Supreme Judicial Court of Maine: Opinion of the Justices, 118 Me. 544, 107 Atl. 673 (1919)

(Ratification of a Federal Amendment by State Referendum does not come within the provisions of the State's initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them.)

MAINE REPORTS
118

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MAINE
JANUARY 7, 1919—MARCH 1, 1920

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Questions Submitted by the Governor of Maine to the Justices of the Supreme Judicial Court of Maine, July 9, 1919, with the Answers of the Justices Thereon.

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the Eighteenth Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the Legislature to the qualified voters of the State, respectfully submit the following answer.

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-fifth. Congress of the United States on December 3rd, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States which amendment provides that after one year from the ratification thereof the manufacture, sale or transportation of intoxicating

liquors 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 thereby prohibited.

This amendment, thus adopted by joint resolution of Congress, was proposed to the Legislature of Maine of 1919 for ratification and was ratified by a joint resolve of the Senate and House of Representatives, the concluding paragraph, after reciting all the preliminary steps, being of the following tenor:

"Therefore Resolved that the Legislature of the State of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the Secretary of State of the State of Maine notify the Secretary of State of the United States of this action of the Legislature by forwarding to him an authenticated copy of this resolve."

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the Secretary of State, requesting that this resolve be referred to the people under Amendment XXXI of Article 4 of the Constitution of Maine, known as the initiative and

referendum amendment, the question is now asked of the Justices whether this joint resolve of the Legislature of Maine, ratifying an amendment to the Federal Constitution proposed by and duly submitted for ratification by the Congress of the United States is subject to the provisions of amendment XXXI, and therefore must be referred to the people under the facts existing in this case.

Answer.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Constitution of the United 'States was complete, final and conclusive so far as the State of Maine was concerned, when the Legislature passed this resolve.

Our reasons are as follows: The subject matter of the action of the Legislature under consideration, is a proposed amendment to the Constitution of the United States, the proposal and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows:

"Art. V. The Congress, whenever two-thirds of both Houses shall 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, as part of this Constitution, when ratified by the Legislatures of three- fourths of the several States, or by Convention in three-fourths thereof, as the one or the other mode may be proposed by the Congress. . . ."

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways;

First, from Congress by joint resolution whenever two-thirds of both Houses deem it necessary;

Second, from the States whenever two-thirds of the 'Legislatures of the several States may request that a national constitutional convention

be called for that purpose, in which case Congress must call such a convention.

All the Federal amendments which have thus far been adopted have been proposed in compliance with the first method, that is by a joint resolution of the two Houses of Congress. No National Constitutional Convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two Houses, and is independent of all executive action. The signature of the President is not necessary and it need not be presented to him for approval or veto. Hollingsworth v. Virginia, 3 pall., 378; Stale v. Dahl, (N. D.) 34 L. R. A. 97. Nor is

Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by Article V, before quoted. The people through their Constitution, might have designated some other body than the two Houses or a National Constitutional Convention, as the source of proposals. They might have given such power to the President or to the Cabinet or reserved it in themselves, but they expressly delegated it to Congress or to a Constitutional Convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a National Constitutional Convention it must be ratified in one of two ways:

First, by the Legislature of three-fourths of the several States, or

Second, by Constitutional Conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto, Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the States. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

Here again, the State Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law making body, but is acting in behalf of and as representative of the people as a ratifying

body under the power expressly conferred upon it by Article V. The people through their Constitution might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves but conferred it completely upon the two Houses of the Legislature, that is the Legislative Assembly.

It is a familiar but none the less fundamental principle of Constitutional Law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner and this organic law was ordained and established not by the States in their sovereign capacity but by the people of the United States. The preamble, "We the people" so states and such is the fact. *Chisholm* v. *State*, 2 Dall., 419. It is equally well settled that it was competent for the people to invest the Federal Government, through the Constitution, with all the powers which they might deem necessary or proper and to make those powers, so far as conferred, supreme; to prohibit the States from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to Federal or State government. Martin V. Hunter's Lessee, 1 Wheat., 304. Whether a certain power has been conferred either expressly or by reasonable implication upon the National Government, or has been reserved to the States or to the people themselves must depend upon the construction of the language of the Constitution governing that particular subject matter.

It admits of no doubt that in the matter of amendment which is governed by Article V, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a National Constitutional Convention, and the power of ratification upon the State Legislatures or upon State Constitutional Conventions.

