State of Oregon Supreme Court: Herbring vs. Brown, 180 Pac. 328 (1919)

(In a mandamus proceeding, the Supreme Court of Oregon refused to order the state's Attorney General to perform certain necessary functions prerequisite to the submission of the ratification of the U.S. Constitution's 18th Amendment by the Oregon State Legislature to a vote of the people under the Referendum provision of the Oregon State Constitution.)

Argued April II), writ dismissed April 29, 1919.

HERBRING v. BROWN.

(180 Pac. 328.)

Statutes—Referendum—Constitutional Provision—Applicability—Joint Resolution.

1. Neither House Joint Resolution No. 1, ratifying proposed "National Prohibition Amendment," nor any other resolution of the legislature, is subject to referendum by Article IV, Sections 1, la, of the Constitution; such sections applying only to proposed laws.

Statutes—Initiative and Referendum—"Bill"—"Act"—"Joint Resolution."

2. To ascertain what is meant by the terms "bill" and "act" in Article IV, Sections 1, la, *of* the Constitution (amended), as to initiative and referendum, reference must be made to the sense in which the words were used before such amendments were passed, and, when reference is so made, it is found that the first term means a proposed law (Article IV, Section 1 [original], and Sections 18, 10; Article V, Section 15), while the second means a bill which has been enacted by the legislature into a law (Article IV, Sections 20, 21, 22, 28); a "joint resolution" being neither a bill nor an act.

Statutes—Initiative and Referendum—Constitutional Provision—Construction.

3. The subject matter upon which the powers given by Article IV, Sections 1, la, of the Constitution, may be exercised, namely, initiative laws, constitutional amendments, and acts of the legislature referred to the people, are referred to collectively as "measures" merely as a matter of convenience and not with intent to include other and different powers.

Mandamus—Ministerial Duties.

4. Since Article IV, Sections 1, la, of the Constitution, do not permit a referendum upon a" House Joint Resolution, the attorney general cannot be compelled under Section 3475, L. O. L., as amended by Laws of 1917, page 230, to provide a ballot title for petitions demanding a referendum of such resolution on the theory that such act is ministerial.

Original proceeding in *mandamus* by Karl Herbring against George M. Brown, Attorney General of the State of Oregon. Demurrer to the petition was sustained and writ dismissed. WRIT DISMISSED.

For petitioner there was a brief over the names of *Mr. Theodore A. Bell and Messrs. Malarkey, Seabrook*

& Dibble, with oral arguments by *Mr. Bell, Mr. Dan J. Malarkey* and *Mr. E. B. Seabrook.*

For defendant there was a brief and an oral argument by *Mr. George M. Brown,* Attorney General of the State of Oregon, *in pro. per.*

For the Anti-Saloon League of Oregon and for the Anti-Saloon League of America, there was a brief
submitted *amicus curiae*, over the names of *Mr. Elisha A. Baker*, of Portland, and *Mr. Wayne B. Wheeler*, of Washington, D. C.

In Banc.

McBRIDE, C. J.—This is a proceeding in *mandamus* arising from the following facts: During the 30th Legislative Assembly of the State of Oregon, which adjourned on February 27, 1919, there was enacted House Joint Resolution No. 1, which is a ratification of a proposed amendment of the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On March 18, 1919, petitioner filed with the Secretary of State of Oregon a proposed form of petition demanding a referendum of said resolution, which petition is in form and substance as required by law.

On March 19, 1919, the Secretary of State sent to the attorney general, two copies of said petition and requested him to provide a ballot title therefor.

On March 25, 1919, after considering the matter in the meantime, the attorney general refused to provide a ballot title on the ground that in his opinion the measure was one which could not be referred to the people for two reasons: First, that a reference thereof to the people would violate Article V of the

Federal Constitution, wherein that article provides that the subject matter thereof should be passed on by the "legislature," which, as there used, is synonymous with "legislative assembly," and excludes the referendum. Second, that such reference to the people would violate Section 1 of Article IV of the Oregon Constitution, wherein it is provided that the people of Oregon "also reserve power at their own option to approve or reject at the polls any act of the legislative assembly," because, it is claimed, the Resolution, sought to be referred, is not an act within the meaning of the above-quoted phrase.

