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The Joint Resolution as a Method of Redistricting States

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Statutes of limitation have been called statutes of repose.[22] The adoption of the New Jersey rule in New York State would accomplish such repose.

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THE JOINT RESOLUTION AS A METHOD OF REDISTRICTING STATES.

The Supreme Court recently had occasion to interpret the term "Legislature" under Section 4 of Article I of the Federal Constitution which makes provision for the election of representatives, as follows:

> "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."

The issue arose when the State of New York, by concurrent resolution of the Senate and Assembly, adopted April 10, 1931, sought to accomplish the districting of the state into forty-five districts for the election of representatives to the Congress of the United States. The Secretary of State, invoking the provisions of Article I, Section 4 of the Federal Constitution, and the requirements of the New York State Constitution, refused to certify that representatives were to be elected in the congressional districts defined in the resolution, in that it required the enactment of a law which had to be approved by the Governor. Mandamus proceedings were commenced to compel the Secretary of State to carry out the provisions of the concurrent resolution. The state courts, in sustaining the respondent's contention, held that the term contemplated the exercise of the law-making power. The Supreme Court affirmed this decision.[1]

Ordinarily the term "legislature" has reference to a representative law-making body. It has the power to do certain things with-

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[22] Adams v. Coon. 36 Okla. 644, 129 Pac. 851 (1913) p. 853: "Statutes of Limitation are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. 25 Cyc. 985." See also Hart v. Goadby, 72 Misc. 232, 129 N. Y. Supp. 892 (1911); Hayes v. McIntire, 45 Fed. 529 (C. C. W. D. Mo. 1891).

[1] Koenig v. Flynn, 141 Misc. 840, 253 N. Y. Supp. 554 (1931), *aff'd*, 234 App. Div. 139, 254 N. Y. Supp. 339 (1st Dept. 1931), *aff'd*, 258 N. Y. 292, 179 N. E. 705 (1932), *aff'd*, 285 U. S. 355, 52 Sup. Ct. 403 (1932).

out exercising that power through the medium or instrumentality of law. On the other hand, when used to designate the legislature in its law-enacting capacity, the formalities for the enactment of laws prevailing in that particular state must be applied. If the approval of the Governor to any bill is essential, his approval must be obtained, or where provision is made for the overriding of his veto, his veto must be overridden.

It is interesting to note what constitutes the legislature under the various provisions of the Federal Constitution. Article I, Section 2, prescribes the qualifications of electors of Congressmen as those requisite to be members of the lower house of the "state legislature." Article I, Section 3, provided that Senators shall be chosen in each state by the "legislature" thereof, and this was the method followed until the adoption of the Seventeenth Amendment. "That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election."[2]

In Article IV, it is provided that the United States shall protect each state against domestic violence upon application of the legislature, or of the executive, when the legislature cannot be convened. Members of the state legislature are required to take an oath to support the Constitution of the United States (Art. VI). The consent of the legislature is required on the purchase of lands for certain purposes (Art. I, Sec. 8). Two or more states may not merge without the "consent of the legislatures of the States concerned" (Art. IV, Sec. 3). In Article II, Section 1, it is provided that the presidential electors shall be appointed as the "legislature" may direct.[3]

Under Article V, amendments may be ratified by the "state legislatures." So also, Congress may, upon application of the legislatures of two-thirds of the states, "call a convention for proposing amendments." In *Hawke* v. *Smith*,[4] the Supreme Court held that an amendment to the Federal Constitution need not be submitted to the people of Ohio by referendum. This decision points out clearly the distinction between the legislative function of districting and the exercise of the ratifying power by the representative bodies of the state legislature:

> "It is true that 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 the Federal Constitution. The act of ratification by the State derives its

[2] Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. 495 (1920).
[3] McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3 (1902).
[4] *Supra* note 2.

authority from the Federal Constitution to which the State and its people have alike assented." [5]

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"Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required." [6]

The phrase "members of the legislature" is found in the Fourteenth Amendment, Sections 2 and 3. State action, to which the prohibitions of this amendment extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law.[7] The term "appropriate legislation" as used in the Eighteenth Amendment necessarily means such legislation as will tend to make this constitutional provision completely operative and effective.[8]

The constitution of the state of New York contains no provision on the subject of redistricting of the state for the purpose of electing representatives. Neither does it contain provision for a concurrent or joint resolution or for legislation by such means. It provides that the legislative power of the state shall be vested in the Senate and Assembly.[9] That no law shall be enacted except by bill,[10] and every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve he shall sign it, if not, he shall return it with his objections to the House in which it shall have originated. The

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[5] Hawke v. Smith, *supra* note 2, at 230.

[6] *Id.* at 231. The function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal one, derived from the Federal Constitution, and it transcends any limitations sought to be imposed by the people of the states in the constitution of those states. Leser v. Garnett, 258 U. S. 130, 42 Sup. Ct. 217 (1922). See also State v. Polley, 26 S. D. 5, 127 N. W. 848 (1910); Carroll v. Becker, 52 Sup. Ct. 402 (1932), *aff'g*, 45 S. W. (2d) 533 (Adv. Sheets March 1, 1932).

