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LEGAL FACETS OF THE INCOME TAX RATE LIMITATION PROGRAM

Frank E. Packard*

The idea of placing a constitutional ceiling upon the power of a government to tax is neither new nor revolutionary. Seventeen precedents exist within the United States for limitations of that character as seventeen state constitutions make specific provision on the point. These self-imposed limitations are set forth as annual maxima and take one of three forms, to-wit: (1) a stipulated number of mills per dollar of assessed valuation of all taxable property within the state,¹ (2) a designated number of cents,² or a percentage of the assessed valuation,³ beyond which the taxing authorities may not go. In terms of date of adoption, these provisions run back to as early as 1864, in the case of Nevada, but one, in the case of Georgia, is as recent as 1945. They cannot, then, be written off as being typical of, or essentially related to, the Granger Movement of the late Nineteenth Century. It is true, however, that the states concerned, with the exception of Michigan, lie west of the Mississippi River or are to be found in the South, for a constitutional ceiling on the power of a state government to tax has not been utilized by Eastern or New England states, nor by those states bordering on the Pacific. While the cost of state government has been rising with the years,

¹ Eleven state constitutions fit this category with limits varying from two mills to fifty mills: S. D. Const. 1889, Art. 11, § 1, two mills; Utah Const. 1896, Art. 13, § 7, two and four-tenths mills; Okla. Const. 1907, Art. 10, § 9, three and one-half mills; Colo. Const. 1876, Art. 10, § 11, four mills; N. Mex. Const. 1911, Art. 8, § 2, four mills; N. D. Const. 1889, Art. 11, § 174, four mills; Wyo. Const. 1890, Art. 15, § 4, four mills; Ga. Const. 1945, Art. 7, § 1(2), five mills; La. Const. 1921, Art. 10, § 3, five and one-quarter mills; Ida. Const. 1890, Art. 7, § 9, ten mills; Nev. Const. 1864, Art. 10, § 145.01, fifty mills.

² Three states have limitations of this kind with variation ranging from twenty to one hundred cents: Mo. Const. 1875, Art. 10, § 8, twenty cents; Tex. Const. 1876, Art. 8, § 9, thirty-five cents; W. Va. Const. 1872, Art. 10, § 1, one hundred cents.

³ In this category are the constitutional provisions of three states, to-wit: Ala. Const. 1901, Art. 11, § 214, sixty-five one-hundredths of one per cent; Ark. Const. 1874, Art. 16, § 8, one per cent; Mich. Const. 1908, Art. 10, § 21, one and one-half per cent.
the impact of the burden thereof has been distributed through the use of such newly developed methods as sales, use, or similar indirect-forms of state taxation to the point where there has been little agitation for an extension of the concept of constitutional tax limitation to other states.

In the field of the federal government, however, the story is quite different. There, governmental reliance on income taxation as a prime source of revenue, with a steady and persistent demand for higher and yet higher income tax rates, has generated pressure for the adoption of an amendment to the United States Constitution placing a twenty-five per cent ceiling on the federal power to levy income taxes. Without comment on the point that much of the claimed need for federal revenue would be abated if state governments would refrain from looking to Washington for subsidization, it is proposed to consider here some of the legal facets related to this demand for constitutional revision.

Beginning in 1939, a movement to secure an appropriate constitutional amendment designed to limit income tax rates, at least in peace time, has spread widely. As it would be unrealistic to expect Congress to initiate the step, the method generally pursued has been one looking toward state action memorializing Congress to call a convention for the purpose of considering such an amendment. That method has not heretofore been utilized as a permissible manner for securing constitutional revision as all of the existing amendments originated with Congress and were submitted by it to state legislatures or to state conventions for the purpose of securing the necessary popular approval. Resolutions in favor of a rate-ceiling amendment, asking Congress to call a convention, have been passed by twenty-six of the state legislatures in the period between 1939 and the present time, and it is

4 Prior to the adoption of the XVI Amendment, the federal revenue was principally derived from duties and excise taxes imposed pursuant to U. S. Const., Art. I, § 8.
5 U. S. Const., Art. V.
6 States which have acted include Alabama, Arkansas, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Utah, Wisconsin, Wyoming.
anticipated that similar resolutions will be submitted in at least seven more state legislatures in session this year. ⁷ If six more states join the list, the essential two-thirds rule would have been fully observed but for the fact that four of the states which originally voted favorably have since taken action to rescind their respective resolutions,⁸ Illinois being among them, and have thereby revived the question as to the operative effect of a retraction by a state legislature after a favorable vote has once been given on an issue of constitutional amendment.