Much of the argument here is devoted to a discussion of the constitutionality of the proposed reference.

1. We do not believe this resolution, ratifying the proposed constitutional amendment, or any other resolution of our legislature, was made the subject of referendum by Sections 1 and la of Article IV of our amended Constitution, which are as follows:

"Section 1. The legislative authority of the State shall be vested in a Legislative Assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less that four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the

public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the Legislative Assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.'

This, section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.

"Section la. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local,

special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal

voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town."

It seems clear to us that these sections apply only to proposed laws, and not to legislative resolutions, memorials and the like. In the initiative clause it is said:

"The people reserve to themselves power to propose *laws* and *amendments to the Constitution*, and to enact or reject the same at the polls."

The *reservation* clause reads:

"And *also* reserve power at their own option to approve or reject at the polls any *act* of the legislative assembly."

In the provision for referendum we find a direction that,

"Referendum petitions shall be filed with the Secretary of State not more

than ninety days after the final adjournment of the session of the legislative assembly which *passed the bill* on which the referendum was demanded."

In Section la we find the provision, that—

"The referendum may be demanded by the people against one or more items, sections, or parts of any *act* of the legislative assembly, in the same manner in which such power may be exercised against a *complete act*."

2. To ascertain what is meant by the terms "bill" and "act," as used in the amendments quoted above, we

must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed. The word "bill" occurs in Sections 2 of Article IV of the original Constitution, where it is said, "The style of every bill shall be 'Be it enacted by the legislative assembly of the State of Oregon,' and no laws shall be enacted except by bill," thus indicating that a bill is a proposed law; a document in the form of a law presented to the legislature for enactment.

The same word is used in Sections 18 and 19 of Article IV, and Section 15 of Article V, and in the same sense as above indicated.

We come now to the term "act," as used in the Constitution. In Section 20 of Article IV we find the following:

"Every *act* shall contain but one subject and matters properly connected therewith, which subject shall be embraced in the title. But if any subject shall be embraced in an *act* which shall not be embraced in the title, such *act* shall be void, only as to so much thereof as shall not be expressed in the title."

In Section 21, Article IV, the following occurs:

"Every act and joint resolution shall be plainly worded," etc.

In Section 22 of the same Article, it is ordained:

"No *act* shall ever be revised or amended by mere reference to its title," etc.

And in Section 28 it is prescribed:

"No *act* shall take effect until ninety days from the end of the session," etc.

No one can read these excerpts without at once arriving at the conclusion that, as referred to in the

Constitution, the term "bill" imports a document in the form of a law, presented to the legislature for enactment, and that the term "act," as there used, means a bill which has been enacted by the legislature into a law. That the framers of the Constitution intended to preserve the well-known distinction between "acts" and "joint resolutions," is indicated in Section 21, *supra*, wherein it is required that *acts* and *joint resolutions* shall be plainly worded.

The initiative and referendum amendments were passed and should be construed in the light of the construction put upon the terms "bill" and "act," by the instrument they proposed to amend, and taking this view it must be held that as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

3. Counsel for petitioner suggest that the term "measures" used in the

amendment, enlarges the scope of the powers reserved beyond the express reservation, but this is evidently not the purpose with which that term is employed. As before observed, there are two powers reserved: (1) The power to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and (2) the power to enact or reject at the polls any act of the legislative assembly. The subject matter upon which these powers may be exercised, namely: Initiative laws, constitutional amendments, and acts of the legislature referred to the people, are thereafter referred to collectively as "measures," merely as a matter of convenience and to avoid frequent enumeration of the powers reserved, and not with the intent to include other and different powers within the scope of the amendment. Had it been the intent of the framers of the referendum

amendment to go beyond these express reservations, it would have been easy and natural for them to have said so.

To give the amendment the effect contended for by petitioners, we would have to read into the reservation the words "And resolutions," making it read, "The people reserve to themselves power * * to approve or reject at the polls any act (or joint resolution) of the legislative assembly," and where the amendment requires that the referendum petition shall be filed within ninety days "after the final adjournment of the legislature which passed the bill," we would be required to judicially amend the section so as to make it read, "within ninety days after the final adjournment of the legislature which passed the bill (or joint resolution)."

