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## A STUDY OF THE LEGAL FACETS STEMMING FROM THE MOVEMENT TO AMEND THE CONSTITUTION LIMITING INCOME TAX RATES TO 25 PER CENT

By

FRANK E. PACKARD\*

The idea of a constitutional ceiling placed upon the power of the government to tax is nothing new or revolutionary as we have seventeen precedents for such a scheme in the form of seventeen States which have self-imposed limitations in their constitutions on the power to tax. These limitations are set forth as annual *maxima* and are of three types: firstly, a number of mills per dollar of the assessed valuation of all taxable property in the state; secondly, a number of cents per hundred dollars valuation; and thirdly, a percentage rate on the valuation. The first type is represented by the following States and numbers of mills respectively: South Dakota,<sup>1</sup> two mills; Utah,<sup>2</sup> two and four-tenths mills; Oklahoma,<sup>3</sup> three and one-half mills; Colorado,<sup>4</sup> four mills; New Mexico,<sup>5</sup> four mills; North Dakota,<sup>6</sup> four mills; Wyoming,<sup>7</sup> four mills; Georgia,<sup>8</sup> five mills; Louisiana,<sup>9</sup> five and one-quarter mills; Idaho,<sup>10</sup> ten mills; and Nevada,<sup>11</sup> fifty mills. The second type is represented by the following States and numbers of cents respectively: Missouri,<sup>12</sup> twenty cents; Texas,<sup>13</sup> thirty-five cents; and West Virginia,<sup>14</sup> one hundred cents. The third type is represented by the following States and percentages respectively: Alabama,<sup>15</sup> sixty-five one-hundredths of one per cent; Arkansas,<sup>16</sup> one per cent; and Michigan,<sup>17</sup> one and one-half per cent. It will be noted that none of these constitutional ceilings placed upon the power of a government to tax obtain in any of the Eastern or New England States.

Great progress has been made in the movement, begun in 1939, to secure an amendment to the Constitution of the United States limiting income tax rates

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1 S. D. CONST. 1889, Art. XI, sec. 1.  
 2 UTAH CONST. 1896, Art. XIII, sec. 7.  
 3 OKL. CONST. 1907, Art. X, sec. 9.  
 4 COL. CONST. 1876, Art. X, sec. 11.  
 5 N. M. CONST. 1911, Art. VIII, sec. 2.  
 6 N. D. CONST. 1889, Art. XI, sec. 174.  
 7 WYOMING CONST. 1890, Art. XV, sec. 4.  
 8 GA. CONST. 1945, Art. VII. VII, sec. 1, par. 2, clause 3.  
 9 LA. CONST. 1921, Art. X, sec. 3.  
 10 IDAHO CONST. 1890, Art. VII, sec. 9.  
 11 NEV. CONST. 1864, Art. X, sec. 145,01.  
 12 MO. CONST. 1875, Art. X, sec. 8.  
 13 TEX. CONST. 1876, Art. VIII, sec. 9.  
 14 W. VA. CONST. 1872, Art. X, sec. 1.  
 15 ALA. CONST. 1901, Art. XI, sec. 214.  
 16 ARK. CONST. 1874, Art. XVI, sec. 8.  
 17 MICH. CONST. 1908, Art. sec. 21.

to twenty-five per cent in peacetime. The mode of amending the Constitution pursued is by State legislatures applying to the Congress to call a convention proposing amendments. No amendment to the Constitution has been effectuated by the use of this method. Resolutions in favor of the income tax rate-ceiling amendment memorializing the Congress to call a convention have been passed by the legislatures of twenty-six States—Wyoming, Rhode Island, Mississippi, Iowa, Maine, Massachusetts, Michigan, Indiana, Arkansas, Delaware, Pennsylvania, Texas, Illinois, Wisconsin, Alabama, Kentucky, New Jersey, New Hampshire, Nebraska, Louisiana, Montana, Nevada, New Mexico, Utah, Kansas and Florida. However, four states—Illinois,<sup>18</sup> Alabama,<sup>19</sup> Wisconsin<sup>20</sup> and Kentucky—subsequently took action to rescind their respective resolutions.

