

## WHAT DO YOU THINK ABOUT THE TWENTY-SEVENTH AMENDMENT?\*

“What do you think about the twenty-seventh amendment,” I asked my aching head just last week. I was sitting at my computer terminal at Duke Law School, papers littering the place as usual, at my office in room 107. “I mean, what do you think about the second amendment,” I caught myself muttering, trying to get things more clearly in mind, using the description Walter Dellinger suggested was more to the point.

The amendment I was fussing over was not the proposed twenty-seventh amendment many remember from having strongly supported it in 1972 (the ERA—the Equal Rights Amendment). Nor was it the Second Amendment so popular with the NRA (the one about the right to bear arms). Rather, it is “the other” second amendment—i.e., the *original* second amendment proposed as part of the list of twelve amendments Congress approved for submission to the states in its first session two hundred years ago, in 1789. The first two of those proposed twelve amendments, unlike the whole of the next ten in the list, had failed to attract more than six state ratification votes. That’s the “second” amendment that was bringing on the headache.

In an effort to clear some of my confusion away (all these numbers, all these dates), I swiveled my office chair about to remind myself what this was all about. I turned to the framed copy of the twelve original amendments Congress had submitted in 1789. There it was, on the office wall next to the framed copies of the Constitution and Magna Carta. And there, too, in handwritten sepia ink (now hard to read from having faded over time under glass on my wall), were the original first and second Amendments that failed to excite the support that had carried the day for the balance of the list—the ultimate Bill of Rights whose bicentennial we passed in remembrance in 1991:

*Article the first . . . . After the first enumeration required by the first article of the Constitution, there shall be one Representa-*

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\* Editors’ note: Our style manual tells us to capitalize constitutional amendments, but fails to anticipate the problem discussed here. We have capitalized references to amendments the legitimacy of which is beyond dispute.

*tive for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.*

*Article the second . . . No law, varying the compensation for the services of Senators and Representatives shall take effect, until an election for Representatives shall have intervened.*

Evidently the inspiration of the first of these unapproved amendments, the one called “article the first,” was to build into the Constitution an initial assurance of substantial local accountability for each House member (not more than 30,000 constituents per representative initially and not more than 40,000 until, using that basis of reckoning, the House had two hundred members, and further providing that the House would never have less than two hundred members thereafter), while also providing that neither should the House be permitted to grow to a size larger than necessary for there to be at least one representative for each 50,000 persons. The measure looked forward. It anticipated future population growth and up to a point it disallowed any measure that might dilute the personal, local representative nature of each Representative. In anticipating that growth, however, it also carried its own small precaution against the possibility that the House might otherwise become absurdly large unless its power to create additional seats were limited in some degree. That precaution is expressed in the last provision of the amendment, disallowing Congress to provide more than one Representative for every fifty thousand persons once the House achieved a size in which it would already contain two hundred members.<sup>1</sup>

The inspiration of the “article the second” was obviously somewhat different—a precaution against too much self-interest in Congress in the use of its spending power to set its own salary and emoluments as it might think best. Hardly a foolproof measure.<sup>2</sup> It

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1. As it turned out, this proposed ceiling (of not more than one additional Representative for each additional 50,000 persons once the House reached 200 members) would not have done very much to have kept the House from becoming absurdly large. Given today’s population, Congress would keep well within that restriction even were it to provide for a House containing 5,000 Members (250 million people divided by fifty thousand). Fancy that.

2. Though not unprecedented, either. In fact, the Constitution has a provision of this sort, i.e., one that postpones the effect of acts Congress may adopt when they are acts of a sort most likely to benefit themselves. So, Article I, Section 6, clause 2 had provided (and even

didn't even require any exceptionally large vote to pass such bills (say, three-fifths or two-thirds affirmative vote to raise one's own pay), as might quite sensibly have been proposed. Instead, it merely postponed the taking of effect of any variation in compensation, "until," as it says, "an election for Representatives shall have intervened." Moreover, it also contains a certain "Catch 22" of its own, i.e., by no means is it just a proposal that would keep current Members from at once benefiting from raises they might be tempted to vote themselves.<sup>3</sup>

Indeed, some keen observers of the time noticed that the proposal was not entirely a taxpayer's blessing—as it might be had it simply forbade any congressional pay *increase* from taking effect until after the next House election, where those who had approved the increase would realize none of it until after successfully facing an electorate whose taxes would be expected to support what they had done. But the proposal contained in the original second amendment is not just of this sort. It is also an "incumbents protection" act, or at least so it is in part, as some at the time quickly figured out.