We are not prepared to go into the business of amending the Constitution to meet supposed hardships, and must hold that the referendum cannot be invoked in the present instance.

Under an amendment to the Constitution of California, in some particulars copied from that here discussed, and in all necessary particulars the same in substance, the Supreme Court of that state has held that the referendum can only be invoked against statutes and not against joint resolutions: *Hopping* v. *Council of City of Richmond*, 170 Cal. 605 (150 Pac. 977).

4. It is further urged that, even conceding that the resolution is not one which our amended Constitution permits to be placed upon the ballot, the attorney general is not the person or official who is entitled to raise the question; that his duties being purely ministerial, he is required to place a ballot title upon any petition

filed with the Secretary of State and transmitted to him, as required by Section 3475, L. O. L., as amended by Chapter 176, Laws of 1917.

It may well be contended that if a matter proposed for reference to the electorate is within that class of subjects, upon which the Constitution permits a referendum, to wit, acts passed by the legislature, the attorney general has no authority to pass upon the constitutionality of the procedure. This would certainly be a plausible contention in the case of petitions under the initiative provisions of the section now being considered. He probably could not be heard to say, "The law you propose to initiate would be unconstitutional if passed, therefore I will not give you a ballot title," but such a case is not before us. We have here presented a case where it is proposed to put upon the ballot

for reference a proceeding by the legislature for which the Constitution has made no provision, and which does not belong to a class of subjects that can be referred under any circumstances. To hold that the attorney general must prepare a ballot title under such circumstances, would place him at the beck and call of any restless person who might desire to refer any subject, for the purpose of obtaining a straw vote upon it, from a joint memorial petitioning Congress to improve a harbor up to the action of the Peace Conference upon the covenant of the League of Nations.

The act, of which the section referred to is a part, does not contemplate any such contingency, and the opening paragraph of the first section is itself a legislative interpretation of the scope of the constitutional amendment, and reads as follows:

"The following shall be substantially the form of petition for the referendum to the people, on any *act* passed by the Legislative Assembly of the State of Oregon, or by a City Council": Section 3470, L. O. L.

It is a petition to *refer* an *act* that must be filed with the Secretary of State, and it is to a petition for an *act* that the attorney general is required to affix a ballot title.

The form of petition given in the section last referred to, is even more explicit. The descriptive portion of the form prescribed for a petition to refer, is as follows:

"We, the undersigned citizens and legal voters of the State of Oregon (and the district of ____, County of ____, or city of ____, as the case may be) respectfully order that the Senate (or House) bill No. ____, entitled (title of act and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought) passed by the Legislative Assembly of the State of Oregon at the regular (special) session of the Legislative Assembly, shall be referred to the people of the state," etc.

The section of the statute requiring the attorney general to affix a' ballot title to petitions for a referendum, has reference to petitions regarding acts, that is: *Laws* passed by the legislature; as to these he is compelled to prepare ballot titles, but there is no statute requiring him to prepare such titles for any other.

This view renders it unnecessary to consider the other questions raised in the argument.

The demurrer will be sustained and the writ dismissed. WRIT DISMISSED.

Herbring vs. Brown, Amicus curiae brief

(Brief arguing that a resolution of the General Assembly of Oregon to ratify a U.S. Constitutional Amendment cannot be referred to the people of the State of Oregon for their approval or rejection.)

In The Supreme Court
of the State of Oregon

MARCH, 1919, TERM.

KARL HERBRING,

Plaintiff,

vs.

GEORGE M. BROWN, Attorney General of the State of Oregon,

Defendant.

AMICUS CURIAE BRIEF

Elisha A. Baker of Portland, Oregon, Attorney for the Anti-Saloon League of Oregon.

Wayne B. Wheeler, of Washington, D. C., Attorney for the Anti-Saloon League of America,

Attorneys Amicus Curiae.

In The Supreme Court
of the State of Oregon

MARCH, 1919, TERM.

KARL HERBRING,

Plaintiff,

vs.

GEORGE M. BROWN, Attorney
General of the State of Oregon,
Defendant.