There would appear to be sufficient precedent, growing up under prior amendments, to indicate that the purported retraction should fail in purpose so that, with six more states added to the list, Congress should be empowered to act upon this growing demand for constitutional limitation on income tax rates. In the case of the Fourteenth Amendment, for example, the New Jersey and Ohio legislatures were originally among those state legislatures which voted approval.⁹ They subsequently took action to rescind their respective ratifications,¹⁰ but Congress, upon receipt of advice of the passage of ratifications by the necessary three-fourths of the states, adopted a resolution which listed the ratifying states, including New Jersey and Ohio,¹¹ and transmitted that resolution to the Department of State. The then Secretary of State, William H. Seward, pursuant to such resolution and acting under statutory duty, thereupon issued his certification declaring the Fourteenth Amendment to be an integral part of the federal constitution.¹² He, too, listed the ratifying states and included New Jersey and Ohio in that category.

In much the same way, when the Fifteenth Amendment was proposed, the state legislature of New York originally voted in

⁷ The seven states are Arizona, California, Colorado, Maryland, New York, South Carolina and Virginia.
⁹ See, for example, Ohio Laws 1867, pp. 320-1.
¹⁰ The proclamation of the Secretary of State mentions the purported action taken and notes it to be "a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual." 15 U. S. Stat. at L. 707.
¹² Ibid., p. 707.
favor of it but later took action to rescind the original determination.\textsuperscript{13} Again, after ratification had been obtained by the requisite three-fourths of the states, Hamilton Fish, in his capacity as Secretary of State issued his certificate that the amendment had been adopted and, in the list of supporting states, he included New York.\textsuperscript{14}

Ratification by state legislatures has been directed by Congress in the case of all but one of the twenty-two amendments to the United States Constitution. In the case of the Twenty-first Amendment, designed to repeal the ill-fated liquor prohibition of the Eighteenth Amendment, Congress did direct that ratification thereof be made through state conventions. This exception to the general policy historically followed was made seemingly \textit{ex industria}. As speed was not facilitated thereby, the only feasible reason for this exception may be said to rest in the fact that the Twenty-first was the only one proposed which was designed to repeal a prior constitutional amendment. It is possible that Congress may have thought it would be incongruous for state legislatures, in order to ratify the proposed Twenty-first Amendment, to take a step which would, in effect, rescind the prior action which they had taken constituting the approval of the Eighteenth Amendment. Actually, of course, the proposal was treated as a new matter but, in essence, it was a repeal, or a rescission, of earlier action. To avoid any question, the issue was submitted to agencies closer to the seat of sovereignty, that is to the peoples of the several states acting through popularly chosen conventions. By so doing, precedent opposed to legislative retraction of an earlier favorable vote on a constitutional question was left undisturbed. There would, then, be reason to believe that all states which have acted favorably on the proposed income tax limitation, regardless of later retraction, should be counted for purpose of securing the necessary quorum.

The second issue which may require consideration is one as

\textsuperscript{13} 16 U. S. Stat. at L. 1131-2 recites: "... it appears from an official document on file in this Department that the ... State of New York has since passed resolutions \textit{claiming to withdraw the said ratification} ... ." Italics added.

\textsuperscript{14} 16 U. S. Stat. at L. 1131-2.
to whether or not, because certain of these state resolutions were passed over ten years ago, it could be said that they have become devitalized by lapse of more than a reasonable period of time, thereby requiring the elimination of such states as Wyoming, Mississippi and Rhode Island from the present count with the possible addition of others as time passes. The Wyoming resolution, first in the field, was adopted over twelve years ago,\textsuperscript{15} while those of Mississippi and Rhode Island date back to 1940.\textsuperscript{16} Persons opposed to the movement to secure the adoption of an income tax rate limitation amendment might base their opposition, at least in part, on the holding in the case of \textit{Dillon v. Gloss}.\textsuperscript{17} It was there decided (1) that Article V of the United States Constitution impliedly requires that a submitted amendment be ratified within a reasonable period of time after proposal; (2) that Congress may, at the time of submission, fix a reasonable time for ratification; and (3) that a fixed period of seven years would be considered as reasonable for this purpose.

