SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING HELD

27th DAY OF FEBRUARY, 1973

The meeting was called to order at 9:35 a.m. Senator Close in the Chair.

PRESENT: Senator Foley
Senator Bryan
Senator Dodge
Senator Hecht
Senator Swobe
Senator Wilson
Senator Joe Neal
Mr. John McSweeney, Division of Aging Services

S.B. 204 - Provides more explicit definition of offenses for which no probation is possible under Uniform Controlled Substances Act.

The committee reviewed the formal amendment which was prepared from Mr. Campos' draft.

Senator Bryan moved to amend and "DO PASS." Senator Swobe seconded the motion. Motion carried.

S.J.R. 14 - Proposes constitutional amendment to allow Legislature to create subdistricts within certain judicial districts for election of individual judges.

Senator Neal testified that this resolution is aimed at subdistricting judges so that the public could have a better understanding of the judicial bench and may better know the type of people running for office.

In the last election (referring to Clark County) there were judges running for a judicial bench who spent a considerable amount of money on their campaigns. This has a bad effect on the public because the type of advertising they engage in (billboards, television and radio) tends to suggest that they are being bought in some way and may be more receptive to the money interests in that particular district, than to the interests of the general public.

Senator Dodge pointed out that the provision requiring candidates to be residents in the subdistrict they are running in would narrow the availability of judges in the smaller counties where a judicial district is presently comprised of several counties. These judicial districts were created in this fashion because there have been

problems in the past of getting good judges in the smaller counties. Senator Neal replied that this subdistricing could be done on a population basis through the legislature since the resolution does not mandate this procedure, but rather permits it.

S.J.R. 13 - Proposes constitutional amendment to make certain elective offices appointive.

Senator Neal testified that this resolution proposes to make certain elective officials such as the secretary of state, attorney general, controller and treasurer, appointed by the Governor with the consent of the legislature.

The Nevada Constitution provides that the Governor is the head of the state, yet he does not have any control over the elected officials mentioned. Looking at the duties performed by these officials, they are not such that would indicate a state-wide election. If the Governor had the authority to appoint these individuals, it would make for better control of the government at the higher level and increase the quality of individuals that would serve.

In the same rationale, the resolution proposes to change such county officials as sherrif, district attorney, and assessor to be appointed by the county commissioners. The county commissioners have the full responsibility of operating the counties but have no control over these elected officials.

Senator Hecht objected that this resolution would take away the rights of the people to elect their representatives which is a fundamental concept of America, and removes the check and balance system of the ballot box.

Senator Neal replied that too many elected officials decreases the quality of government because of the political friction between parties.

Senator Bryan remarked that there would be mechanical and financial problems involved in implementing this procedure if one of the state officials referred to would die in office and the legislature was not in session that year. If the Governor called a special session the Assembly would not have a function in the approval of an appointed successor, and yet one house could not be called in and another not called.

Senator Neal agreed that this might incur additional expenses, but felt that it is a good argument for establishing annual sessions of the legislature. Annual sessions would relieve the financial and mechanical problems of interim appointments.

Senator Dodge objected that this resolution would invite a controlled government situation. Senator Neal replied that it would not invite any more problems than could possibly happen under the present system.

S.B. 249 - Provides for interlocutory license suspensions under Nevada Administrative Procedure Act.

Senator Close read the amendments requested on this bill which provide that the agency may suspend a license if it is necessary to the public health, welfare and safety, but must have a hearing within 10 days and not more than 30 days and make a public finding that an emergency situation exists. Not more than 30 days after the hearing, if the agency finds an emergency does exist, there can be further suspension of the license for a period of 30 days.

The committee agreed than an ambiguity still exists in this bill and requested further amendments to make the language beginning "if the agency finds" a separate paragraph since it does not relate to the previous provision.

Senator Dodge moved to amend and re-refer back to committee. Motion was seconded by Senator Foley. Motion carried.

A. B. 49 - Provides for termination of leases jointly executed by certain senior citizens upon death of one of them.

Mr. John McSweeny testified that this is a good bill with safeguards built in to limit coverage to citizens 65 or over with a combined income not to exceed $5,000. Most citizens at this age level are living on a fixed income and upon the death of either spouse, the whole life situation changes for the surviving spouse. The bill would allow a surviving spouse to terminate a rental lease if he or she so desires upon 30 days written notice to the landlord.