AMICUS CURIAE BRIEF

STATEMENT.

This is a proceeding in mandamus to compel the defendant to perform certain duties alleged to be imposed upon him by law, in and about preparing a ballot title and ordering House Joint Resolution number one of the Thirtieth Legislative

Assembly of Oregon, ratifying the proposed constitutional amendment to the United States Constitution prohibiting the manufacture and sale of intoxicating liquor for beverage purposes in the United States, to be referred to the people of the State of Oregon for their approval or rejection.

Congress proposed an amendment, two-thirds of both houses deeming the same necessary, to the United States Constitution, providing that after one year from its ratification, the manufacture, sale or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof, from the United States, and all territory subject to the jurisdiction thereof, for beverage purposes, should be prohibited, and providing further, that the amendment should be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution.

The Thirtieth Legislative Assembly of the State of Oregon, passed House Joint Resolution No. 1, ratifying the proposed amendment to the Constitution of the United States, by an almost unanimous vote.

The proposed amendment as submitted by the Congress is as follows:

"ARTICLE . . . . .

Section 1. After one year from the ratification of this article, the manufacture, sale or

transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the. Legislatures of the

several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

House Joint Resolution No. 1 by which the Legislative Assembly of Oregon ratified the proposed Constitutional Amendment is as follows:

"HOUSE JOINT RESOLUTION No. 1

Joint Resolution ratifying a proposed amendment to the Constitution of the United States of America:

WHEREAS, Both Houses of the Sixty-Fifth Congress of the United States of America, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America, in the following words, to-wit:

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States:

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 amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the Legislatures of the several states as provided by the Constitution:

ARTICLE . . . . . .

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors with n, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of submission hereof to the States by the Congress.

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THEREFORE BE IT RESOLVED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON AS FOLLOWS:

Section 1. That the said proposed amendment to the Constitution of the United States of America be and the same hereby is ratified by the Legislative Assembly of the State of Oregon.

Section 2. That certified copies of this preamble and Joint Resolution be forwarded by the Governor of this State to the Secretary of State of the United States at Washington, to the presiding officer of the United States Senate and to the speaker of the House of Representatives of the United

States."

The question at issue is, "Can a resolution of the General Assembly of Oregon be referred to the people of the State of Oregon for their approval or rejection at an election?"

POINTS AND AUTHORITIES.

I.

Any measure, or any amendment to the Constitution of Oregon may be referred to a vote of the people of Oregon for approval or rejection, except laws for the public peace, health, or safety, either by a petition to the Secretary of State properly signed, or when ordered by the legislative assembly.

Section 3475, Lord's Oregon Laws, as amended by Ch. 36, Gen. Laws, Oregon, 1913, as further amended, Ch. 176, Gen. Laws of Oregon, 1917, Section 2.

Article IV, Section 1, Constitution of Oregon.

Article IV, Section 1A, Constitution of Oregon.

II

This resolution was regularly adopted by the Legislature in one of the two ways prescribed by the Federal Constitution. Congress prescribed the manner of the adoption of the proposed amendment, as it had a right and as it was its duty to do, to be by ratification by the several states as prescribed by the United States Constitution.

Article V, United States Constitution.

III.

Article V of the United States Constitution provides that all amendments shall be valid to all intents and purposes, *when ratified by the legislatures of three-fourths of the States.*

The proposition to refer to the people the resolution ratifying the amendment means that such amendment shall not be valid when ratified by the legislatures of three-fourths of the states, but that such ratification shall, in no event, be effective until and unless approved by a vote of the people. If

the people by their vote should reject the proposition, then, in that event, it might occur that the legislatures of three-fourths of the states might ratify an amendment to the United States Constitution, and it never become a valid amendment. Thus a state referendum on a Federal amendment would suspend and might annul an amendment that had in fact been legally adopted in strict compliance with the Federal Constitution.

IV.

The power granted the legislatures of States with reference to amending the Constitution of the United States, comes directly from the Constitution of the United States.

Article V, United States Constitution.

V.

