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## NOTES

## The Analogous Development of the Fair Trade and Tax Limitation Movements

by Frank E. Packard\*

THE FAIR TRADE ACT, or resale price maintenance, movement began in 1913. The movement to limit federal income, gift, and estate tax rates to twenty-five per cent in peacetime commenced in 1939. The fair trade act movement was spearheaded by the American Fair Trade League. The federal income, gift, and estate tax rate limitation movement is spearheaded by the Western Tax Council.

From 1914 to 1932, thirty federal fair trade bills were presented to the Congress. The Capper-Kelly fair trade bill<sup>1</sup> was rejected by the Congress in 1929 and again in 1932. The sponsors of, and adherents to, the fair trade act movement took a long view of the matter and decided that their efforts to achieve federal legislation on the subject would be best served by charting a new and different strategic course of action. As was observed in the *Harvard Law Review* in 1936: ". . . the rejection by Congress in 1932 of the Capper-Kelly bill to legalize resale price maintenance by contract spurred adherents to seek relief in state capitols."<sup>2</sup>

The first state general assembly to adopt a fair trade act was that of California in 1931.<sup>3</sup> As was pointed out in the *Marquette Law Review* in 1951: "The history of federal price maintenance legislation, or rather attempted legislation, begins in 1929 with the Capper-Kelly fair trade bill. It is to be noted that this bill, which did not pass, was introduced before any state had passed a fair trade act . . . The Capper-Kelly bill served as the model for the first state act. The California Fair Trade Act of 1931."<sup>4</sup> Professor James Angell McLaughlin in his article entitled "Fair Trade Acts" in the *University of Pennsylvania Law Review* in 1938 wrote as follows: "The federal law against resale

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<sup>1</sup> S. 240, 71st Cong., 1st Sess.; H. R. 11, 71st Cong., 1st Sess. (1929).

<sup>2</sup> 49 *Harvard Law Review* 811, 813 (1936).

<sup>3</sup> Deering's Cal. Business and Professions Code 1943, secs. 16900-16905.

<sup>4</sup> 35 *Marquette Law Review* 183, 192, 193 (1951).

price maintenance was not doomed to be demolished by a frontal attack, however. A flanking movement through the state legislatures proved to be much more effective. A California Statute of 1931, with extended sanctions added by amendment in 1933, was made the basis of a rapid and sweeping campaign through the states . . . When the United States Supreme Court upheld the Illinois and California Acts, the rout of the previous policy was virtually complete. The laggard legislatures climbed on the band wagon until forty-three acceded, and Congress adopted and the President (reluctantly, it is said) signed the Miller-Tydings Act, exempting from the Sherman Act resale price maintenance contracts lawful in the state where the resale is to be made.”<sup>5</sup>

After forty-three state legislatures enacted fair trade laws the Congress passed a fair trade law, the Miller-Tydings Act, in 1937.<sup>6</sup> The Miller-Tydings Act was an amendment of the first section of the Sherman Act of 1890<sup>7</sup> and of the fifth section of the Federal Trade Commission Act of 1914.<sup>8</sup> After the passage of the Miller-Tydings Act two additional states, Alabama<sup>9</sup> in 1939 and Delaware<sup>10</sup> in 1941, adopted fair trade acts, bringing the number of states having fair trade acts up to a present total of forty-five. The three states which do not have fair trade acts are Missouri, Texas, and Vermont. Missouri<sup>11</sup> and Texas<sup>12</sup> have laws against fair trade or resale price maintenance. There is no law on the subject either way in Vermont. The Miller-Tydings Act was amended in 1952, the new law being known as the McGuire Act.<sup>13</sup>

The movement to place a ceiling of twenty-five per cent on federal income, gift, and estate tax rates in peacetime in order to be effectuated requires an amendment to the Constitution of the United States. It would not mean amending the original Constitution but would mean only amending an amendment (the

<sup>5</sup> 86 *University of Pennsylvania Law Review* 803, 815, 816 (1938).

<sup>6</sup> 50 Stat. 693 (1937), 15 U. S. C. sec. 1 (1948).

<sup>7</sup> 26 Stat. 209 (1890), 15 U. S. C. sec. 1 *et seq.* (1946) as amended.

<sup>8</sup> 38 Stat. 719 (1914).

<sup>9</sup> Ala. Code 1940, tit. 57, sec. 78.

<sup>10</sup> Del. Code Ann., vol. 3, sec. 1902.

<sup>11</sup> Vernon's Mo. Ann. Stat., vol. 21, sec. 416.040.

<sup>12</sup> Vernon's Tax. Civ. Stat., vol. 20, art. 7426, sub-sec. 4; art. 7429.

<sup>13</sup> 66 Stat. 632 (1952), 15 U. S. C. sec. 45 (Supp. 1952).

Sixteenth Amendment) or, more technically speaking, repealing the Sixteenth Amendment and substituting an amendment in its place which would include gift and estate taxation as well as income taxation and would place a twenty-five per cent limitation on the rates of all three types of taxation.

In 1939 when the tax limitation program was launched the Congress showed little inclination of passing the proposed amendment to the Constitution. In order to make the pressure of public opinion and the sentiment of states felt by the Congress the tax limitation movement chartered a grass-roots course of action. The grass-roots plan of action meant pursuing the second of the two modes of amending the Constitution as specified for in the Fifth Article. The second method has never been utilized to completion, but already the tax limitation movement has utilized the second method much further than it was ever utilized heretofore.

The second method simply stipulates that two-thirds (thirty-two) of the general assemblies of the states may adopt resolutions advocating a suggested amendment to the Constitution and memorializing the Congress to call a convention for the purpose of considering the proposing of the suggested amendment and that if thirty-two state legislatures pass such memorialization resolutions it is mandatory upon the Congress to convene a convention for the purpose of deciding the proposing of the suggested amendment. This obligation upon the Congress is compulsory and mandatory rather than merely discretionary and optional as the word "shall" rather than the word "may" is used in the Constitution.

However, in order for public opinion and the sentiment of the states to influence the Congress in the matter it is not necessary for as many as thirty-two state legislatures to act. At present twenty-nine state legislatures have adopted memorialization resolutions advocating as a suggested amendment the limitation of twenty-five per cent on federal income, gift, and estate tax rates in peacetime. Responding to the sentiment of twenty-nine states and the manifested public opinion therein the Reed-Dirksen bill<sup>14</sup> with popular and powerful support was introduced in the Congress. In all likelihood the bill will be passed because it represents the crystallized sentiment of a clear majority of the

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<sup>14</sup> H. J. 103, 83rd Cong., 1st Sess. (Jan., 1953).

states. Thus, the necessity for a convention would be alleviated and by proceeding on the basis of action by twenty-nine state legislatures rather than by waiting for action by three more state legislatures in order to constitute the requisite number of thirty-two in accordance with the two-thirds provision, tax relief and economy in government may be brought all the sooner to the people of the United States. It would be better to persuade the Congress to take action rather than to force it to do so.

It took the legislatures of forty-three out of a total of forty-eight states by enacting fair trade or resale price maintenance laws to induce the Congress to pass the Miller-Tydings Act. If no additional state legislatures adopt memorialization resolution advocating the suggested tax limitation movement before the Reed-Dirksen bill is passed, then it will mean that twenty-nine out of a requisite thirty-two states have persuaded the Congress to pass the suggested tax limitation amendment to the Constitution. Passage of the Reed-Dirksen bill would seem to be practically assured due to the fact that legislative action by twenty-nine out of a requisite thirty-two states constitutes an even higher ratio of state backing than legislative action by forty-three out of a total of forty-eight states.