Mr. McSweeny suggested that the wording of subsection 2 be changed from "provisions apply to husband and wife whose combined income does not exceed $5,000 for the preceding calendar year" to "widower or widow whose combined income did not exceed $5,000 for the preceding calendar year."

Senator Close suggested including a time limit for the surviving spouse to give notice to the landlord, or specifying that notice be given promptly upon the death of the spouse. Mr. McSweeny had no objection.

Mr. Gene Miliken of the Nevada Association of Realtors asked to go on record as supporting this bill with the minor amendment mentiontioned above.

S.J.R. 1 - Ratifies proposed constitutional amendment relative to equal rights for men and women.

Chairman Close announced that since the committee has heard substantial testimony both pro and con, they should be prepared to vote at this time.

Senator Swobe moved that this resolution be passed out of committee to the Senate floor with a recommendation "DO NOT PASS." Motion seconded by Senator Hecht.

Remarks by Senator Foley: This bill has caused all of us a lot of concern and thought. I had previously felt that I would support it, but since the extensive testimony during hearings and widespread concern, I think we have to be sure we are doing the right thing.

I requested an opinion from the Legislative Counsel Bureau and expressed to them my deep concern over the second clause of the amendment concerning the delegation of power to the Congress of the United States. The conclusion of the opinion I received from the LCB (attached to these minutes) states that the actual impact (of the second clause), short term or long term, is impossible to predict at this point in time. It is for this reason I intend to oppose S.J.R. 1.

Remarks by Senator Dodge: I am going to oppose this piece of legislation. My first reaction was that it could well endanger the protective legislation given women as workers, wives, mothers, and widows. In our society, as it is presently constructed, we should give serious consideration to the removal of this protection. The advocates of this resolution say the answer to this is to give the protective legislation to men but I don't think it will work that way in all cases. The end result will be that some protection will be removed from the law.

There is one economic consideration that has not been fully considered and not even thought about by women; that is the widow's exemption. I have had this researched, and presently in Nevada there are 8,822 widows who have filed for the widow's exemption. This exemption is not extended to widowers. I am afraid, under the Equal Rights Amendment, it would be lost, not by affirmative action by the legislature but from widowers filing claims that they were discriminated against because they are not women.

The legislature is now processing a broader and independent exemption for senior citizens. With this exemption to senior citizens it is highly unlikely that we would extend the widow's exemption to widowers and it would go down the tubes. I don't think that is a good trade.

There is a lot of federal legislation which addresses itself to discrimination against women. In 1967 we passed the Wage Discrimination Act and in 1969 an act which prevented employment discrimination by virtue of sex. These are the two principal areas where discrimination exists against women, although in lesser areas there may be some. I think without the ERA we have ample existing federal and state legislation. I am not ready to sacrifice some protective legislation, notably the widow's exemption, as a trade-off for the ERA.

Senator Bryan remarked that he is already on the record.

Remarks by Senator Wilson: No votes will be changed or attitudes modified by remarks made in committee or on the floor. I think we know pretty much how the vote is going to go. There is one purpose to be gained by the process we have gone through and the public interest shown whether on one side or another. That is, these matters are not as equitable as we would like; employment is not as fair nor is the chance for a fair salary.

I don't really care if a woman wants or doesn't want to work; she ought to have the opportunity to do what she wants to do. If she elects to work and enter a career, she ought to have the right to fulfill that choice to the utmost.

Nobody in favor of this is afraid of endangering all the benefits women have accrued. They recognize that since the passage of the Civil Rights Act of 1964 the U. S. Department of Justice and the Attorney General of this State have taken the position that legislation which proports to confer a benefit on the basis of sex is not enforcible. These laws should be enforcible but should be rewritten so that they remain firm and clear, not because of the ERA, but because of the passage of the Civil Rights Act of 1964.

We had testimony from the State Labor Commissioner who pointed out that they are under continuing pressure because of the Department of Justices' opinions, and the laws on the books are becoming less and less enforcible. We will have to reform these laws whether the ERA passes or not. If the ERA does nothing but frame that debate, it will be meaningful.

Whether the ERA passes or not, we still have a job ahead of us. If it fails, we ought not to sit down because we are afraid of the consequences and turn our backs on the need to redraw the legislation, not to withstand what ERA may or may not do, but apply it to women under the Civil Rights Act of 1964.

I hope that this issue has been of some benefit generally. The amendment is not going to pass, but I hope that the effect of the debate can be constructive. Don't answer the problem by making an emotional appeal and ignoring the problem for the next 20 years.