When a territory seeks and accepts statehood, it agrees to accept the provisions of the Constitution of the United States. One of these provisions is that an amendment to the Federal Constitution may be adopted by the legislatures of three-fourths of the States. No provision is anywhere made referring the acceptance or rejection of the amendment to the people of a state. A state cannot prescribe a different method for amending the Federal Constitution than that which is found in the Constitution of the United States.

VI.

The ratification of a Federal Amendment to the Constitution is not a legislative act involving

legislative power which is subject to the referendum. It involves no legislative discretion as to form, penalty, or substance of the amendment. It is the act of a delegated body to accept or reject the amendment. It is not a legislative act; it is in a sense an executive act. Ratifying a Federal Constitutional Amendment does not require that the resolution shall be read on separate days; it does not require an aye and no vote; it is not necessary that the resolution shall be printed nor engrossed. It does not require executive approval, nor is it subject to executive veto. It is in no sense an *act* or a *measure* of the legislature.

Hollingsworth vs. Virginia, 3 Dall. 378. 1 L. Ed. 644.

Commonwealth vs. Griest, 196 Pa. 296. 46 Atl. 505.

VII.

Congress and legislatures have two separate and distinct functions (a) the passage of laws, known before passage as bills, and after passage as acts or measures, and (b) the exercise of such executive or judicial functions as may be conferred upon them by constitutions or laws, as for example the ratification by legislatures of Federal Constitutional Amendments; the duty of the legislature in some states to accept or reject the nominations or appointments made by the Governor, the delegation to the House of Representatives of the power of impeachment and the delegation to the Senate of the power to try impeachments.

Watson on Constitution, Vol 2, page 1318 ff, Vol. 1, pages 378, 379.

In the exercise of the first power, that of the passage of laws, the legislative body does not exhaust its powers, because the same or subsequent sessions of the legislature may amend or repeal former legislation. But in the exercise of its second power, either its executive or judicial power, it does exhaust its power. For example, if a legislative body in the exercise of its power approves an appointment of the Governor, or the Senate, approves an appointment or nomination of the President, neither it, nor a subsequent session of it, can "un-approve" (to coin a word) that appointment. The act done is final, exhausting power. The Fourteenth Amendment to the United States Constitution was ratified by the legislature of Ohio (65 Ohio Laws 280). The next legislature expressly rescinded the action. New Jersey did the same, yet Congress held the amendment had been ratified by both states, and that the attempted rejection was a nullity. The power was exhausted. (15 U. S. S. at Large,

706.)

The New York legislature ratified the Fifteenth Amendment and then attempted to reconsider and rescind its action but Congress held the Fifteenth Amendment had been ratified by that state. (16 U. S. S. at L., 1131.)

VIII.

The assent of the President to the proposal by Congress of Federal Amendments is unnecessary

and the Governor's approval of a resolution proposed by the legislature is unnecessary.

Hollingsworth vs. Virginia, 3 Da11. 378. 1 L. Ed. 644.

Commonwealth vs. Griest, 196 Pa. 296. 46 Atl. 505.

IX.

It is obvious from the foregoing that it is the law making power of the legislative bodies which is subject to the referendum, and not the other power which is lodged in the legislative body by constitution or laws, which for want of better terms are designated executive or judicial powers of the legislature.

It is the *acts*, the *laws*, the *measures* passed *by* the General Assembly, not the *resolutions of* the General Assembly, which are the subject of the referendum.

ARGUMENT.

Article V of the Federal Constitution provides:

> "The Congress, whenever two-thirds of both Houses deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, and part of this Constitution when ratified by the legislatures of three- fourths of the several

> states, or by convention in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

This provision of the Constitution prescribes two methods for proposing amendments. One by Congress, and the other a convention, upon the application of the legislatures of two-thirds of the states. In either case the proposed amendment must be ratified by the state legislatures or a state convention, as the Congress specifies. No other method is outlined or provided by the Federal Constitution.