Note that it is "any variation" (and not just "any increase"), the amendment disallows from taking any immediate effect. So the proposal also provides a cushion for members in Congress against the downside risk of constituent pressure to take *less* salary and benefits than they have been receiving, as might well happen, say, in a recession or in other circumstances when the economy might be in distress and the emoluments of office holding might seem to be unreasonably high in comparison with what others might earn: *no*

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now still provides): "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which [office] shall have been created, or the Emoluments whereof shall have been increased during such time."

This generally forgotten clause, incidentally, has actually had more use than one might suppose. For example, Senator Orin Hatch of Utah was a rumored leading prospect for nomination to the Supreme Court just a few years ago but his chances were dimmed because a general pay raise including the pay of Supreme Court members had recently been approved. So, since the emoluments of being a Supreme Court Justice (the office to which he would have been appointed) had been increased during his term of election, Senator Hatch became ineligible for appointment during the balance of his six-year term. And a little earlier, when President Nixon named William Saxbe, a Senator from Ohio, to be Attorney General, this clause temporarily barred the nomination for the same reason, i.e., the salary for that office had then been recently increased pursuant to an act of Congress. But in this instance a compliant Congress found a way out. It passed a special law lowering the Attorney General's salary to its former level, after which Saxbe's name was resubmitted and he was then quickly confirmed as Attorney General. (*Query* whether this made the matter constitutionally kosher.)

3. In contrast, there is no similar "Catch 22" of the sort I'm about to describe, in the provision in Article I, Section 6, clause 2, quoted in note 2.

*decrease Congress might vote in respect to its own compensation could have any immediate effect on any of those voting to "accept" it.*

How nice, for Congress, that the amendment would have this effect. And insofar as any such measure would be approved to affect the emoluments or pay of members of the House (and not just the Senate where members serve for six-year terms), such legislation as they would be approving would merely encumber their successors, and none of themselves during the whole balance of their term of office. How fine for them. Perhaps it was partly in recognition of this feature of the proposed amendment that the original second amendment failed to draw more than six state ratification votes during the two-year period when all the rest, save itself and the First were approved, in 1791.<sup>4</sup>

Even assuming some in the House might seek reelection (and thus become their own successors), still, according to the very terms of the amendment no such enacted decrease would affect them unless they were successful in being reelected. Well, that's not such a bad thing looked at from their point of view. Were they not reelected they would have the strong consolation of knowing they would thereby avoid having to live under the more modest standard of compensation they had approved and which their successors in turn would be forbidden to alter during their own first two-year term.<sup>5</sup>

Looked at this way, the proposed amendment might even be self-servingly politically useful to the more well-to-do members in Congress. For they could use it insofar as they might be of a mind to do so, as a means of discouraging prospective opponents. How so? By approving a prospective decrease in compensation (which prospective decrease the amendment itself would keep from having any current effect on those voting it into law). By thus voting to fix a lower compensation for a minimum of the next two years following the very next election, one might usefully discourage prospective candidates less well to do than oneself from even attempting to seek the office—candidates unable to match the incumbent's campaign expenditures and unable to stay out of debt if made to depend solely upon the lower compensation the office would unalterably

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4. Actually, there is no reason to be coy about this matter, i.e., these were among the reasons that drew misgivings to this amendment. James Madison himself, incidentally, expressed no enthusiasm in its behalf.

5. This is so, of course, because any such legislation, even merely to restore compensation to its previous level that those who voted to cut it had enjoyed, could have no effect until still another election intervened—and this according to the amendment itself.

carry for a minimum of the next two years.<sup>6</sup>

So, much in the manner of certain misgivings that accompanied the original, unratified first amendment, the proposed second amendment was subject to equivalent misgivings of its own. Even if it were to be made modestly serviceable (say, simply to limit Congress from increasing its own benefits without some intervening election), still this amendment was not suitable.<sup>7</sup> Rather, far from simply accomplishing that task (that not all thought to be sound in its own right), this amendment seemed to do something more, and not all of it for the good.

Neither the original first nor second amendments, therefore, were felt to be up to the same scale of the better drafted amendments of the time, i.e., the other ten amendments promptly ratified as the Bill of Rights. And so matters passed into history two centuries ago, noticeable since then principally just on a few ornamental office wall copies in faded sepia ink.

