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Amending the U.S. Constitution; Two More Problems (1) Are Their Rejections Binding?

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A cursory consideration of the right of secession of the United States from the United Nations might lead one to believe that a complication would result from the fact that the United Nations maintains its headquarters in the United States. However, this situation presents no problem as the following analogy will illustrate.

The embassy or legation in the United States of a foreign power is indeed considered in contemplation of the law as part of the sovereign jurisdiction of the homeland of the represented foreign power. But should the United States sever diplomatic relations with such foreign power, the foregoing condition ceases to exist.

Should the United States secede from the United Nations the idea of the employment of force by the other member nations to frustrate such action is remote for both legal and practical reasons. Professors Goodrich and Hambro in their book wrote that: "If the action is thought to be unjustified by the remaining members, no action will or can be taken to prevent it."[6] The United States, unlike the Confederate States ninety-one years ago, is the dominant military power in the world today and, therefore, in a position to make good such secession and to uphold its legal right.

AMENDING THE U.S. CONSTITUTION; TWO MORE PROBLEMS

(1) ARE THEIR REJECTIONS BINDING?

By

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(*Editor's Note*—Whether or not the suggested limitation of federal taxation of income becomes part of the Constitution might well be decided by answers to two vital questions of Constitutional law. In the October issue of this volume, 57 Dick. L. Rev. 86 Frank E. Packard discussed the first, i.e., whether the states could rescind resolutions memorializing Congress to propose such an amendment. The author here considers the second problem, i.e., whether state legislatures are bound by their prior rejections of the resolution.)

Probably almost everyone by now has heard of the movement to amend the Constitution of the United States so as to limit federal income tax rates to a maximum of twenty-five per cent in peacetime, by causing state legislatures to adopt resolutions memorializing the Congress to call a convention for the purpose of proposing such an amendment.

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[6] Goodrich, Professor Leland M. and Professor Edvard Hambro, Charter of the United Nations—Commentary and Documents, World Peace Foundation, Boston, p. 145 (1949).

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Article V of the Constitution provides for such a convention when the legislatures of two-thirds of the states request it. To date twenty-eight state General Assemblies have passed resolutions to this effect, four short of the required two-thirds, or thirty-two.

However, since one or both Houses of several state legislatures have rejected such resolutions, the question arises whether the four resolutions still needed may be obtained from the twenty states which have not adopted such a resolution, or whether the choice is limited to those states which have neither adopted nor rejected the resolution. The latter alternative, if it were legally sound, would halve the number of states that could possibly approve the resolution.

It is submitted that, although a state general assembly which *ratifies* a proposed amendment to the Constitution of the United States or which adopts a resolution memorializing the Congress to call a convention for the purpose of proposing an amendment to the Constitution cannot retract such affirmative action,[1a] nevertheless a state legislature which affirmatively declines to ratify a proposed amendment, or, similarly, affirmatively rejects a resolution memorializing the Congress to call a convention for the purpose of proposing an amendment, is not precluded from subsequently ratifying the amendment or adopting the memorializing resolution, respectively.

Since all of the existing twenty-two amendments to the Constitution of the United States have been initiated by proposal of Congress and since the Constitution has no express provision on the rule urged here, the method of reasoning which is available to prove the foregoing proposition must be that of analogy. The analogy can be drawn with the following rule:

That affirmative refusal by a state to ratify an amendment proposed by the Congress does not preclude later ratification.

Distinguished legal scholars, as well as the courts, have announced the latter rule. Professor Justin Miller of the School of Law of the University of Minnesota, writing in the Minnesota Law Review, stated that:

> ". . . if a state rejects the proposed amendment it may thereafter change its vote and ratify . . . . The fact that, after all, the negative votes of only thirteen states, regardless of size, population or importance can defeat the will of all the rest of them would seem to go a long way toward justifying the present rule that a vote can be changed from rejection to ratification . . ."[1]

Judge John Alexander Jameson, in his textbook entitled *A Treatise on Constitutional Conventions; Their History, Powers and Modes of Proceeding,* stated that:

1a See 57 Dick. L. Rev. 86 (1952).

1 Miller, Professor Justin, "Amendment of the Federal Constitution: Should It Be Made More Difficult?" 10 Minn. L. Rev. 185, 188 (1926).

". . . the right of a (s)tate legislature, after a negative vote has once been passed, to recede from it and ratify an amendment, is, we think, upon principle, unquestionable."[2]

The Supreme Court of Kansas in 1937 in its opinion in the case of *Coleman* v. *Miller*[3] said:

"It is generally agreed by lawyers, statesmen and publicists who have debated this question that a state legislature which has rejected an amendment proposed by Congress may later reconsider its action and give its approval, but that a ratification once given cannot be withdrawn."

Of the decision by the Supreme Court of Kansas in *Coleman* v. *Miller,* Professor Lester Bernhardt Orfield wrote in his textbook entitled *The Amending of the Federal Constitution* as follows:

"The Kansas view is supported by Congressional practice as to the Thirteenth and Fourteenth Amendments, and by the legal theory that the Constitution creates only a power to ratify and not a power to reject. It is also supported on the ground of public policy in that less delay results and that it is less confusing than counting subsequent reversals. To allow a rejection to be final is to make the amending process less deliberate."[4]

Two years after the Kansas decision the Supreme Court of the United States in an opinion in the same case said:

"The state court adopted the view expressed by textwriters that a state legislature which has rejected an amendment proposed by the Congress may later ratify. The argument in support of that view is that Article V says nothing of a rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the (s)tates; that the power to ratify is thus conferred upon the (s)tate by the Constitution, and, as a ratifying power, persists despite a previous rejection. . . . The precise question as now raised is whether, when the legislature of the (s)tate, as we have found, has actually ratified the proposed amendment, the (c)ourt should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V speaking solely of ratification, contains no promise as to rejection. Nor has the Congress enacted a statute relating to rejections."[5]

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2 Jameson, Judge John Alexander, "A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding," Callaghan and Company, Chicago, 628. (1887). The following authorities reach the same conclusion. 26 Georgetown L. Journ. 98, 107, 114 (1937); Garrett, Professor Finis J., "Amending the Federal Constitution," 7 Tenn. L. Rev. 286, 304 (1929); Willoughby, Professor Westel Woodbury, "The Constitutional Law of the United States," Baker, Voorhis and Co., N.Y., 593 (1929).