The proposal of a referendum on the resolution ratifying an amendment imposes a limitation and restriction on Article V of the Constitution. This article provides that all amendments *shall* be valid to all intents and purposes *when ratified by the legislatures* of three-fourths of the states. * * * The proposition to refer the amendment, or its

ratification, to the people means that such amendment *shall not* be valid when ratified by the legislature of a state, that such ratification by the legislature shall in no event be effective, and that said amendment shall not go into effect until and unless

approved by a majority of those voting upon the same. A state referendum on a Federal Amendment in effect provides that the action of such legislature in ratifying amendments proposed to it by Congress shall not be operative, and its action in ratifying such an amendment shall be null and of no force and effect unless approved by a majority vote of the electors. If the people by their vote should reject the proposition, then it might occur that the legislatures of three-fourths of the states might ratify an amendment to the United States Constitution in the manner provided by the Constitution, and it never become a valid amendment. Or the legislatures of thirty-six states of the Union might ratify a proposed Federal Amendment, and one of them submit its action to referendum and the people reject it, and the amendment fail because of it.

Thus a state referendum on a Federal amendment would suspend and might annul or make null an amendment that had in fact been legally ratified in strict compliance with the Federal Constitution.

It would be hard to imagine a more direct interference with a provision of the Constitution of the United States. The power granted the legislature of a state with reference to amending the Constitution of the United States comes directly from the Constitution itself. No such power is attempted to be conferred by the constitution of the state, nor could it be; yet this power, granted directly

by the Constitution of the United States, is to be taken away from the legislature by the referendum. What is proposed to be done, then, is simply this: to disregard the mandate of the United States Constitution and substitute the majority of the electors of a state in place of the legislature. Before this can be done, the Federal Constitution itself must be amended.

When a territory seeks and accepts statehood and becomes a part of the Federal Government, it agrees to accept and abide by the provisions of the Federal Constitution. One of these provisions is that an amendment may be adopted to the Federal Constitution by the legislatures of three-fourths of the states. There is and never was a provision referring the acceptance or rejection of a proposed amendment to the people. A state cannot prescribe a different method for amending the Constitution than that which is found in the Federal Constitution which it has agreed to abide by. If this were so, there would or could be as many different ways of ratifying a proposed amendment to the Federal Constitution as there are states in the Union, which would lead to confusion. Any referendum of a resolution ratifying a Federal Constitutional amendment is unauthorized, unprecedented and a meaningless plebiscite designed to delay the operation of the date when this Federal amendment will go into effect.

The ratification of a Federal amendment is not a legislative act involving legislative power such as

is subject to the referendum. It is not done by an *act* or a *measure* of the legislature. It

is not read on separate days, it is not printed or engrossed, it is not necessary to have the executive approval nor is it subject to the executive veto. It involves no legislative discretion as to form, penalty or substance. It is the act of a delegated body whose only duty is either to accept or reject the proposed amendment, just as the legislature in some states may accept or reject nominations made by the Governor and as the Senate may confirm or reject the nominations of the President to public office. Referendums are applicable only to legislative acts, to legislative *measures*, to *laws* passed by the legislature as such. Nowhere has it ever been pretended that they are applicable to mere lgislative *resolutions*.

The now celebrated case of Ohio vs. Hildebrandt, universally relied upon by plaintiff and those similarly situated in other states, is not in point. That case involves the Congressional Gerymander Act.

Article 1, Section 4, of the Federal Constitution provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislatures, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

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Both the Ohio constitution and the legislature provides for a referendum on an act adopted by the legislature. The Gerymander Act was a legislative act. The Federal Constitution gave the legislature the specific authority to provide the time, place and manner of holding such elections. In 1911 Congress amended the Federal Act to specifically provide that the redistricting of a state might be made "in the manner provided by the laws thereof." It was the *act* of the Ohio legislature in this respect, a *law* of Ohio made by her legislature that was subjected to the referendum in the Hildebrandt case.

