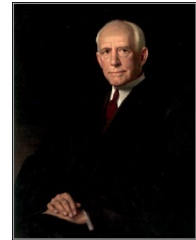


General Discussion

DILLON v. GLOSS, 256 U.S. 368 (1921)

In *Dillon v. Gloss*, 256 U.S. 368 (1921) (hereafter *Dillon*) the Supreme Court addressed whether or not Congress could place a limit on the time allowed for states to ratify a proposed amendment. Associate Justice Willis Van Devanter delivering the opinion for a unanimous Court found a ratification limit was constitutional provided the limit was “within some reasonable time after the proposal.” While the Court did not specifically discuss the authority of a convention to impose ratification time limits on its amendment proposals, the discussions of previous Court rulings shown thus far indicates a convention, to avoid massive constitutional quandaries, must have this authority.



Van Devanter

The Court discussed the convention clause in general. This discussion is significant in that the Court expressly stated that (a) *the people* are the source of sovereignty in this nation and (b) all amendments must have the sanction of the people in *representative* assemblies. There have been recent attempts by several political groups to cause a convention call whereby the states, *as sovereign entities*, control all aspects of a convention such as delegate selection, agenda, amendment text and outcome *without any participation of the people whatsoever*. This premise will be discussed in greater detail later in this Appendix. The Court emphatically rejected this premise stating:

“Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to *representative assemblies* in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that *all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies*, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people’s will and be binding on all.” [Emphasis added].

The issue for an Article V Convention is whether a convention in which delegates to the convention are pre-selected by a state legislature, without a vote of the people: given a set of instructions as to what shall be discussed, voted and approved at a convention, without input of the people; face state felony charges if said delegates stray to discuss other issues without permission of the state legislature, without advice of the people; are subject to editorial review by the state legislature of any amendment proposal, without involvement of the people; and are mandated to manufacture a pre-determined amendment from the state legislature, without review of the people, it can be

said such assembly is *representative* or *sanctioned* by the people as the people have no part of its process whatsoever. Obviously to *sanction* something at the minimum requires the sanctioning party have the ability to sanction meaning at some point the question is placed before them so they *can* consent.

While the Court was discussing ratification conventions, it did not exclude the proposal convention (an Article V Convention) nor Congress from its emphatic statement of that “all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies.” Hence, as state legislatures, Congress and state ratification conventions are all elected and thus qualify as having the sanction of the people of the United States, it follows for a convention to qualify it must a representative assembly meaning its delegates are elected, not appointed and share the same autonomy as the other three representative assemblies.

As stated in Hawke, neither Congress nor the federal courts have the right to alter the ratification procedure from that which the Constitution has set. Gulf clearly states unless there is a reasonable basis for doing so, discrimination is not permitted in the amendatory process. Discrimination against the convention that is, denying it the identical powers of amendment proposal permitted to Congress is therefore unconstitutional.

In all instances where Congress imposed a ratification time limit, the text of that limit was included as part of the language of the proposed amendment. Clearly, if Congress sent its ratification limit in a message separate of the proposed amendment language when notifying the states of its proposed amendment, no question of equality would exist. The convention has no ratification function and therefore is limited strictly to amendment proposal. By sending a separate message Congress would have decisively separated its two constitutional functions, proposal and ratification so that such limit became part of its *ratification* authority. However such an act would be unconstitutional as neither mode of ratification describes such power for Congress. Hence, the power must be a power of amendment *proposal* rather than of ratification as Congress is free, like the convention, to *propose* anything it wishes. It remains to the states to determine whether or not that proposal becomes part of the Constitution. Any doubt of this interpretation is removed by the obvious fact all ratification limits have been enrolled as part of the Constitution as a section of each amendment meaning the term limit was ratified along with the proposed language. Thus, the Dillon ruling actually addresses whether or not, *as part of its proposal authority*, Congress can insert a *ratification instruction* into the text of a proposed amendment.

The Court did not directly address whether a convention has the same power of ratification time limit as Congress. The question of whether a convention possesses such power is best answered by examination of the consequence of

allowing *only* Congress to insert such a time limit in an amendment proposed by a convention. More generally, the question opens the door to addressing whether or not Congress has the power to “edit” the proposed text of a convention proposed amendment before Congress “agrees” to submit the proposed text for ratification by the states. Again the doctrine expressed in Hawke resolves this question. The Constitution contains no provision permitting Congress authority to “edit” an amendment proposal submitted by a convention including inserting a time limit of any description. The two modes of proposal are distinct, separate and autonomous just as the two modes of ratification are distinct, separate and autonomous. Because of this compartmentalization an amendment cannot be ratified using one-fourth state conventions and one-half state legislatures to achieve the necessary three-fourths ratification. By the same token the convention has the right to propose an amendment without bowdlerization by Congress. To permit otherwise compromises the integrity of the entire amendment process by violating the separation of powers doctrine.

