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A STUDY IN THE INVALIDITY OF MEMORIALIZATION RESCISSION RESOLUTIONS

By

FRANK E. PACKARD*

Twenty-eight state legislatures have passed resolutions memorializing the United States Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States limiting federal income tax rates at twenty-five per cent in peacetime.

Similar action by four more state general assemblies is necessary in order to have two-thirds of the states, or thirty-two states, as required by Article 5 of the Constitution before the Congress has to call the convention for the purpose of proposing an amendment to the Constitution imposing a twenty-five per cent ceiling on federal income tax rates in peacetime.

Of the twenty-eight state legislatures which adopted the foregoing resolutions those of Alabama, Illinois, Kentucky and Wisconsin rescinded their passage of such resolutions. The resolutions of rescission subsequently adopted by the legislatures of these four states are null and void and are of no legal effect whatsoever.

This can be proved conclusively (1) by keeping in mind the federal amendatory process provided for in Article 5 as follows: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . ."5 (emphasis mine)—and (2) by comparing memorialization by states with proposal by the Congress and comparing the right of a state to withdraw a memorialization with the right of the Congress to withdraw a proposal.

Such a right does not exist in either case according to Professor Lester Bernhardt Orfield, who in his text book, The Amending of the Federal Constitution, states as follows:

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2 Ill. Laws, p. 1797 (1945).
4 Wis. Laws, pp. 1126, 1127 (1944-45).
5 U.S. Const., Art. 5.
"Suppose Congress should attempt to withdraw an amendment after it had been proposed. This question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin amendment. . . The practice has been to regard such a withdrawal as ineffectual. The theory apparently is that each affirmative step in the passage of an amendment is irrevocable. . . confusion would be introduced if Congress were permitted to retract its actions." 6

This view is shared by Professor Francis M. Burdick, who in his text book, The Law of the American Constitution, states that "it seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration. . . ." 7 Professor Orfield continues, stating that "in such a case the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite."

Additional proof that a state legislature does not have the legal right to rescind a memorialization resolution may be adduced by comparing the right of a state to withdraw a memorialization and the right of the Congress to withdraw a proposal on the one hand with the right of a state to withdraw a ratification of a proposed amendment to the Constitution on the other hand for as the Supreme Court of the United States declared in 1921 in the case of Dillon v. Gloss " . . . proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor. . . ." 8 In the case of this additional comparison the answer is the same, since a state cannot withdraw a ratification.

Judge John Alexander Jameson in his text book, A Treatise on Constitutional Conventions—Their History, Powers and Modes of Proceeding, states that:

"The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, 'shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states; etc. By this language is conferred upon the states, by the national Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity. . . . When ratified by the legislature of a state, it will be final as to such state. . . . When ratified all power is expended." 9

Professor Walter F. Dodd, writing in the Yale Law Journal, states that:

". . . the view is incontrovertible, that a state, once having ratified, may not withdraw that ratification. . . . to construe the Constitution other-

8 256 U.S. 368, 374, 375; 65 L.Ed. 994, 997; 41 S.Ct. 510, 512 (1921).
wise, would be to permit great confusion in that no state in ratifying could know what the status of the amendment was if at the same time other states were permitted to withdraw. Of course, confusion would occur also in that it would be difficult to know when three-fourths of the states had ratified. . . . The function of ratification seems to be one which, when once done, is fully completed, and leaves no power whatever in the hands of the state legislature.”

The Court of Appeals of Kentucky held in 1937 in the case of Wise v. Chandler that:

"It is the prevailing . . . view of writers on the question that a resolution of ratification of an amendment to the federal Constitution, whether adopted by the legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in Article 5 are 'precisely the same,' when a legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection.'”

The Supreme Court of Kansas in the same year ruled in the case of Coleman v. Miller that:

"It is generally agreed by lawyers, statesmen and publicists who have debated this question that a . . . ratification once given cannot be withdrawn. . . . from historical precedents, it is . . . true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make Article 5 of the federal Constitution read that the amendment should be valid 'when ratified by three-fourths of the states, each adhering to its vote until three-fourths of all the legislatures shall have voted to ratify'. . . . when a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist.'”

When a state adopts a resolution memorializing the Congress to call a convention for the purpose of proposing an amendment to the Constitution that state is engaging in a "federal function" which places such activity within the exclusive domain of federal jurisdiction and completely removes it from the pale of state province and beyond the power of state withdrawal. The truth of this is manifest since the function of a state legislature in memorializing the Congress to call a convention for the purpose of proposing an amendment is derived wholly from the Constitution the same as is either the function of the Congress in proposing an amendment or the function of a state legislature in ratifying a proposed amendment and since the latter two functions have been judicially identified as federal functions totally without state realm.

11 270 Ky. 1, 8, 9; 108 S.W.2d 1024, 1028 (1937).
The Supreme Court of Kansas declared in 1937 in the *Coleman v. Miller* case that:

"It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the Constitution of the United States, *like the function of Congress in proposing an amendment*, is a federal function derived from the federal Constitution; and it transcends any limitation sought to be imposed by the people of a state. (Emphasis mine.) The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal Constitution, to which the state and its people alike have assented. . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held."18

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