There is no provision anywhere that the legislature may provide the time, place and manner of holding an election relating to ratification of a Federal Constitutional amendment. Congress, nor the Constitution, does not provide that ratification may be completed in the manner provided by the laws of a state. Congress, in this amendment, points out one method of ratification, as it was its constitutional duty to do, and that method was by the legislature itself. Any referendum or other method which the legislature might choose to ascertain the sentiment of the people, would have no binding effect. It cannot side-step, equivocate or shirk its responsibility. Until the Federal Constitution is changed, the legislature must act and no other authority can be substituted for it, not, however, under its legislative power, but as the delegated body whose duty it is to accept or reject the proposed

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amendment. The word "legislature" does not always mean legislative power. (See McPherson vs. Blacker, 146 U. U. 1.) See also opinion of the Attorney General of Ohio (1917) where it is said:

> "Whenever a state 'legislature' is referred to in the Federal Constitution merely as descriptive of a body of public officers, or wherever powers or privileges not essentially legislative are conferred in terms upon a 'state legislature,' the presumption does not apply."

Article V of the Constitution reposes the future of ratifying amendments in either the state legislatures or in conventions in the several states, leaving in Congress the discretion of determining with reference to each amendment between the two methods of ratification. In practice, Congress has in every instance, including the present instance, specified that the amendment should be ratified by the legislatures of three-fourths of the states. It was apparently the intention of the framers of the Constitution that this should be the usual method of ratification and that the ratifications by conventions should be the exceptional cases.

Mr. Irebell of North Carolina said in convention called to ratify the Federal Constitution in that state:

> "By referring this business to the legislatures, expense would be saved, and, in general, it may be presumed they would speak

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> the genuine sense of the people. It may, however, on some occasions do better to consult an immediate delegation for that special purpose."

Vol. 4, Elliott's debates on the Federal Constitution, p. 177.

In Vol. 4, Elliott's debates, p. 404, Elbridge Gerry is quoted as saying:

> "The convention of the states respectively have agreed for the people that the state legislatures shall be authorized to pass on these amendments in the manner of a convention."

Thus it is seen that the placing of the ratifying power in the ordinary case, in the hands of the state legislatures, was done advisedly, and upon the impression that, unless there should be signs of the times which should cause Congress to believe the contrary, the people would be satisfactorily represented in their legislatures. Congress, with reference to this, the eighteenth amendment, evidently thought that the people would be satisfactorily represented by their legislatures, and thus prescribed the method of ratification in this instance to be "by the legislatures of the several states," as it had the right and as it was its duty to do. No other body but Congress had the power to designate the method of ratification, and no other body, not even the body of the people, have the right to say it shall be ratified in any other manner, until the Constitution of the United States shall have been amended as to its method of amendment.

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So the legislature, in ratifying Federal Constitutional amendments acts as a ratifying body, not a law making body, just as the U. S. Senate in trying impeachments acts as a court and not as a law making body, and as the House of Representatives, in impeachment cases, acts as a grand jury, not as a law making body, and as the state legislature, prior to the seventeenth amendment, acted as a designated body for the election of United States Senators, and not as a law making body. So these anomalous functions were placed by the framers of the Constitution wherever it seemed politic or convenient to place them. Surely the framers of the Constitution cannot be said to have thought that trying impeachment cases was legislating, just because they saw fit to place it in the Senate which was primarily a legislative body; nor can they be said to have thought that ratifying Federal amendments to the Constitution was a legislative

function, just because it was conveniently placed in the State legislatures, whose main function was, of course, legislative. The framers of the Constitution recognized, as have all lawyers both before and since that time, that a body is not legislating unless it is making laws, that is laying down rules for the regulation of human conduct, and that a step taken even by a legislative body, whose only effect is to determine a fact, is not a legislative act. A legislature does not exhaust its power, by the process of legislation. It may lay down a rule for future human conduct, and it may lay down another and different rule for conduct which will supercede the

first; it may repeal, it may amend, it may reenact. Here again it is demonstrable that ratification is not legislation, for when ratification is done it cannot be undone; scrambled eggs cannot be unscrambled. The power is exhausted; it is a final act; it cannot be undone; it cannot be repealed or amended. As an example of this, the fourteenth amendment to the United States Constitution was ratified by the legislature of Ohio by resolution. (65 Ohio, L. 280.) The next legislature expressly rescinded this action. New Jersey did the same, yet Congress held the amendment had been adopted by both states and that the attempted rejection was a nullity. (15 U. S. St. at L. 706.) The legislature of New York ratified the fifteenth amendment and then attempted to reconsider and rescind its action, but the Congres held that the fifteenth amendment had been ratified by that state. (16 L. S. St. at L. 1131.)