Rescissions were not effectuated in the foregoing premises for the following three reasons:

1. New Jersey and Ohio<sup>22</sup> were among the States which ratified the proposed Fourteenth Amendment.<sup>23</sup> Subsequently, New Jersey and Ohio<sup>24</sup> took action to rescind their respective ratifications. However, after passage of ratifications by the necessary three-fourths States, the Congress passed a resolution<sup>25</sup> listing the ratifying States and included New Jersey and Ohio. The Congress transmitted such resolutions to the Department of State. Secretary of State William H. Seward, in pursuance of such resolution and acting under statutory duty, issued his certification<sup>26</sup> declaring the Fourteenth Amendment an integral part of the Constitution. In his certification, Secretary of State Seward also listed the ratifying States and included New Jersey and Ohio.
2. New York was among the States which ratified the proposed Fifteenth Amendment. Subsequently, New York took action to rescind her ratification. However, after passage of ratifications by the requisite three-fourths States, Secretary of State Hamilton Fish, acting under statutory duty, issued his certification<sup>27</sup> declaring the Fifteenth Amendment an integral part of the Constitution. In his certification Secretary of State Fish listed the ratifying States and included New York.
3. In the cases of all but one of the twenty-two amendments to the Constitution, the Congress directed ratification to be by State legislatures. Only in the case of the Twenty-First Amendment did the Congress direct the ratification to be by State conventions. This exception to the general policy historically fol-

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<sup>18</sup> Ill. Laws 1945, p. 1797.

<sup>19</sup> Ala. Acts 1945, p. 155.

<sup>20</sup> Wis. Laws 1944-1945, pp. 1126, 1127.

<sup>21</sup> Ky. Acts 1946, p. 720.

<sup>22</sup> Ohio Laws 1867, pp. 320, 321.

<sup>23</sup> 14 U. S. Stat. at L. 358.

<sup>24</sup> 65 Ohio Laws 280.

<sup>25</sup> 15 U. S. Stat. at L. 709, 710.

<sup>26</sup> 15 U. S. Stat. at L. 708, 709.

<sup>27</sup> 16 U. S. Stat. at L. 1131, 1132.

lowed was made seemingly *ex industria*. The only feasible reason for the exception is that the Twenty-First Amendment is the only amendment which repealed a preceding amendment (the Eighteenth Amendment). The Congress apparently thought that in order for the States to ratify the proposed Twenty-First Amendment and thus to rescind the prior action that their respective legislatures had taken in ratifying the Eighteenth Amendment ratifying action by an agency closer to the seats of sovereignty—the peoples of the States themselves—was necessary and, therefore, designated conventions as the mode of ratification.

The text of the resolutions specifies that the limitations upon the income tax rates “. . . shall, however, be subject to the qualification that in the event of a war in which the United States is engaged creating a grave national emergency requiring such action to avoid national disaster . . .” such limitations may be deferred. The phraseology employed is broad enough to include “a police action” for in 1941 in the case of *Verano V. De Angelis Coal Co.* the District Court of the United States for the Middle District of Pennsylvania held that “. . . a formal declaration of war is not necessary before it can be said that a condition of war exists . . .”<sup>28</sup>

The Wyoming legislature passed its resolution twelve years ago. Mississippi and Rhode Island passed their resolutions eleven years ago. It might be contended by opponents of the movement to secure the income tax rate-limitation amendment that an unreasonable length of time has elapsed since passage of the resolutions by Wyoming, Mississippi and Rhode Island and, therefore, the resolutions passed by these three States no longer can be counted. Such an argument would be based partly on the holding in the case of *Dillon v. Gloss*<sup>29</sup> that Article V of the Constitution impliedly requires amendments submitted to be ratified within a reasonable time after proposal; that the Congress may fix a reasonable time for ratification, and that the period of seven years fixed by the Congress was reasonable. However, the fallaciousness of this contention becomes apparent when we consider the following statement by Mr. Justice Van Devanter in the unanimous decision in the Dillon case: “. . . 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.”<sup>30</sup> 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 amendments and the Congress directs the mode of ratification.

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<sup>28</sup> 41 F. Supp. 954, 955 (1941).

<sup>29</sup> 256 U. S. 368 (1921).

<sup>30</sup> 256 U. S. 368, 374, 375 (1921).

