> The notion that, say, the question whether a state may validly rescind its ratification—a yes-or-no question of pure law—is “political,” or “nonjusticiable,” seems to me quite absurd.<sup>5</sup> In this short piece, I will be concerned with another threatened looseness in the amendment process—the possible elimination of the President from all parts of the process, including congressional “proclamation” that an amendment has been validly adopted.<sup>6</sup>

The actually relevant materials are few and simple. The only provision of law that ought ever to have mattered, for it is clear and sufficient, is the text of Article I, Section 7, Clause 3:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.<sup>7</sup>

If Congress wants to extend time for ERA, or for any other amendment, the consent of both Houses is necessary. If Congress wants to “proclaim” the ratification of an amendment, the consent of both Houses is also necessary. How can there be any doubt, then, that the “order, resolution or vote” purporting to perform either act is to be submitted to the President for signature or veto?

The difficulty arises out of, and only out of, a 1798 case, *Hollingsworth v. Virginia*,<sup>8</sup> which held that the Eleventh Amendment was constitutionally

4. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. (forthcoming, Winter 1978); Rees, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 LA. L. REV. 896 (1977). I stand generally, for now, on these demonstrations, though I may write something of my own on this in the future.

5. Such a position is almost as absurd as the “lobster-trap” theory itself, which would count a state that has tried to rescind as being for the amendment even though it is actually against it. In the most extreme case, this approach would make it possible for an amendment to take effect even though it had been officially rejected, on mature consideration, by a majority—even a large majority—of states. For arguments opposed to mine, see Burke, *Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U.W.L.A. L. REV. 1 (1976); Note, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147 (1973); Note, *The Equal Rights Amendment: Will States be Allowed to Change Their Minds?*, 49 NOTRE DAME LAW. 657 (1974).

6. It should be remarked that the idea that Congress has any “proclamation” function has little support. Almost all amendments have been “proclaimed” by the executive branch acting on its own.

7. U.S. CONST. art. I, § 7, cl. 3.

8. 3 U.S. (3 Dall.) 378 (1798).

adopted, though the congressional vote *proposing* the amendment had not been submitted to the President. Counsel challenging the amendment argued:

And it is no answer to the objection, to observe, that as two thirds of both Houses are required to originate the proposition, it would be nugatory to return it with the President's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proportion. The concurrence of the President is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both Houses of Congress.<sup>9</sup>

The record of the argument indicates that during Attorney General Lee's presentation on this question in support of the Amendment, Justice Chase stated: "There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution."<sup>10</sup> But the decision was announced without opinion. The report states:

The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.<sup>11</sup>

All this, of course, leaves us entirely in the dark as to how or why the Court thought it had evaded the clear language of Article I, Section 7, Clause 3. Even Chase's comment, which is merely assertive of a conclusion, is definitely not a part of the Court's opinion in this case. There was, in fact, nothing we would now call an "opinion."

I have elsewhere suggested that this case is inadequately reasoned.<sup>12</sup> Now an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason even projectable, ought not to be followed beyond its own facts. Perhaps this case is harmless when so confined; an amendment proposed by two-thirds of each house, and actually wanted by three-fourths of the states, probably would not have been

9. *Id.* at 379.

10. *Id.*

11. *Id.* at 380. It should be noted that this case was decided literally overnight, and that it is hard to imagine greater pressure on the Supreme Court than existed with respect to validating the Eleventh Amendment, which had been passed to correct its own universally resented decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Further, a different decision would have invalidated the whole Bill of Rights. Such against-the-wall pressure should in itself warn us against extension of the case's holding.

12. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 208-09 (1972).

vetoed, and probably would have passed over a veto. At least these reasons now seem to me sufficient for acquiescence in this ancient precedent, on its own facts and without one inch of extension—though I still think the case to have been wrongly decided, if plain words can have plain meaning.

But how different would be, say, a “resolution,” passed by both houses, “proclaiming” that an amendment has been “adopted,” when in fact three of the thirty-eight states counted as affirmative have rescinded their ratifications!<sup>13</sup> Such a “resolution” would of course be ineffective unless passed by both houses; the consent of both is therefore “necessary.” What possible ground could there be, in such a case, for the resolution’s not going to the President for signature or veto? Even those prudential reasons that might lead one reluctantly to acquiesce in the *Hollingsworth* holding are entirely wanting.