Remarks by Senator Hecht: This matter has pointed out to me the need for public hearings. I was going to vote for this resolution, but since the hearings I have seen the pitfalls. Several hundred bills would have to be changed if this amendment were passed. My basic objection is that we would be giving up our state's rights to future supreme court decisions.

I don't see any need to rush into this since we have a few years to pass it. I think we ought to study it for the next two years.

Remarks by Senator Swobe: The reasons I am not going to support this legislation is that I feel we are delegating to the Congress many areas which should be reserved for the state. Also, I feel that the family is a very important element and that passage would be very detrimental to the family.

I think it should be noted that the reason I made the motion to pass the bill to the Senate floor is because of the importance the bill has generated and the public interest in it. Four votes against the bill in committee would kill it with no chance to go to the Senate floor for a vote. The motion does put the resolution on the floor and permits the entire Senate to vote.

Remarks by Senator Close: My main concern revolves around the possible supreme court interpretation of the amendment. Many people have been somewhat surprised at various interpretations of constitutional provisions the supreme court has rendered in the past few years. Many of the applications and interpretations the supreme court has given to the constitutional amendments were not interpreted at the time the amendments were passed. I feel there are many discriminatory laws with regard to women, some favoring them and some detrimental to them. Hearings we have had demonstrated these areas to us. We have had a study by the Legislative Counsel Bureau showing

where possible areas of discrimination occur by statute. Where they are unjust or unreasonable, they should be amended. Our committee is aware of these areas and is prepared to act on them and remove as many as we can. Regardless of whether or not we adopt this amendment, we still have until 1979 for the amendment to be adopted by 38 states. If the amendment is not adopted until 1979, or if it is never adopted, the alleged discrimination would continue to exist, unless action is taken in Nevada today. The committee is prepared to take this action.

I do not feel that anyone who opposes this amendment supports or condones the discrimination that exists.

The Chairman then called for a roll call vote on the motion made by Senator Swobe.

Roll call on Senate Joint Resolution No. 1:

Yeas--6.
Nays--Wilson. 1

Motion carried.

S.B. 263 - Prohibits the making or uttering of written instruments for the payment of preexisting obligations under certain circumstances.

Chairman Close stated that this bill would provide that giving a false check after receiving merchandise would constitute a crime. Presently, the law provides that giving a false check to get merchandise is a crime, but getting merchandise in the first instance and then giving a false check in payment at a later date is not a crime.

Senator Dodge remarked that he is opposed to this bill. This bill has been presented in every session and a distinction has always been drawn between giving consideration of payment before the title is transferred and giving consideration not as an inducement for transfer of title. The key is whatever misrepresentation or fraudulent thought the purchaser had in mind when he received the goods.

Minutes of the February 19th, 20th, 21st, and 22nd meetings were approved.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted,

Eileen Wynkoop
Secretary

APPROVED:

Melvin D. Close, Jr., Chairman

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
CARSON CITY, NEVADA 89701

ARTHUR J. PALMER, *Director*

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CLIFF YOUNG, Senator, *Chairman*

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EARL T. OLIVER, C.P.A., *Fiscal Analyst*
ARTHUR J. PALMER, *Research Director*

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Attachment

February 21, 1973

Senator John P. Foley
Legislative Building, Rm. 319
Carson City, Nevada 89701

LCO No. 75

Re: Effect of Section 2 of Proposed Equal Rights Amendment to U.S. Constitution

Dear Senator Foley:

You have requested the written opinion of the legislative counsel concerning the effect of the enforcement clause of the proposed equal rights amendment to the United States Constitution.

Question No. 1

Section 2 of the proposed equal rights amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

What is the difference in effect between this language and section 2 of the 18th Amendment, which provided: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."? (Emphasis added.)

Answer

The "concurrent power" concept of the 18th Amendment has never been clearly interpreted by the United States Supreme Court. Even so, upon comparing the enforcement clause of the 18th Amendment

with that of the proposed equal rights amendment, it is clear that the latter is much more heavily weighted in favor of Congress' power to decide unilaterally what legislation is appropriate to the enforcement of the substantive provisions, including the enactment of federal laws prohibiting or superseding certain state laws or types of laws within the purview of the amendment.

Analysis

The 18th Amendment

Section 2 of the 18th Amendment was a departure from the enforcement clauses of earlier amendments to the U.S. Constitution, and this fact (plus the controversy stirred by the very nature of national prohibition) resulted in a great deal of debate as to the meaning and effect of the "concurrent power" concept.