The foregoing contention by opponents of the movement to secure the income tax rate-ceiling amendment is also based on the dissenting opinion by Mr. Justice Butler,<sup>31</sup> in which Mr. Justice McReynolds concurred,<sup>32</sup> in 1938 in the case of *Coleman v. Miller*. Mr. Justice Butler was of the opinion that the thirteen years intervening between the time the Congress proposed the Child Labor Amendment and the time the Kansas legislature ratified same constituted an unreasonable length of time. However, here again, in a dissenting opinion, as in the opinion of the Court in the *Dillon* case, the reasonable-length-of-time doctrine is measured from the time of proposal; and until there is proposal, the doctrine is inapplicable.

The question arises as to whether under the terms of Article V when thirty-two State legislatures pass resolutions memorializing the Congress to call a convention for the purpose of proposing constitutional amendments it is mandatory or discretionary with the Congress to call a convention. The authorities are in agreement that under such circumstances it is mandatory upon the Congress to call a convention. Professor Henry Rottschaefer stated that amendments " . . . may be proposed by Congress on its own initiative whenever two-thirds of both houses shall deem it necessary, or by a convention called for that purpose which Congress is required to call on application of the legislatures of two-thirds of the States."<sup>33</sup> Professor Westel Woodbury Willoughby wrote as follows: "It would appear that the act thus required of Congress is a purely ministerial one in substance, if not in form, and the obligation to perform it is stated in imperative form by the Constitution."<sup>34</sup> In the words of Article V "The Congress . . . on the application of the legislatures of two-thirds of the several States, shall call a convention proposing amendments." As long ago as 1816 it was held by Mr. Justice Story in *Martin v. Hunter's Lessee*<sup>35</sup> that the word "shall" imports the imperative and the mandatory.

There are already outstanding enough State legislatures which have passed resolutions pertaining to other subject matter so that these added to the twenty-six State legislatures which have passed resolutions in favor of the income tax rate-limitation amendment make up the necessary two-thirds States which, according to the terms of Article V, make it imperative for the Congress to call a convention. Before the first State (Wyoming) legislature passed a resolution regarding an income tax rate-ceiling amendment in 1939, there were already outstanding thirty-six State legislatures which had passed resolutions memorializing the Congress to call a convention. The source for this statement is the compilation showing the applications made from time to time to the Senate by the legislatures of various States for the calling of a constitutional convention for the purpose

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<sup>31</sup> 307 U. S. 433, 470 (1938).

<sup>32</sup> 307 U. S. 433, 474 (1938).

<sup>33</sup> Rottschaefer, Henry, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW, West Publishing Co., St. Paul, Minn., 1939, p. 388.

<sup>34</sup> Willoughby, Westel Woodbury, THE CONSTITUTIONAL LAW OF THE UNITED STATES, Baker, Voorhis and Co., N. Y., 1929, Vol. I, p. 597.

<sup>35</sup> 14 U. S. 304, 4 L. Ed. 97, 103 (1816).

of proposing certain amendments to the Constitution of the United States presented by Senator Tydings of Maryland during the second session of the seventy-first Congress in 1930.<sup>86</sup> The compilation by Senator Tydings was recognized as authoritative, in the report to the New York Bar Association on December 31, 1930 by the Committee of Five (Henry W. Taft, Chairman, Wilbur F. Earp, Edward G. Griffin, Wesley H. Maider, Roscoe R. Mitchell and Isaac R. Oeland) to Look into and Report on the General Proposals Pending in Congress to Amend the Federal Constitution as follows: "At the Second Session of the 71st Congress, however, Senator Tydings presented to the Senate a compilation showing all of the applications for the calling of a constitutional convention which had been made to Congress since the adoption of the Constitution. The statement was printed as Document No. 78. It seems to show that 36 . . . states have filed petitions. Upon the information contained in Senator Tydings' statement our report is based."<sup>87</sup> However, since nine of the thirty-six States—Arkansas,<sup>88</sup> California,<sup>89</sup> Kentucky,<sup>40</sup> Minnesota,<sup>41</sup> New Jersey,<sup>42</sup> Pennsylvania,<sup>43</sup> Utah,<sup>44</sup> Maine<sup>45</sup> and Wyoming<sup>46</sup>—had passed only resolutions exclusively concerning the advocating of the direct election of United States Senators, the Seventeenth Amendment would seem to have negated the efficacy of the resolutions by these nine States and, therefore, to discount these nine States in the matter. This view is fortified by the following statement by Professor Lester Bernhardt Orfield: "In 1901 several legislatures petitioned for a convention to consider an amendment for the popular election of Senators, and by 1909 twenty-six states had petitioned for that purpose. The adoption of the Seventeenth Amendment would perhaps destroy the effect of these petitions."<sup>47</sup> This view is further fortified by the following excerpt from the report to the New York Bar Association on December 31, 1930 by the Committee of Five to Look into and Report on the General Proposals Pending in Congress to Amend the Federal Constitution: "The petitions for the election of senators by the direct vote of the people showed a widespread public opinion favorable to that change. But they were not numerous enough to make it mandatory upon Congress to call the convention, and Congress removed the necessity for the convention method by responding to the prevailing sentiment and itself proposed Amendment XVII, which was speedily ratified, the ratification being proclaimed by the Secretary of State on May 31, 1913. The Committee, therefore,