Indeed, though the plain language of Article I, Section 7, Clause 3 ought to settle the question, at least one extratextual consideration gives strong support for maintenance of the executive’s role in this process. The earliest use of the veto was to “negative” actions of Congress that were in the President’s view unconstitutional.<sup>14</sup> A President who vetoed such a “resolution” as the one I am hypothesizing would be acting on this most venerable of grounds, because his veto would rest on the view that the amendment had not been adopted in pursuance of the constitutional forms. If the Congress in its turn disagreed, it could override the veto, by the two-thirds majority mandated by Article I, Section 7. Very much the same reasoning, of course, applies to any proposal to extend time for ratification.

That is really all there is to it; the clarity of Article I, Section 7 cannot be made brighter by much speaking. Everyone knows that there is very often more to constitutional law than merely following the text. But when the text speaks plainly to a bedrock procedural point, and when no extratextual reasons can be adduced for not following it, how can it be right simply to treat it as though it were not there? Is this not most reprehensible of all in the case of the constitutional-amendment process, the legitimacy of each step of which ought to be especially clear? Those who conscientiously oppose an amendment would justifiably feel cheated and betrayed if they could plainly see that a procedure mandated by the Constitution was simply being left out. How are they to be answered? By *Hollingsworth v. Virginia*, a per curiam decision not squarely in point?

It remains only to say that all this does not in any way touch on or disturb the conclusion that the validity of some of the actions of the participants in the amendment process is subject to judicial review. All Acts of Congress go through the Article I, Section 7, Clause 3 procedure, yet all are subject

13. See note 5 *supra*. In fact, if all questions about the amending process are political, their reference to the executive branch for decision would probably sit easier with past practice, because it is that branch that has traditionally “proclaimed.” But not much should be made of this, for no amendment has ever been “proclaimed” when there were not unrescinded ratifications by three-fourths of the States. If there is substantial question as to the regularity of the ratification of an amendment, the “proclamation” should go through the normal Congress-plus-veto process and be subject to the normal *Marbury v. Madison* scrutiny by the judiciary.

14. See Black, *Some Thoughts on the Veto*, 40 L. & CONTEMP. PROB., Spring 1976, at 87, 89-91.

to judicial inquiry as to constitutionality, in a proper case. The President's signature *and* the review by a Court in a proper judicial case are *both* normal safeguards as to legislation in general. How could it be thought that we need any less as to the more important matter of constitutional amendment?

One thing should be added. Some questions about the amendment process probably are legitimately to be looked on as "political." But the important point just here is that, if any question be "political," and hence suitable to be remitted to the "political" branches, there is no reason at all for not insisting that this reference be to the regular legislative procedure, *including submission for possible veto*, as commanded by Article I, Section 7. In any normal "political" decision, that is what is done; why should less be done as to the crucial matter of amendment? The judgment of the House and Senate alone, even on the amendment-procedure question, which can be looked on as "political," should be viewed by the courts as being just as ineffective as would be a proffered "statute" that had passed the House and the Senate but had not been sent to the President for his approval or veto. In such a case, the courts should treat the question as still open, for it has been resolved only by some and not by all of the procedures mandated by the Constitution as conditions-*precedent* to juristic validity of Congress's actions.

The ultimate irony would be the prevalence of the view that the question whether a congressional action concerning the amendment process must go to the President is *itself* a question to be settled by the two houses, without Presidential approval. These bootstraps would have to have wings, like the sandals of Hermes.<sup>15</sup>

The points I have made here, though concerning only the Presidential role, suggest a wider reflection. The process of amending the Constitution should be as technically perfect as it possibly can be. It should be unquestionably legitimate, and should be seen by all to be legitimate. I hope (I own, waveringly) that it is not necessary to add that this should have nothing to do with one's views as to the merits of any single proposed amendment.

Charles L. Black, Jr.  
Sterling Professor of Law  
Yale University

15. And one might mention that no President can "waive" anything for his successors.