The fallacy of the objection, if made, would appear evident from a reading of the statement made by Mr. Justice Van Devanter, speaking on behalf of a unanimous court, in the Dillon case. He said: "... 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."\textsuperscript{18} The time interval which must not be unreasonable is the interval between proposal and ratification of an amendment. The doctrine of the case has no application to, nor could it support any argument in opposition to, the several resolutions calling for a constitutional convention. There is nothing in either constitutional provision or decision making the reasonable time period pertinent to those steps which precede the formulation and submission of a proposed amendment. There is, as yet, no proposed amendment nor will there be one until Con-

\textsuperscript{17} 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994 (1921).
\textsuperscript{18} 256 U. S. 368 at 374-5, 41 S. Ct. 510, 65 L. Ed. 994 at 997.
gress calls a convention, that convention proposes an amendment or amendments, and Congress directs the mode of ratification. Until then, no issue regarding the reasonableness of the time interval between the initiatory steps taken by one state and the reaching of a climax by the passage of the necessary thirty-second resolution could arise.

No greater strength is provided with respect to this objection by anything said or done in the case of *Coleman v. Miller*. True it is that Mr. Justice Butler, with Mr. Justice McReynolds concurring, there dissented on the point as to whether the Kansas legislature had delayed its ratification of the Child Labor amendment beyond a reasonable period of time. It was his belief that a thirteen-year interval between proposal and ratification constituted an unreasonable length of time. Aside from the fact that his views appear in a dissenting opinion, hence possess little beyond persuasive effect, it may be noted that, as in the Dillon case, the stress is on the time period between submission of a proposed amendment and its ratification, not one relating to the initiatory steps.

Assuming that no state action already taken is ineffective for the purpose, whether by reason of ineffectual attempt at retraction or by the long passage of time, the next problem would seem to be one as to the character to be given to the several state resolutions after a quorum has been reached. If they are but directory in character, Congress could still prevent action on the proposed income tax rate limitation by tabling the matter in much the same way it did, years ago, with regard to the many memorials, resolutions, and petitions presented to it relating to slavery. If, on the other hand, the summons is of mandatory character, Congress would have no alternative in the matter. It would either have to pass enabling legislation calling the convention into session or be guilty of a clear violation of its constitutional duty.

In that connection, the language of the Constitution itself becomes important. Article V thereof, providing for its amendment, directs that "The Congress . . . on the application of

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the legislatures of two-thirds of the several states, shall call a convention proposing amendments."20 In the light thereof, it is not surprising that all writers on the subject are in agreement on the point that, when a sufficient demand is made, it is mandatory upon Congress to call a convention. Professor Rottschaefer, for example, has said 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 upon application of the legislatures of two-thirds of the states."21 "It would appear," wrote Professor Willoughby, "that the action 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."22 Mr. Justice Story, as long ago as 1816, pointed out, through the medium of the decision in Martin v. Hunter's Lessee,23 that the word "shall" as used in the Constitution imports the imperative and the mandatory. There can, then, be little doubt on the score as to the action Congress should take upon receipt by it of a sufficient number of state resolutions dealing with the income tax proposal.

The question then could become one as to what action could be taken if Congress, despite the sufficiency of the memorialization, should either fail or refuse to call a convention for the proposing of amendments and the pressure of public opinion should prove ineffective to prod it into action. It is not expected that Congress would attempt to defeat the will of more than a majority of the states, but if it did clear legal remedy exists to deal with that eventuality. That remedy could take the form of a writ of mandamus directed to each individual member of Congress. It would not be necessary to search very far for precedent. Two cases will serve to illustrate what might be accomplished through the use of that form of proceeding. In State v. Town Council of

20 U. S. Const., Art. V. Italics added.
23 14 U. S. (1 Wheat.) 304, 4 L. Ed. 97 (1816).
South Kingston, for example, the Supreme Court of Rhode Island issued such a writ against a municipal quasi-legislative body, pointing to the fact that the case was a proper one for judicial consideration. It there said:

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.