The ratification by the legislature has never even taken the form of legislation. The practice has always been for the two Houses of the legislature to ratify by joint resolution. The requirements as to reading, printing, etc., of the proposal, absolutely essential in legislation, have never been insisted upon. (See Matthews Legislative and Judicial History of the Fifteenth Amendment, page 68.) The joint resolution when passed has never been submitted to the Governor for approval or veto. This practice, the legality of which has never been, and is not now disputed, is conclusive, for if

the word "legislature" as used in Article V, United States Constitution, was meant to include all those who do and may exercise any control over state legislation, then the failure to accord the Governor the veto power over these resolutions has been illegal and not a single amendment of the United States Constitution has been constitutionally adopted.

The word "Congress" is used in the United States Constitution in two senses. In Section 1, Article 1, U. S. Constitution, all legislative power is vested in Congress. Clause 2 of Section 7, Article 1, gives the President the veto power over legislation. Now the problem is to determine whether all Congressional action is subject to the executive veto. Section 8 sets forth in eighteen paragraphs certain things which the Congress is empowered to do. All of these are essentially legislative in nature and it has never been disputed that the expression "the Congress" as here used means the Congress in the legislative sense and its acts are subject to executive veto. Again in Article III, Section 1, judicial power is vested in such courts as the Congress may establish. In Article III, Section 2, paragraphs 2 and 3, certain powers are granted to "the Congress" which are in their nature legislative. But in Article V, U. S. Constitution, where Congress is given power to propose amendments to the United States Constitution, or to call a convention, the practice has always been for Congress to act by resolution, and the executive approval has not been required. Also Article I, Section 3, the

Senate is given power to try impeachments, which is not legislative power, and in Article I, Section 2, the House of Representatives is given the sole power of impeachment, which is not a legislative function. These distinctions show that Congress is vested with two kinds of powers, one strictly legislative and the other executive or judicial powers of the legislature, as the case may be. The meaning of the word "legislature" in Article V. of the United States Constitution, to-wit, a corpus designation, is not a law making power, and when such power is exercised by the legislature, it is not making *law* or passing an *act* or a *measure* and only its acts when legislating are subject to the referendum. If by the term "legislature" as used in Article V of the U. S. Constitution is meant all of those persons who may have anything to do with the enactment of state statutes, functioning in the way they must when state legislation is under consideration, then the state executives have, from the foundation of the Union, been necessary parties to the ratification of Federal amendments by the state legislatures. The regular practice, however, has been for legislatures, by resolution to ratify the Federal amendments and the state executives have never had anything to do with the transactions. The sufficiency of these ratifications have never been questioned on this ground, so far as we have been able to learn, yet at this late date a theory of constitutional interpretation is proposed which will, if adopted, render unconstitutional and void every amendment of the United States Constitution. Obviously,

the contention, if adopted, would prove far too much.

The proposal, therefore, of the plaintiff for a referendum is a clear attempt to supplant a plain provision of the United States Constitution by taking away from the legislature the power of ratifying a proposed amendment to the Federal Constitution, and placing that power by referendum, in the hands of the people of a given state. If the laws of Oregon relating to the referendum can be said to have done this, then the laws of other states can change or supplant this feature of the Federal Constitution, and if the laws of a state can supplant a provision of the Federal Constitution by substituting something else for such provision in one instance, it can do it in any number of instances, and, shortly, we would not only have as many ways of ratifying a constitutional amendment as there are states, but the Federal Constitution would become non-existant, or supplanted by state enactments and substitutions. If the terms used in such an instrument as the United States Constitution cannot be objectively defined at all, but may be given a purely subjective meaning by each state, with reference to each section of the Constitution, then the United States Constitution, as the embodiment of the Supreme Law of the Land, is no longer existent. Such an action as that proposed by the plaintiff herein would be as plain an attempt at nullification by state action of Federal law as was the abortive attempt of South Carolina in 1863, in

adopting the Nullification Ordinance. (See Elliott debates on the Federal Constitution, Vol. 4, p. 580.)

It would be intolerable for the United States Constitution to be so dealt with.

Respectfully submitted,

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