3 146 Kan. 390, 400, 71 P.2d 518, 524 (1937).

4 Orfield, Professor Lester Bernhardt, "The Amending of the Federal Constitution," The University of Michigan Press, Ann Arbor, Michigan, 70, 71 (1942).

5 307 U.S. 433, 447, 450, 59 S. Ct. 972, 979, 980 (1939).

Concerning the opinion of the Supreme Court of the United States in *Coleman* v. *Miller*, Professor Orfield wrote as follows:

> "It would seem to follow from the recent decision of the Supreme Court that the fact of rejection by more than one-fourth of the states does not bar ultimate ratification of an amendment if Congress deems the amendment still open for ratification . . . Since rejection by a single state was not conclusive, it logically followed that rejection by a group of states carried no greater weight. Thus the fact that twenty-one states had rejected the child labor amendment and notified the Secretary of State, and four states had rejected without such notice did not destroy the amendment. That the present Article V does not allow rejection by one-fourth of the states plus one to defeat the amendment permanently was to some extent indicated by the Wadsworth-Garrett Joint Resolution in 1926 proposing an amendment which would expressly permit one-fourth of the states plus one to kill the amendment. In the case of the Fourteenth Amendment, ten states out of thirty-seven, or more than one-fourth, had rejected, yet Congress treated it as ratified. Thus the prevailing view seems to be that a rejection is not final. . . ."[6]

Likewise, Professor Walter F. Dodd, writing in the Yale Law Journal, said:

> ". . . it is perhaps clear that a state legislature has a continuing power of ratification until an amendment is adopted, or until such a long period has elapsed that a sort of statute of limitations may be said to have run against any power to ratify the proposal. It may be remembered that the power in the state legislature is one derived from the federal Constitution, and is a power to ratify, not a power to reject. If a (C)onstitutional amendment is proposed, one state legislative session may not by explicitly rejecting prevent the further exercise of the federal power conferred upon the state legislature. Rejection by a state legislature is in this respect equivalent to the negative result arising from state legislative inaction. There is no power in and of itself to reject a federal (C)onstitutional amendment, and failure to act by one-fourth of the states is sufficient. In the case of the Thirteenth Amendment, New Jersey first rejected the amendment and then ratified. In the case of the Fourteenth Amendment, four states (North Carolina, South Carolina, Georgia and Virginia) rejected and then ratified. In the case of the Fifteenth Amendment, Ohio and New Jersey rejected and then ratified. In all of these cases, where the action was taken previous to the issuance of the proclamation that an amendment had been adopted, the states were included by the Secretary of State as ratifying."[7]

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[6] Orfield, Professor Bernhardt, "The Amending of the Federal Constitution," The University of Michigan Press, Ann Arbor, Michigan, 1942, pp. 72, 73. Professor Hugh Evander Willis in "The Doctrine of the Amendability of the United States Constitution," 7 Ind. L. Journ. 457, 461 (1932), states for his reason in arriving at the same conclusion that "the Constitution mentions only ratification and not rejection."

[7] Dodd, Professor Walter F., "Amending the Federal Constitution," 30 Yale L. J. 321, 347 (1940). Other articles dealing with the subject which recognize the same argument are 11 So. Cal. L. Rev. 472, 473 (1938) and 24 Minn. L. Rev. 393, 395, 396 (1940).

Conclusion

It is apparent from what is said above that there exists a very respectable body of authoritative opinion by scholars who have addressed themselves to the subject which supports and, under the circumstances, in effect establishes the proposition that a state legislature may, after actively rejecting a proposed amendment, later validly ratify it. The clear logic upon which this proposition is based is that a state, when acting with respect to the federal Constitution, is not acting as an independent and sovereign power, but under powers granted to it or created in it by Article V of the United States Constitution itself. That article provides on this subject that Congress, whenever two-thirds of both houses deem it necessary, shall propose amendments to the Constitution which shall be valid when ratified by the legislatures of or by conventions in three-fourths of the states. It will be seen that the Constitution authorizes ratification only, and makes no mention of rejection; and this circumstance was cited by the United States Supreme Court in *Coleman* v. *Miller* in the language quoted above, as the controlling one.

The same logic applies directly to the other part of Article V, which provides that Congress shall, on the application of the legislatures of two-thirds of the states, call a convention for proposing amendments. A state presumably makes a Constitutional "application" when it adopts a resolution requesting Congress to take the desired action. There is nothing in Article V which authorizes a state, after it has made such an application, to cancel it or withdraw it. Whatever may be the power of a state acting as a sovereign to undo any action previously taken, the state in this instance is not acting as a sovereign, but as a branch of the federal union; and what it may validly do with respect to a Constitutional amendment is what the Constitution itself provides that it may do—that, and nothing more.

The inescapable conclusion is that the action of any state legislature which has heretofore purported to reject the present resolution calling for a convention to propose an amendment to limit the rate of income taxes is a nullity, and that the additional legislatures required to make up the two-thirds of the forty-eight states contemplated by Article V may come from among any or all of the legislatures which have not heretofore adopted the resolution, *including those which have purported to reject it.*