In the other, that of Virginia v. West Virginia, the United States Supreme Court itself issued such a writ against a state legislature. It answered a challenge thereto by saying:

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

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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.\textsuperscript{27}

There is no likelihood, therefore, that the remedy would prove inadequate for the congressional duty, in relation to calling a convention for the purpose of considering amendments to the constitution, is clearly ministerial in character and would require no exercise of discretion which would militate against the use of mandamus.\textsuperscript{28}

Naturally, such a proceeding would have to be brought by some one acting as relator and would have to be instituted in an appropriate court. Although the United States Supreme Court itself issued the writ in the West Virginia case aforementioned, it did so because recourse had been had to its original jurisdiction over suits wherein two or more of the United States appear as parties.\textsuperscript{29} Not being vested with original jurisdiction over mandamus proceedings as such, but merely empowered to use that remedy as a necessary incident to a jurisdiction already acquired, it would obviously be improper to institute the action in the United States Supreme Court. In fact, since \textit{Marbury v. Madison},\textsuperscript{30} any attempt to provide that court with original jurisdiction over mandamus, short of a constitutional amendment so providing, would be ineffective. There is no question, however, since the holding in \textit{Kendall v. United States},\textsuperscript{31} that federal district courts, including the courts of the District of Columbia, are empowered to act in such matters and choice of a tribunal in the last mentioned area would seem preferable so as to facilitate the acquisition of jurisdiction over the person of members of Congress. An appeal from a decision of such a court could, if necessary, be taken to the Supreme Court of the United States.

\textsuperscript{27} 246 U. S. 565 at 603-4, 38 S. Ct. 400, 62 L. Ed. 883 at 891.

\textsuperscript{28} That mandamus will not lie against the members of a state legislature to compel performance of a duty requiring the exercise of discretion, see Fergus v. Marks, 321 Ill. 10, 152 N. E. 557, 46 A. L. R. 960 (1926).

\textsuperscript{29} U. S. Const., Art. III, § 2.

\textsuperscript{30} 5 U. S. (1 Cranch) 368, 2 L. Ed. 60 (1803).

\textsuperscript{31} 37 U. S. (12 Pet.) 524, 9 L. Ed. 1181 (1838).
As to the designation of a relator, Mr. Walter K. Tuller, writing in the North American Review, has indicated that 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.\textsuperscript{32}

Whether the writ would be obeyed, or whether the claim might be advanced that one department of the federal government is powerless to assert its authority over another and co-ordinate branch of the same government, are questions which could not be answered at this time and may, for that matter, never arise. As Mr. Tuller states, every officer, of whatever branch, is sworn to support and obey the Constitution, 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."

This analysis has been pursued with an additional thought in mind. At the moment, less than thirty-two states have adopted resolutions calling for a convention to consider a specific proposal relating to a constitutional amendment prescribing limitations on the power of the federal government to levy income taxes. Enough state legislatures have, from time to time, passed resolutions pertaining to other subject matters, however, so that, if these states could be added to the twenty-six expressly favoring the income tax proposal, the necessary quorum would have already been reached and could form the basis for immediate action. Long prior to the action of the Wyoming legislature on the income tax question, thirty-six state legislatures had passed resolu-

\textsuperscript{32} Tuller, "A Convention to Amend the Constitution—Why Needed—How It May Be Obtained," 11 No. Amer. Rev. 369, particularly 382-3 (1911).
tions at varying times memorializing Congress to call a convention. A list of the states involved was submitted to the Senate, in 1930, by Senator Tydings of Maryland during the second session of the Seventy-first Congress. His compilation was recognized as authoritative by a bar association committee which had been charged with the duty of looking into and reporting on general proposals relating to amendments to the federal constitution.

Nine of the states so listed had passed resolutions dealing exclusively with the subject of, or advocating the direct election of, United States senators, so it might be regarded that these resolutions had been negated by the adoption of the Seventeenth Amendment. Congress itself removed the necessity for popular action on that point through conventions by responding to the prevailing sentiment with its own proposal which was speedily ratified and proclaimed in 1913. It would appear to be no more than logical that these nine states, except as they may have specifically acted on the income tax question, should not be counted for quorum purposes. But all told, during the height of the senatorial discussion, some twenty-six states adopted resolutions and most of these were quite general in scope although they may have been framed with the same thought in mind.