Hawke clearly states Congress is limited to a choice between two modes of ratification in the Constitution—nothing more. Neither mode describes a power of editing permitting Congress to alter the text of a convention amendment prior to it being submitted to the states for ratification consideration. Therefore while Congress has a right to propose a ratification time limit it is limited to an amendment proposed by Congress. Simultaneously if a convention proposes the amendment, it has the same authority to impose a ratification time limit if it so chooses.

Moreover allowing Congress editing powers over a convention amendment proposal opens huge constitutional enigmas. The Constitution, for example, does not require a two-thirds vote by Congress to choose a mode of ratification for a proposed amendment. If Congress by majority vote “edits” a proposed convention amendment and inserts a ratification time limit, is it still a properly proposed amendment? Has the text, originally proposed by two-thirds vote in one constitutional body but now modified by majority vote of another constitutional body satisfied the two-thirds mandate of the Constitution that all amendment proposals receive a two-thirds vote of support from the proposing body before submission? If Congress instead modifies the amendment by two-thirds vote in both houses, has it now “proposed” the amendment instead of the convention? If so, what becomes of the original amendment proposal of the convention passed by a similar two-thirds vote? Does that text simply die away replaced by the congressional proposal? If the Constitution is to have any validity, such conundrums must be avoided at all costs.

Even if Dillon only addresses Congress’ right to insert ratification time limits in an amendment proposal, the quagmire of denial of this equal right to the convention makes it obvious Gulf’s equal protection position is preferable. By such action, all thorny constitutional questions vanish. Each body is free to

propose such limit as it deems proper for its amendment proposal without effect on the choice of ratification mode exclusively granted Congress or the number of states mandated to ratify to cause the proposal to become part of the Constitution.

In discussing its conclusion of permitting ratification time limits, the Court said,

“We do not find anything in the article [Article V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefore that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. ... That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generations. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal.”

The event which invalidated the Court’s determination of contemporaneousness as the basis of ratification of a proposed amendment was the ratification of the 27th Amendment. As mentioned by the Court, the 27th Amendment was one of 12 proposed amendments submitted by the Congress part of the original Bill of Rights in 1789. In 1992, the requisite three-fourths states ratified the proposal thus making the 1789 proposed amendment the 27th Amendment to the Constitution. The period of ratification for the states therefore exceeded 200 years. Based on the ratification of the 27th Amendment, it is clear unless the

proposing body places a ratification time limit in the proposed amendment, there is no limit on when the states may ratify a proposed amendment. This ratification nullifies most of Dillon's premise that proposal and ratification are events which must occur within a short period of time so as to be contemporary. Instead the 27th Amendment's ratification shows ratification can occur over centuries. A proposed amendment remains valid therefore until ratified by three-fourths of the present states or is rejected by more than one-fourth of the present states.

In its discussion of the amendment process the Court quoted Article V noting that "on the application of the legislatures of two thirds of the several states [Congress] shall call a convention for proposing amendments..." However later in its ruling the Court returned to discussion of the convention stating,

"An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the Senate. A further mode of proposal-as yet never invoked-is provided, which is, *that on the application of two-thirds of the states Congress shall call a convention for the purpose.*" [Emphasis added].

The Court clearly states the purpose of the applications submitted by the states. It is to cause Congress to call a convention "for the purpose" of proposing amendments. With this clear interpretation of the purpose of the applications the Court established the convention, not the states, propose amendments. Hence, any text in the language of an application dealing with an amendment proposal is a matter for a *convention* to resolve, not Congress. Therefore as the purpose of the application is to call a convention, any subject matter of amendment contained in the application has no constitutional consequence as it is dicta relative to the constitutional purpose of causing Congress to call. It is the act of submission and total number of submissions which concern Congress and not any content of the application. If this were not so it would enable the states to by-pass the convention and render it a pro forma rather than a substantive constitutional process.

If such interpretation were correct, the Court would be required to state this as part of its definition of the constitutional purpose of an application. There is no language in Dillon referring to the amendment subject matter in an application as the basis of determination of whether or not Congress is obligated to call a convention. The 1930 statement in Congress in Section 2 of this Appendix

demonstrates that body recognized this constitutional interpretation by the Court as the summation clearly referred to the number of applying states rather than any subject matter or matters contained in the applications as the basis for a convention call by Congress.

