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## A Study in the Unconstitutionality of the Proposed Federal Abolition of the Poll Tax

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## NOTES

### A STUDY IN THE UNCONSTITUTIONALITY OF THE PROPOSED FEDERAL ABOLITION OF THE POLL TAX

By HOWARD NEWCOMB MORSE, of the Augusta Bar

In the Constitution of the United States New York was given six representatives, Pennsylvania eight, and South Carolina five.<sup>1</sup> One hundred fifty-nine years later we find that New York's number of representatives has increased from six to forty-five and Pennsylvania's from eight to thirty-three. However, South Carolina has gained only one more representative in over a century and a half. In fact so little national political power have the eleven States that comprise the South today (Texas, Alabama, Tennessee, Georgia, South Carolina, Mississippi, Virginia, North Carolina, Arkansas, Florida, and Louisiana), that a mere thirteen States in the North, excluding all New England States, can carry the Presidential elections (California, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin).

Because of comparatively little industrialization the South has few great cities (her three largest cities—New Orleans, Huston, and Louisville—being only the fifteenth, twenty-first, and twenty-fifth largest respectively in the nation). The South represents only one-fourth of the population of the nation and therefore only one-fourth of the seats in the House of Representatives.

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<sup>1</sup>Art. I, sec. 2, clause 3.

Whenever a bill unpopular with the South is presented to the House or the Senate for a vote, the South, in order to compensate for lack of numbers, must through self-protection resort to strong negative tactics, such as the filibuster. But it takes over one-third of the Senate to prevent cloture, and the South has only a little over one-fourth of the seats in the Senate. Thus, it can be seen that the North, if it is so disposed, can enforce gag-rule on the South.

Whenever a bill would be harmful to a certain section of the country nine times out of ten that section of the nation is the South. This is because there is great divergence—sociological, ideological, political, economic, cultural—between the South and the rest of the nation. The South is eminently well-trained in the use of negative strategy. From the War between the States up until a few years ago the South was often able, with the help of an allied faction in Congress, to muster enough votes in Congress to defeat measures requiring a two-thirds vote which would be injurious to the South. However, in recent years by aligning herself with a minority (led by Senator Wherry) in the Republican Party against Wagner-Chavez-Marcantonio measures, the South and the above mentioned minority among Republicans have been able to defeat many New Deal measures requiring only a simple majority for passage.

A very important bill generally offensive to the entire South even though its provisions would apply only to the seven Southern States where the poll tax obtains (Alabama, Texas, Mississippi, Arkansas, South Carolina, Virginia, and Tennessee) is the bill to abolish by federal action the poll tax as it prevails in these States.

The annual amount of the poll tax varies from \$1.00 in South Carolina,<sup>2</sup> Arkansas,<sup>3</sup> and Tennessee<sup>4</sup> to \$1.50 in Alabama<sup>5</sup> and Virginia<sup>6</sup> to \$1.50 State poll tax, 25c maximum county poll tax, and \$1.00 maximum municipal poll tax in Texas<sup>7</sup> to \$2.00 in Mississippi<sup>8</sup> plus an extra \$1.00 which may be levied for school purposes at the discretion of the county tax collectors.

The poll tax is levied on all South Carolina male citizens, except those in military service, from the ages of twenty-one to sixty, on all Texas citizens from twenty-one to sixty, except veterans of the Second World War within eighteen months after their discharge, on all Mississippi citizens from twenty-one to sixty, on all Tennessee citizens from twenty-one to fifty, and on all Alabama citizens from twenty-one to forty-five. All Virginia and Arkansas citizens are subject to the poll tax.

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<sup>2</sup>Art. XI, Const., sec. 2565, as amended.

<sup>3</sup>Secs. 4693-4704, 111472.

<sup>4</sup>Secs. 1081, 1082, 1348, 1547, 1554-1559.

<sup>5</sup>Tit. 51, secs. 237-248.

<sup>6</sup>Ch. 5, sec. 22, Tax Code.

<sup>7</sup>Arts. 1030, 7046.

<sup>8</sup>Sec. 243, Const., secs. 9751, 6518, Code 1942.