The United States Supreme Court dealt only summarily with this issue in the "conclusions" which constituted the majority opinion in the National Prohibition Cases, 253 U.S. 350, 40 S.Ct. 486, 64 L.Ed. 946, upholding the Volstead Act. Concerning the enforcement clause, the Court said:

> The second section of the Amendment -- the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation" -- does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

> The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.
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> The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.

Although this helped to define what "concurrent power" was not, it was hardly a complete or satisfactory discussion of the other intricacies of construction surrounding the term. Nevertheless, it was all the Court had to offer on the subject.

The majority opinion produced critical comments among the concurring and dissenting justices and led to some confusion in subsequent lower court decisions. (For a critique of the Court's ambiguity and unwillingness to face with greater firmness the problems implicit in this portion of the 18th Amendment, see Noel T. Dowling's discussion in 6 Minnesota Law Review 447. See also 70 A.L.R. 132.) At any rate, the interpretation of the

"concurrent power" clause of the 18th Amendment gradually became moot after adoption of the 21st Amendment, so that the questions it raised 50 years ago are now for the most part theoretical.

A review of the cases and commentaries of that era, however, leads to the conclusion that the language of section 2 of the 18th Amendment did, albeit to a degree never clearly defined, result in an atmosphere which placed the states in a stronger position, vis a vis Congress, than they would enjoy today under the enforcement clause of the proposed equal rights amendment.

The Equal Rights Amendment

Early in the equal rights movement, the enforcement language incorporated into the proposed amendment was similar to that of the 18th Amendment. According to an article in 80 Yale Law Journal at 908, the 1943 ERA proposal contained an enforcement clause identical to section 2 of the 18th Amendment. As late as 1970, the proposed amendment still contained a provision stating that "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation." (Emphasis added.)

The 1971-72 version of the amendment was the first version in which the enforcement clause appeared in its present form. This is,

of course, the version now before the states for ratification. It is patterned after the enforcement clauses appearing in the 13th, 14th and 15th Amendments and in several of the later amendments, including the 26th (the 18-year-old vote), adopted in 1971.

Given the history of the amendment and the extent of discussion in connection therewith, we may conclude that the change to the present enforcement language was made by the ERA sponsors with full awareness of the implications. The leading cases interpreting identical enforcement clauses of the 14th and 15th Amendments had been decided in 1966 (State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed. 769, and Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed. 828). Further, proponents of submission of an equal rights amendment had been warning against attempting to utilize the 18th Amendment concept of shared or "concurrent" enforcement. (See 84 Harvard Law Review 1516.)

Therefore it appears that the enforcement clause of the 1972 proposal was drafted with the full intention of giving Congress enforcement powers with respect to the equal rights amendment which are just as broad as those which Congress has with respect to the 14th and 15th Amendments.

This clearly negates any implication of concurrent powers with the states. On the contrary, taking into consideration the Supreme

Court rulings in Katzenbach v. Morgan and South Carolina v. Katzenbach, supra, (see discussion below), the language of section 2 means that Congress' power to enforce the amendment, if adopted, would be determined to a large extent by Congress itself. Although we have found nothing to indicate that the equal rights amendment would result in Congress' assuming exclusive jurisdiction over all matters relating to equal rights for men and women, the congressional enforcement language definitely authorizes wide latitude in the enactment of federal legislation prohibiting or superseding various state laws or types of laws on the subject.

Question No. 2

What is the impact of section 2 of the proposed equal rights amendment on the balance between federal and state powers, particularly in areas where the powers have traditionally been exercised by the states (such as marriage, divorce, child custody, inheritance, community property and employment of women)?

Answer

Although it is difficult to predict the actual impact of section 2 on the federal-state balance in matters affected by the amendment, it is clear that the potential for congressional intrusion into areas heretofore reserved to the states is great.

Under the language of the enforcement clause as interpreted by the U.S. Supreme Court (Katzenbach v. Morgan, supra), Congress would have considerable latitude, prior to any judicial determination, to make its own decisions as to what constitutes "appropriate" federal legislation to enforce the provisions of the amendment -- regardless of the effect such legislation might have on existing state laws or on the lawmaking powers of the states generally.

The only limits on such congressional discretion by the Constitution or the Court would relate to whether the legislation is in fact "appropriate" to enforce the provisions of the amendment. If it is appropriate, the federal legislation would supersede state legislation because of the Constitution's supremacy clause (Article VI, para. 2). If not, Congress might be encroaching on the powers reserved to the states under the 10th Amendment.