## I

Presumably all this is indeed just a bit of forgotten legal history even many readers of this journal might not be expected to know, and why should they? Lacking framed sepia stained wall copies of their own, even the best of us can be forgiven for not knowing what a 204-year-old amendment happened to say or why it failed to make the grade in 1791. Perhaps, one would say, if the matter came up all over again, one could bestir oneself over trivial pursuits of this kind. But only if Congress again proposed something like the original second amendment would it again become newsworthy. In the meantime one not on a light teaching load may be pardoned for not sharing any particular excitement of this sort. In a practical world, in today's world, what does it matter what the original second amendment may or may not have provided, or why it did not survive the contemporary scrutiny of those to whom it was submitted for ratification in the existing state legislatures of two hundred years ago, or why it was left behind?

Well, it might matter if one had a thought of life everlasting for proposed amendments, a capacity of indefinite life, quiescent in incubant oblivion for mostly two centuries then suddenly born again in a whole series of little-noticed resolutions by state legislatures,

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6. This anticipated use of the clause was also given as one reason in opposition to the proposed amendment at the time it was under active review.

7. Indeed, such an amendment would not look like this amendment. Rather, it would look more like the comparable clause already written into the Constitution, in Article I, Section 6, clause 2, quoted in note 2.

the earliest<sup>8</sup> of any of the contemporary ones coming a full century and eighty-seven years after the amendment failed as part of the original Bill of Rights.

In fact, though, Congress evidently has a theory of just this sort, though for some reason it did not care to have it reviewed (it turned aside requests to hold hearings). For that is the story of the twenty-seventh (or is it the second?) amendment. Preferring to avoid anything calling attention to its salaries and emoluments in this presidential election year,<sup>9</sup> Congress has now declared the whole task of proposing and of ratifying a new amendment as a task already done.<sup>10</sup>

## II

And so we now have a twenty-seventh amendment . . . or do we? I suppose we do (certainly Congress has said so<sup>11</sup>). Neverthe-

8. Wyoming, on March 3, 1978.

9. E.g., its own recent substantial self-approved salary increases, its House banking practices, franking privileges, etc.

10. On May 21, 1992, by concurrent resolution Congress congenially declared the twenty-seventh amendment to be "valid . . . as part of the Constitution of the United States." The vote was 99-0 in the Senate, 414-3 in the House. What a remarkable accord on a matter of unprecedented constitutional novelty as this most assuredly was. Votes of this near unanimity seldom come (except, perhaps, on votes to recess or to adjourn). The longest time any past amendment had actually taken to be ratified by the states was four years. The longest time Congress itself had ever deemed appropriate was ten (actually seven years, beginning with the Eighteenth Amendment, plus an added three-year extension belatedly approved in the more recent case of the ill-fated ERA). One would have thought the novelty of the notion of resuscitating the original second amendment by late ratifications counting two hundred years after its sole proposal by Congress would have been worth a day or two of reflection in House and Senate Committee review. But there was no such review, none at all.

11. Is this conclusive? Those who remember *Coleman v. Miller*, 307 U.S. 433 (1939), may certainly think so for they will recall certain dicta by four justices that Article V amendment questions are "nonjusticiable" questions committed solely to Congress. Yet, if so, here's a curious point. Professor Tribe recently published his view that the original second amendment became a valid amendment the moment Michigan adopted its resolution of ratification (May 7, 1992), making it the thirty-eighth state (counting from 1789). In Professor Tribe's published opinion (*Wall Street Journal*, May 13, 1992, at A15), the amendment took full effect on that date, period. Congress had no function to perform according to Professor Tribe (a conclusion conveniently making it unnecessary for Congress to hold any hearings). Virtually the same day, Professor Dellinger agreed with Professor Tribe's view in that he emphatically agreed that no action by Congress was needed and that the constitutional status of the original second amendment was not up to Congress, either. *Washington Post*, May 8, 1992, at A1. But there was a slight difference between the two, even so. The slight difference such as it was was this: according to Tribe, the original second amendment was as of May 7th a new and valid part of the Constitution of the United States, whereas in Dellinger's view, the original second amendment was not and could not be anything of the sort—because it had lapsed more than a century before. (In short, were the amendment brought to Congress, it ought not matter—because it was far, far too late.) See also Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 425 (1983) (same point).

less, in the Supplement to my casebook,<sup>12</sup> it will go in with an asterisk. And here's why. The explanation is just a personal way of coping with the headache I've been unable to overcome in thinking about Congress and how it sometimes behaves in matters of constitutional law. It goes also to what one thinks one owes to others just as a teacher, in thinking about matters of this sort, and to try to do so as best one can according to some larger constitutional sense of general right or wrong.