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<sup>86</sup> Sen. Doc. 78, 71st Cong., 2d sess.

<sup>87</sup> 74 Cong. Rec. 2924, 2925 (1931), 17 A.B.A.J. 143 (1931).

<sup>88</sup> Ark. Laws 1903, p. 483.

<sup>89</sup> Cal. Stat. 1903, p. 682.

<sup>40</sup> Ky. Acts 1902, p. 394.

<sup>41</sup> Minn. Laws 1901, p. 676.

<sup>42</sup> N. J. Laws 1907, p. 736.

<sup>43</sup> 1901, P.L. 860.

<sup>44</sup> Utah Laws 1903, p. 204.

<sup>45</sup> Maine Laws 1911.

<sup>46</sup> Wyoming Laws 1895, p. 298.

<sup>47</sup> Orfield, Lester Bernhardt, *THE AMENDING OF THE FEDERAL CONSTITUTION*, The University of Michigan Press, Ann Arbor, Mich., 1942, pp. 42, 43.

is of the opinion that as the purpose in filing the petitions for the popular election of Senators was satisfied . . . they have become ineffective. If the same conclusion is doubtful concerning petitions requesting a convention for general purposes, it is sufficient to say that the deduction of those petitions relating exclusively to the popular election of Senators would reduce the number of petitioning states substantially below the required two-thirds."<sup>48</sup> Thus, the nine State legislatures which passed only resolutions exclusively dealing with the advocating of the popular election of United States Senators subtracted from the thirty-six State legislatures which passed various types of resolutions memorializing the Congress to call a convention plus the twenty-six States which passed resolutions pertaining to the income tax rate-limitation amendment is a total of fifty-three States. But, of course, several of the thirty-six States which passed diverse types of resolutions are among the twenty-six States which passed resolutions regarding the income tax rate-ceiling amendment. To be exact, this duplication exists on the part of thirteen States—Iowa, Michigan, Indiana, Delaware, Texas, Illinois, Wisconsin, Alabama, Nebraska, Louisiana, Montana, Nevada and Kansas. These thirteen States subtracted from the previous total of fifty-three States is a total of forty States or eight more States than are required by the terms of Article V of the Constitution to make it imperative and mandatory upon the Congress to call a convention for the purpose of proposing amendments.

A question which arises is whether resolutions which pertain to different subject matter can be counted together for the purpose of securing the necessary two-thirds States or only resolutions limited exclusively to the same subject matter can be counted together for the purpose of securing the requisite two-thirds States. The former view is the one accepted by the authorities. Professor Lester Bernhardt Orfield stated that: "A closely related problem is whether the requests must seek a convention for identical purposes. Should two-thirds of the legislatures ask a convention for the purpose of a general revision or for the same specific purpose, there would be no difficulty. But when one legislature desires a convention for one purpose, as to prohibit polygamy, another legislature for another purpose, as to adopt the initiative and referendum, and a third legislature for a general purpose, there is some doubt whether the prerequisite for a call has been met. The better view would seem to be that the ground of the applications would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes."<sup>49</sup> Mr. Wayne B. Wheeler, writing in the *Illinois Law Review*, expressed the following opinion: ". . . the sufficiency of a general resolution asking for a convention is unquestionable. Even where thirty-two state legislatures made application for a convention, each requesting a different amendment it might be considered sufficient to call

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<sup>48</sup> 74 Cong. Rec. 2924, 2926 (1931), 17 A.B.A.J. 143, 145 (1931).