A federal anti-poll tax act would be unconstitutional. There is no *right* to vote. All a person has is the constitutional guarantee that his State cannot deprive him of his vote without suffering a stipulated penalty if the person be a male, an inhabitant of the State in which he seeks to vote, twenty-one years of age, and a citizen of the United States, and has met all the qualifications for voting imposed by his State. It is interesting to note in this connection that minors between the ages of eighteen and twenty-one, if otherwise qualified, are eligible to vote in Georgia and South Carolina. However, these States could deprive males between the ages of eighteen and twenty-one who are otherwise qualified of their votes with impunity because the constitutional guarantee applies only to those twenty-one years of age or over.

The Constitution of the United States provides that, "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."<sup>9</sup> Since "manner of holding elections" includes the qualifications for voting, a federal anti-poll tax act would be unconstitutional as it would neither "make or alter such regulations." Congress can make such a regulation only when the State has not acted, when the State has not first made such a regulation. Congress can alter such regulations; but altering involves changing or modifying such regulations, not repealing them.

The word "alter," as contradistinguished from the word "repeal," means to change or modify the form, character, or nature of a thing, without a destruction of the existence of the thing altered or changed, or a loss or absolute change of its identity, according to *City of Hannibal v. Winchell*,<sup>10</sup> *Haynes v. State*,<sup>11</sup> *Davenport v. Magoon*,<sup>12</sup> *Heiple v. Clockamas County*,<sup>13</sup> *Black River Importing Company v. Holway*,<sup>14</sup> and *Builer v. City of Lewiston*.<sup>15</sup> The Constitution of Arizona of February 14, 1912 attests to recognition of the obvious difference in meaning of the words "alter" and "repeal" by stating that, "All laws of the territory of Arizona now in force, not repugnant to this constitution, shall remain in force as laws of the State of Arizona until they expire by their own limitations or are altered or repealed by law."<sup>16</sup>

A federal anti-poll tax law would have the effect of repealing or nullifying—and not of altering—the regulations of seven States as to qualifications required of their respective peoples to vote for United States Senators and Representatives and

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<sup>9</sup>Art. I, sec. 4, clause 1.

<sup>10</sup>54 Mo. 172, 177.

<sup>11</sup>15 Ohio St. 455, 458.

<sup>12</sup>13 Or. 3, 4 P. 299, 301, 57 Am. Rep. 1.

<sup>13</sup>20 Or. 147, 25 P. 291, 292.

<sup>14</sup>87 Wis. 584, 58 N. W. 126, 128.

<sup>15</sup>11 Idaho 393, 83 P. 234, 236.

<sup>16</sup>Art. 22, sec. 2.

as to qualifications required of their respective delegations of electors to vote for President and Vice President, in the case of Presidential electors, by virtue of the Constitutional provision that: "... the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>17</sup>

A State may impose an unlimited number of qualifications for voting (long State, county, and municipal residence periods, poll tax, property ownership, intelligence tests, educational requirements, et cetera et ad infinitum). And even after a person has qualified to vote in every way, he still can be deprived from voting. However, in such case, providing the person be a male, the offending State would suffer the penalty set forth in the following provision: "... when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."<sup>18</sup>

A State could deprive females from voting with impunity as no penalty is specified in the Nineteenth Amendment should a State decline to honor it.

Four States came into the Union on the same condition; that is, their ratifications of the Constitution contained the same condition subsequent. These States are South Carolina, New Hampshire, New York, and Rhode Island. South Carolina's condition subsequent as embodied in her ratification of 12 May, 1788 is in these words: "And whereas, it is essential to the preservation of the rights reserved to the several States, and the freedom of the people, under the operations of a General Government, that the right of prescribing the manner, time, and places of holding the elections to the Federal Legislature, should be forever inseparably annexed to the Sovereignty of the several States,—This Convention doth declare, that the same ought to remain, to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the General Government."

When South Carolina's ratifying convention passed her ratification containing this condition subsequent, all but six of the original thirteen States had previously ratified the Constitution, all without this condition subsequent. Since the seven States already members of the Union accepted South Carolina as a member, they assented to South Carolina's condition subsequent. Such assent thereupon operated so as to make South Carolina's condition subsequent apply to each and every one of the seven States as forcefully as it applied to South Carolina. And by accepting South Carolina as a member, the seven States already members of the Union are forever estopped from denying the foregoing proposition, namely, that by their ac-

ceptance of South Carolina they assented to South Carolina's condition subsequent and that such assent thereupon operated so as to make South Carolina's condition subsequent apply to each and every one of them as forcefully as it applied to South Carolina.