Back in 1921, the Supreme Court actually addressed this very question, about the original second amendment itself.<sup>13</sup> It did so incidental to its discussion of a different issue then before the Court, albeit a question also involving the timeliness of state ratifications within some relevant period reasonably contemporaneous of the date an amendment might be proposed. In taking on this question (which, incidentally, it did *not* deem to be "nonjusticiable"), here is what the Court unanimously declared, first starting at the logical beginning place, namely, the text of Article V. Addressing that text, the Court began its review in the following way. "It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?"<sup>14</sup> Then, having set the general framework for the ensuing discussion, this was the Court's unanimously presented review:

We do not find anything in [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 therefor 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*

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12. William Van Alstyne, *First Amendment Cases and Materials* (Foundation Press, 1991).

13. *Dillon v. Gloss*, 256 U.S. 368 (1921).

14. *Id.* at 371.

*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.* These considerations and the general spirit of the Article lead to the conclusion expressed by Judge Jameson [citing to Jameson on Constitutional Conventions, 4th ed., Sec. 585] “that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.” 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 generation. *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 V is that the ratification must be within some reasonable time after the proposal. \* \* \* Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt.<sup>15</sup>

### III

*Dillon v. Gloss* is just one view of this matter, of course, but still it is interesting, is it not? And might one expect that the deference one branch of government owes another in this country would operate both ways, rather than in just one as Congress may suppose? It has been often enough observed that the Court ought to be respectful of Congress, so not lightly to judge its powers, or lightly upset what it does. It has also often enough been said that the Court should second guess the constitutional positions taken by Congress, if at all, only after the most careful inquiry and respect that is Congress's due. Certainly, however, one might expect this to work the other way 'round as well, though it very seldom does. The story of the twenty-seventh amendment is a story demonstrating that it does not.

*Dillon v. Gloss* provided the Supreme Court's considered view of what Article V requires in order that an alteration or addition to

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15. *Id.* at 374-76. (Emphasis added). It is unusual to quote so extensively from an Opinion by the Court, but in this instance it may be worthwhile.

the Constitution be deemed to satisfy the Constitution. It is also a compelling view, and it was measuredly ventured in a wholly non-inflammatory way by a unanimous Supreme Court, a Court including Holmes, Brandeis, and Edward White, the Chief Justice of the United States. One might suppose Congress would provide good reasons to suggest why it is not sound, if indeed it is not.

In *Dillon*, the Court expressly considered the idea of an amendment proposed (and never renewed) in one century, accumulating ratifications in another "by representatives of generations now largely forgotten," and whether it was capable of working ratchet-like, through ensuing centuries "by representatives of the present or some future generation," to some lumbering, arithmetically successful end. It rejected the idea as being inconsistent with any sensible understanding of the Article V extraordinary consensus. And, in the Court's view, though Congress might anticipate this sort of matter and so in advance "fix a definite period," still, were it to do so even its own provisions would need to "keep within reasonable limits," if it did. The notion of a proposed amendment with everlasting incubant durability was turned aside (in the Court's view "quite untenable"), and the original second amendment was itself given as an example of a proposal long since lapsed unless Congress wished to renew it again by proposal, which it never did (and never has).

In the annals of the law, however, we have not seen much of that reciprocity by Congress for the Court's views, as it expects for its own. Certainly we have not seen much of it when Congress has evidently been of the view that its own reelection interests might be disserved. And that is the actual story of the twenty-seventh amendment.

Meantime, what shall one say of this amendment? How shall we end this brief review? May an amendment proposed by a Congress in 1789 as part of a larger set, having failed to attract the requisite consensus of state ratifications common to the rest of the set during the era of its active consideration, and never renewed by any later Congress during a time span of two hundred years, yet be deemed to have survived for purposes of acquiring sufficient ratifications staggered over decades and centuries? In the Court's own one recorded opinion, the answer is "No." Does Congress actually believe the contrary, moreover, or is it that Congress doesn't actually have a belief at all? Perhaps that is more appropriate for you to say. The view from Durham, however, for whatever it's worth, is to see

Congress as through a glass, darkly, in the annals of its treatment of our constitutional law.

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