Some writers have expressed a belief that all these calls have been rendered sterile. For example, Professor Orfield wrote: "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." The aforementioned bar association committee also indicated that it was "of the opinion that as the purpose in filing the petitions . . . was satisfied . . .

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34 74 Cong. Rec. 2924-5 (1931); 17 A. B. A. J. 143 (1931).
they have become ineffective.” It did add that if this conclusion was “doubtful concerning petitions requesting a convention for general purposes,” still it was sufficient to say, at that time, that the deduction of the number relating exclusively to the popular election of senators would “result in reducing the remaining number substantially below that required for the needed two-thirds.”

A simple mathematical calculation will reveal, provided all of these resolutions are not invalidated, that the quorum point has been reached prior to this time. Thus, if the nine resolutions relating to the popular election of senators be deducted from the thirty-six mentioned in the Tydings report and the product thereof be added to the twenty-six dealing with the subject of an income tax limitation, the net result would be a total of fifty-three. But, of course, several of the thirty-six states which have passed diverse types of resolutions prior to 1939 are included in the list of twenty-six which have taken specific action on the income tax question. To be exact, thirteen states fall into this category of duplicate action. If these, in turn be deducted, there would still remain forty states, or eight more than the thirty-two required by Article V of the Constitution, to make it imperative and mandatory upon Congress to call a convention at this time. Such a convention could have for its purpose the considering and proposing of amendments at least on the tax question, if not on any or every possible point, for every general call would logically include, within itself, the lesser and specific topic of tax limitation.

The question which arises at this point is whether it would be proper to count outstanding resolutions which pertain to different subject matters together for the purpose of securing the necessary number of states or whether only those resolutions limited exclusively to the same topic may be counted. What little authority there is on the subject would approve the first of these views. Professor Orfield has written to the effect that no prob-

37 17 A. B. A. J. 143 at 145.
38 The thirteen are Alabama, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, Texas, and Wisconsin.
lem exists if two-thirds of the state legislatures asked for a convention for the purpose of general revision or for revision in the same particular. It is, he notes, 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" that some doubt would arise whether the prerequisite for a call has been met. He indicated that the "better view would seem to be that the ground of the application would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes." In much the same vein is the comment of Wayne B. Wheeler who expressed the opinion that where "thirty-two state legislatures made application for a convention, each requesting a different amendment" the result might be considered "sufficient to call a convention on the ground that they conclusively showed a widespread demand for changes in government." Is there not occasion, then, to believe that Congress should act without further delay?

No attempt has here been made to evaluate the merit or wisdom of the proposed limitation on income tax rates, other than to note that if such a proposal was submitted and ratified it would, without question, become binding on the federal government, the powers of which are no more than delegated ones. It, unlike the truly sovereign state, lacks an unfettered power to tax and may derive its revenue only from those sources and in the manner prescribed by the constitution. The argument will, therefore, probably be raised that any limitation of the type which has been proposed would render the federal government powerless to protect the nation and lead to a return of the days of the Articles of Confederation.

Those who would offer that argument should note that each resolution specifies that the proposed limitation on income tax

39 Orfield, op. cit. note 36, p. 42.
40 Wheeler, "Is a Constitutional Convention Impending?" 21 Ill. L. Rev. 782, particularly p. 795 (1927).
rates should 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," the tax limitation may be deferred. If the sub-argument should be made that it would require a "war" to produce a deferral in the tax limitation program and that a "police action" would not be sufficient, the simple answer is that the phraseology is broad enough to include the so-called "police action." As a federal judge once phrased the point, "a formal declaration of war is not necessary before it can be said that a condition of war exists." The proposed limitation, therefore, appears to have been carefully written and the people, through a convention called for the purpose, should be given a prompt opportunity to pass upon the suggestion.

43 A proposed joint resolution has been submitted to Congress. It was referred to the House Committee on Judiciary on September 13, 1951, but no other action has, as yet, been taken thereon.