To describe the possible or probable limits of federal involvement in legislating on such matters as marriage, divorce, custody, inheritance, property rights and employment would require a thorough review of each specific area of substantive law -- something which time does not permit -- and even such a review would fail to provide definitive answers. The point is that extensive federal involvement in these areas is entirely possible at some point

following adoption, and it should not be discounted by the states in considering the amendment.

Analysis

Since section 2 of the proposed equal rights amendment follows closely the language of the enforcement provisions of the Civil War Amendments, we assume that judicial interpretations of those provisions will be equally applicable to the proposed ERA provision. Thus we turn to the leading cases decided by the United States Supreme Court in the context of the 14th and 15th Amendments.

A case decided in 1879, Ex parte Com. of Virginia, 100 U.S. 339, set the stage for interpreting section 5 (the enforcement section) of the 14th Amendment as granting broad powers to Congress. Commenting on section 5, the Court said:

> It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

When litigation arose over the federal Voting Rights Act of 1965, Ex parte Virginia was cited, along with the following interpretation of the "necessary and proper" clause of the Constitution by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, for the purpose of describing Congress' broad powers pursuant to the enforcement clauses:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

In South Carolina v. Katzenbach, supra, where portions of the Voting Rights Act were at issue, the Court upheld federal legislation as an "appropriate" means for carrying out the mandates of the 15th Amendment. The Court declared the applicability of the "necessary and proper" test:

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.

The Court went on to crystallize this line of reasoning in Katzenbach v. Morgan, supra, where Congress' power to override a New York English literacy requirement was upheld as "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth

Amendment," given effect "by force of the Supremacy Clause, Article VI." The Court declared that "the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e) [of the Voting Rights Act]."

Discussing the meaning of the enforcement clause, the Court in Katzenbach included the following discussion:

> "The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides -- even with the guidance of a congressional judgment -- that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction. . . . A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment."

Having thus concluded that a prior judicial determination was unnecessary to the legitimate exercise of congressional power under the enforcement clause, the Court proceeded to consider the extent of Congress' power and the guidelines to be used in determining what constitutes "appropriate" legislation.

Concerning the breadth of Congress' power, the Court reiterated what it had said in earlier cases:

> By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, §8, cl. 18. . . . [T]he McCulloch v. Maryland standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Moving into a discussion of guidelines for measuring the appropriateness of Congress' action, the Court continued:

> It was well within congressional authority to say that this need . . . warranted federal intrusion upon any state interests served by the [state] English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations -- the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy

> or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the . . . requirement. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.
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> . . . Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, . . . to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. . . . (Emphasis added.)

From these pronouncements we can conclude that the power of Congress pursuant to any enforcement clause similar to § 5 of the 14th Amendment will be extremely broad.* This would most certainly apply to the enforcement clause of the proposed equal rights amendment, and states should be cognizant of this fact during their consideration of the amendment.

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*The Court continued its discussion of § 5 of the 14th Amendment in Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, concerning the imposition of the 18-year-old vote in state and local elections, but that case is distinguishable from Katzenbach v. Morgan in that the Court was not dealing with a specific constitutional grant of power as to voting age and therefore had no definite base to which to apply the § 5 enforcement clause.

As to the full import of the potential for federal intrusion into state laws relating to marriage, divorce, child custody, inheritance, community property and employment of women, the states cannot know, at the time they are considering ratification, the extent to which they will be forced to give up their existing powers reserved under the 10th Amendment.

First, there has been no determination at the federal level of which state laws and types of laws do in fact touch upon the equal rights to be guaranteed by the amendment.

Second, there is the question of how long Congress may choose to wait for the states to act on their own volition in these areas. Only Congress itself will make this decision.

Third, it will initially be a matter for determination by Congress, possibly even without thorough consultation with the states, how extensive and how detailed any federal laws enforcing the equal rights amendment should be, if enacted. Even using the guidelines suggested in Katzenbach, predictions by the states in this area would be imprecise.

In conclusion, without more definite information about what to expect from Congress, the states are placed in a disadvantageous position. The potential impact of section 2 of the proposed equal

rights amendment on the balance between federal and state powers in areas such as marriage, divorce, custody, property and employment is great, but the actual impact, short term or long term, is impossible to predict at this point in time.

Very truly yours,

CLINTON E. WOOSTER
Legislative Counsel

By Janet Wilson
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