The distinction between the exercise of the ratifying function by the legislature and other functions is further referred to in National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486 (1920); U. S. v. Sprague, 282 U. S. 716, 51 Sup. Ct. 220 (1931); McPherson v. Blacker, *supra* note 3.

[7] Georgia Power Co. v. City of Decatur, 281 U. S. 505, 50 Sup. Ct. 369 (1930); Nashville etc. R. Co. v. Taylor, 86 Fed. 168 (C. C. Tenn. 1898), *modified*, 88 Fed. 350 (C. C. A. 6th, 1898); Owens v. Battenfield, 33 F. (2d) 753 (C. C. A. 8th, 1929).

[8] Rose v. U. S., 274 Fed. 245 (C. C. A. 2d, 1921), certiorari denied, 257 U. S. 655, 42 Sup. Ct. 97 (1921). See also National Prohibition Cases, *supra* note 6.

[9] Art. III, §1.

[10] Art. III, §14.

legislature may by a two-thirds vote of the members elected, pass the bill as a law over the objections of the Governor.[11]

In districting the state for representation in the House, New York has always proceeded by bill and not by concurrent resolution. The Court of Appeals has held that "a concurrent resolution of the two Houses is not a statute." [12]

In *Davis* v. *Hildebrant*,[13] the state constitution of Ohio contained a referendum provision for redistricting the state with a view to representation in Congress. It was held that the term "legislature" in Article I, Section 4, does not comprehend simply the representative agencies of the state composed of the members of the elected bodies, but comprehends the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including (in this case) the popular referendum provided by the laws of the state.[14]

In *McPherson* v. *Blacker*,[15] the court quotes Chief Justice Chase (*Texas* v. *White*, 7 Wall. 700, 721):

> "A state in the ordinary sense of the Constitution is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."

And continues:

> "The state does not act by the people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the Constitution of the State, and the sovereignty of the people as exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed." [16]

In *Smiley* v. *Holm*,[17] argued at the same time as the principal case, legislative enactment redistricting the state for congressional representatives was vetoed by the Governor. It was then, by resolution, ordered deposited with the Secretary of State without other action thereon. The constitution of the state of Minnesota provides that "the legislature shall have power to prescribe the bounds

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[11] Art. III, §15.

[12] People *ex rel.* Argus Co. v. Palmer, 12 Misc. 392, *aff'd*, 146 N. Y. 406, 42 N. E. 543 (1895).

[13] 241 U. S. 565, 36 Sup. Ct. 708 (1916).

[14] See Leser v. Garnett, Hawke v. Smith, National Prohibition Cases, all *supra* note 6.

[15] *Supra* note 3.

[16] McPherson v. Blacker, *supra* note 3, at 25.

[17] 285 U. S. —, 52 Sup. Ct. 397 (1932), *rev'g*, 184 Minn. 228, 238 N. W. 494 (1931).

of congressional * * * districts * * *." [18] And with regard to resolutions requiring the concurrence of both Houses provides:

> "Every order, resolution or vote requiring the concurrence of the two Houses (except such as relates to the business or adjournment of the same) shall be presented to the Governor for his signature and before the same shall take effect shall be approved by him or being returned by him with his objections shall be repassed by two-thirds of the members of the two Houses according to the rules and limitations prescribed in the case of a bill." [19]

The apportionment was held ineffective because it was not repassed as required by law. The Court said:

> "Whether the Governor of the State through the veto power shall have part in the making of state laws, is a matter of state policy. Article I, section 4 of the Federal Constitution neither requires nor excludes such participation. And provision for it as a check in the legislative process cannot be regarded as repugnant to the grant of legislative authority."

The New York Court of Appeals has held that the term "legislature" refers not only to the Senate and Assembly but to the law making body as a whole.[20] Since the legislature of each state is the creation of its constitution, what constitutes that legislature and what constitutes the proper exercise of its function resides in the state constitution or the court of last resort of the state in passing upon the legality of the acts of the legislature thereunder.[21]

ROSE LADER.

EXECUTORS, TRUSTEES—DOUBLE COMMISSIONS.

The question of whether a fiduciary, named both executor and trustee, is entitled to commissions in both capacities has frequently been reviewed by the Courts in this jurisdiction. The provisions

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[18] Art. IV, §23.

[19] Art. IV, §12.

[20] Doyle v. Hofstader, 257 N. Y. 244, 177 N. E. 489 (1931). "In the state of New York that department is not the legislature alone, but the legislature and the Governor, the one as much as the other, an essential factor in the process. * * * We beg the question when we argue that the legislature may give immunity because the legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the legislature and the Governor. *Cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U. S. 565; Hawke v. Smith, 253 U. S. 221. * * * The legislature can initiate, but without the action of the Governor it is powerless to complete."

[21] *Ibid.* See also Koenig v. Flynn, 258 N. Y. 292, 179 N. E. 705 (1932).