This view has the sanction not only of reason but of authority. Mr. Iredell, in the North Carolina Convention which ratified the Federal Constitution, in discussing this ratifying clause, said: "By referring this business to the Legislatures, expense would be saved and in general it may be presumed they would speak the general it may be presumed, they would speak to the general sense of the people. It may however on some occasions be better to

consult an immediate delegation for that purpose. This is therefore left discretionary." 4 Elliot Deb., 176, 177. This discretion under the terms of Article V is to be exercised by Congress.

In *Dodge v. Woolsey*, 18 How., 331, 348, the Supreme Court of the United States, in emphasizing the supremacy of the constitution said: "It is supreme over the people of the United States, aggregately and in their separate sovereignities, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them by the Congress of the United States when two-thirds of both Houses shall propose them, or when the Legislatures of two-thirds of the several States shall call a convention for proposing amendments; which in either case become valid to all intents and purposes, as a part of the Constitution when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. . . . . Now whether such a supremacy of the Constitution with its limitations in the particulars just mentioned and with the further restriction laid by the people upon themselves and for themselves as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme as has been stated and that the statement is in exact conformity with it."

A well known writer on Constitutional Law after tracing the history and the scope of Article V concludes as follows:

"Whether an amendment is proposed by Congress or by a Convention, it is ratified or rejected by the representatives of the people either in Legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." Watson Const., Vol. 2, page 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practice if a State Legislature has once ratified a Federal amendment a subsequent Legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the fourteenth amendment and by New York with reference to the fifteenth, but the proclamation of the Secretary of State for the United States was issued announcing

the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescission by subsequent Legislatures. The attempted rescission was ignored. Watson Const., Vol. 2, page 1315.

If a subsequent Legislature cannot rescind the ratification by a former Legislature, it would seem that much less could such ratification he rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject matter.

It follows from what has been said, that even if the people of Maine by adopting in 1908 the initiative and referendum amendment to our State Constitution had attempted to assume or regain the power of ratification of proposed amendments to the Federal Constitution, by exercising a supervisory authority over the State Legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by Article-V, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify Federal amendments. The authority is elsewhere.

But the people by the adoption of the initiative and referendum amendment did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Maine, 428, 446, and it was there held that the design of the initiative and referendum was to make the lawmaking power of the Legislature not final but subject to the will of the people and to confer that power in the last analysis upon the people themselves. And the court adds:

"This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of Article IV under the general head of 'legislative power.' 'Every bill or resolution *having the force of law* to which the concurrence of both houses may be necessary . . . . which shall have passed both houses, shall be presented to the Governor, and if he approve he shall sign it' etc. The referendum applies and was

intended to apply only to acts or resolves of this class, to every bill or resolution having the force of law, that is to what are commonly known as legislative

acts and resolves, which are passed by both branches, are usually signed by the Governor and are embodied in the Legislative Acts and Resolves as printed and published. And the words 'No act or joint resolution of the Legislature' etc. before quoted, in the referendum amendment must be construed in the light of the context, considering all the sect ions, and parts and articles together as meaning 'no act or joint resolution of the Legislature having the force of law.' This is the simple and plain interpretation of simple and plain language." In the application of that rule of construction this court held in that case that a joint address to the Governor on the part of both branches of the Legislature calling for the removal of a public officer was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution, ratifying the proposed Constitutional amendment was neither a public act, a private act nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article V of the Federal Constitution to perform that particular act. The principles laid down in *Moulton v. Scully* are decisive of this point.

The Supereme Court of Oregon in a case decided on April 29, 1919, passed upon this branch of the question where this same Federal amendment was involved, and held that the term "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed laws. *Herbring v. Brown*, 180 Pac. Rep., 328.

In conclusion it may be said that not only have all previous amendments to the Federal Constitution been ratified by two-thirds of the Legislatures of the several States, but this particular Eighteenth Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by Federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this Eighteenth amendment had been duly ratified by the Legislatures of three- fourths of the States including by name the State of Maine, and therefore certifying, in pursuance of U. S. Rev. St. Section 205, "that the amendment aforesaid has become valid to all intents and

purposes as a part of the Constitution of the United States." See appendix to Part 2 of U. S. Stat. 3d Session, Sixty-fifth Congress, 1918, 1919.

The construction which we adopt is evidently the same which the Federal authorities have placed upon the Federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

We have the honor to remain,

Very respectfully,

(Signed)

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