Some convention opponents suggest the contemporary standard of Dillon applies to state applications for a convention. A reason Congress can reject a state application, these opponents state, must be on the basis of how old, or rather how long, Congress has ignored the application. Thus, after an unspecified period Congress can refuse to call based on the age of the application if it puts off calling the convention long enough to allow the applications to age. The Constitution disagrees. The term “on the application... [Congress] shall call a convention...” describes an immediate response on the part of Congress. Any delay is unconstitutional. The unconstitutional cannot usurp the constitutional. Therefore any time delay by Congress to call the convention cannot affect the efficacy the applications.

Moreover, as described in Section 2, the official action of Congress has thus far been to allow the applications to “lie on the table.” According to Robert’s Rules of Order, Newly Revised, 11th Edition, to lie on the table means that there is no time limit on an issue an assembly places on the table. It hibernates. Therefore, according to parliamentary procedure, *no time is attached to the issue* meaning the applications are literally as contemporary as the day they were submitted to Congress by the states because under the rules of parliamentary procedure the applications do not age so long as they lie on the table.

Frank E. Packard, attorney, discussed Dillon as it applies to applications in a Marquette Law Review Article (Volume 35) reprinted on pages 243-50 of this Appendix. Packard discussed the submission of applications by the states for a convention call regarding limitation of federal income tax rates. He notes several states have rescinded applications but notes state rescissions “were not effectuated” by the federal government where the states have taken such action in the part in regards to the amendatory process.

Packard cites the example of the states of New Jersey and Ohio which first ratified, then attempted to rescind their ratification votes of the 14th Amendment. He noted Secretary of State William H. Seward and Congress ignored the rescissions and listed the two states as ratifying states in declaring the amendment ratified. Packard then cites the action of Secretary of State Hamilton Fish regarding a rescission by the state of New York of its ratification vote for the proposed 15th Amendment. Again the secretary of state ignored the rescission and listed New York as one of the ratifying states for the 15th Amendment (Page 244).

Packard's third example concerned the repeal of the 18th Amendment in which he postulated that as the state legislatures had approved the 18th Amendment, it was likely Congress felt its repeal required "an agency closer to the seats of sovereignty—the peoples of the states themselves..." Thus Packard asserts that for the state legislatures to rescind a convention application once submitted it would require consent by the people, a process not found in Article V and therefore, as specified in Hawke, not permitted. As no process exists in the Constitution to rescind applications, such rescissions by definition are unconstitutional (Pages 244-45).

Packard then discusses the concept of contemporaneousness and state applications. He states some applications "might be contended by opponents...that an unreasonable length of time has elapsed since the passage of the resolutions... and therefore, the resolutions passed by these ...states no longer can be counted." Packard counters this argument by quoting from Justice Van Devanter who stated, "...proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time." Instead Packard states, "Thus, the reasonable length of time necessary is the interval between proposal and ratification. The reasonable-length-of-time doctrine is inapplicable to the movement to secure the income tax rate-ceiling amendment as there has been no proposal as yet of such income tax rate-limitation amendment. *There can be no proposal until the Congress calls a convention, the convention proposes the amendments and the Congress directs the mode of ratification.*" [Emphasis added] (Pages 244-45).

Thus the contemporary argument is invalid because all state applications have been designated by Congress as lying on the table. This parliamentary action means the applications enter a state of hibernation on which time has no effect. Further, as Packard describes, the time-length doctrine of Dillon only takes place *after* an amendment is proposed meaning until the convention actually proposes an amendment the Dillon doctrine of time limit cannot be attached.

Finally Packard suggests applications must be grouped by subject matter in order for them to "count" toward a convention call. In doing so he ignores the clear interpretation by the Court in Dillon regarding the purpose of the application which is to cause a convention call, not propose an amendment. As explained by Madison and Hamilton, the Founders clearly did not intend such an obvious obstacle to exist which Congress could easily turn to its advantage and not call the convention. Madison made it clear there was to be no "vote, debate or committee." Hamilton described the process as "peremptory" giving "the national rules no option" on the matter. Clearly having an option to group applications by subject matter prior to determining whether to call a convention allows Congress to easily dismiss applications for the slightest reason and thus *not call*. The idea violates the dogmas established by the

Founders who wrote Article V with the intent of providing a method of amendment proposal *not* controlled by Congress. Subject matter determination obviously controls that proposal method and therefore is not what the Founders intended. Finally, the public record of applications submitted by the states show the states have satisfied the “same-subject” requirement at least three times meaning such discussion is moot as regardless of the method of tabulation involved Congress must call a convention.