The next State to join the Union, New Hampshire, came into the Union on the following condition subsequent as contained in her ratification of 21 June, 1778: "That Congress do not exercise the powers vested in them, by the fourth section of the first article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned."

Since the eight States already members of the Union accepted New Hampshire as a member, they assented to New Hampshire's condition subsequent, which was the same kind of condition subsequent which already applied to all eight. The next State to enter the Union was Virginia. After Virginia came New York. New York's condition subsequent as embodied in her ratification of 26 July, 1788 is these words: "That the Congress will not make or alter any regulation in this State, respecting the times, places, and manner, of holding elections for Senators or Representatives, unless the Legislature of the State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance, be incapable of making the same; and that in those cases, such power will only be exercised until the Legislature of this State shall make provision in the premises."

Since the ten States already members of the Union, including Virginia, accepted New York as a member, they assented to New York's condition subsequent. The next State to enter the Union was North Carolina. The last of the original thirteen States to join the Union, Rhode Island, came into the Union on the following condition subsequent as contained in her ratification of 29 May, 1790: "That the Congress will not make or alter any regulation in this State respecting the times, places, and manner of holding elections for Senators or Representatives, unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance, be incapable of making the same; and that, in those cases, such power will only be exercised until the Legislature of this State shall make provision in the premises." It will be noted that Rhode Island's condition subsequent is a verbatim repetition of New York's condition subsequent.

Since the twelve States already members of the Union, including North Carolina, accepted Rhode Island as a member, they assented to Rhode Island's condition subsequent.

Each of the remaining thirty-five States was admitted into the Union on a basis of absolute equality with each of the original thirteen members. Once admitted to Statehood, such equality is guaranteed by the very terms of the Constitution—as for instance the provision that, ". . . each State shall have at least one Representa-

tive,"<sup>19</sup> the provision that, "The Senate of the United States shall be composed of two Senators from each State. . . and each Senator shall have one Vote;"<sup>20</sup> the provision that, ". . . all Duties, Imports and Excises shall be uniform throughout the United States;"<sup>21</sup> the provision that, "The Congress shall have power. . . to establish one uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"<sup>22</sup> the provision that, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another;"<sup>23</sup> and the provision that: ". . . if there be more than one who have such Majority and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President. . . . But in choosing the President, the Votes shall be taken by States, the Representation from each State having one vote."<sup>24</sup>

The absolute equality of all States is further attested to by the provision that, "Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State;"<sup>25</sup> the provision that, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States;"<sup>26</sup> the provision that, ". . . no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress;"<sup>27</sup> the provision that, ". . . nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State;"<sup>28</sup> and the provision that no amendment shall ever be made which shall deprive any "State, without its Consent. . . of its equal Suffrage in the Senate."<sup>29</sup>

Since each of the thirty-five States to enter the Union subsequent to the original thirteen States came into the Union on a basis of perfect equality with each of the original thirteen States, the condition subsequent applicable to the original thirteen States applies to the remaining thirty-five States just the same as all rights and powers possessed by each of the original thirteen are possessed in equal amounts by each of the remaining thirty-five.

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<sup>17</sup>Art. I, sec. 2, clause 1.

<sup>18</sup>14th Amend., sec 2.

<sup>19</sup>Art. I, sec. 2, clause 3.

<sup>20</sup>Art. I, sec. 3, clause 1.

<sup>21</sup>Art. I, sec. 8, clause 1.

<sup>22</sup>Art. I, sec. 8, clause 4.

<sup>23</sup>Art. I, sec. 9, clause 5.

<sup>24</sup>Art. II, sec. 1, clause 3.

<sup>25</sup>Art. IV, sec. 1, clause 1.

<sup>26</sup>Art. IV, sec. 2, clause 1.

<sup>27</sup>Art. IV, sec. 3, clause 1.

<sup>28</sup>Art. IV, sec. 3, clause 2.

<sup>29</sup>Art. V.