<sup>49</sup> Orfield, Lester Bernhardt, *THE AMENDING OF THE FEDERAL CONSTITUTION*, The University of Michigan Press, Ann Arbor, Mich., 1942, p. 42.

a convention on the ground that they conclusively showed a wide-spread demand for changes in government . . .".<sup>50</sup>

A problem which presents itself is whether, in the event of failure or refusal on the part of the Congress to call a convention for proposing amendments and in the event that the pressure of public opinion should prove ineffective, the hand of the Congress can be forced in the matter. Under the foregoing circumstances an action at law of *mandamus* in the District Court of the United States would lie against every member of the Congress. For precedents there are the cases of *State v. Town Council of South Kingston* and *Virginia v. West Virginia*. In the former the Supreme Court of Rhode Island issued a writ of *mandamus* against a municipal *quasi*-legislative body and in the latter the Supreme Court of the United States held that it had the power to issue a writ of *mandamus* against the West Virginia legislature. In the former case the Supreme Court of Rhode Island stated that: ". . . the question is whether the case alleged is a proper one for the issue of a writ of mandamus. One office of mandamus is to enforce obedience to statute law. In general, it lies to compel all officers to perform ministerial duties, as well as to compel subordinate courts to perform judicial duties; but not to compel the exercise of discretion in any particular way. It is not contended that the duty of the town council in this matter is other than ministerial. Mandamus is peculiarly the proper remedy when other specific remedies are wanting. The remedy which a legislature can provide is to make a law applicable to the case. When the law is made, it is for the court to enforce it, or to punish for disobedience of it. In either function it must construe the statute, *i.e.* declare what it means. In the present case, if the law already made imposes a present duty, no further legislation would make it more imperative. Any legislative act designed as a remedy must impose ministerial duties upon individuals. The court must again be resorted to, to compel such individuals to perform those duties. So that in the last analysis this remedy by mandamus is the only specific and efficient one, and if it is not afforded there are no other means which can give to the electors the opportunity to exercise such rights as the law gives them."<sup>51</sup> In the latter case the Supreme Court of the United States declared that: "The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. Insofar as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said."<sup>52</sup>

Mr. Walter K. Tuller, writing in the *North American Review*, stated that: "Every officer, of whatever branch, is sworn to support and obey the Constitution,

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<sup>50</sup> Wheller, Wayne B., "Is a Constitutional Convention Impending?" 21 ILL. L. REV. 782, 795 (1927).

<sup>51</sup> 27 A. 509, 602, 22 L. R. A. 65, 67, 68 (1893).

<sup>52</sup> 246 U. S. 565, 603, 604, (1918).

and it is the natural presumption, fully justified by our history, that none will refuse to obey its mandates as interpreted by that body whose function and duty it is to do so.

"The form of remedy for compelling Congress to act would seem clearly to be a writ of mandamus. It is believed that such a proceeding may be instituted by any citizen. Every citizen of the country has a direct interest that the Constitution shall be obeyed, and that interest is none the less real and entitled to recognition and protection by the courts that it is not capable of financial computation. Indeed, the very fact that he has no other remedy serves rather, under the established principles governing its issuance, to emphasize his right to this writ. Since the Constitution does not confer original jurisdiction upon the Supreme Court to issue writs of mandamus (see *Marbury v. Madison*, *supra*), it would be necessary to commence the action in the courts of the District of Columbia. It has been settled since the decision of *Kendall v. United States*, *supra*, that those courts have jurisdiction to issue the writ of mandamus as an original proceeding. From the decision there an appeal can be taken to the Supreme Court of the United States."<sup>58</sup>

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<sup>58</sup> Tuller, Walter K., "A Convention to Amend the Constitution—Why Needed—How It May Be Obtained," 11 *NORTH AMERICAN REVIEW* 369, 382, 383, (1911).