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Amendments to Constitution: Ratification by State Convention

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AMENDMENTS TO CONSTITUTION: RATIFICATION BY STATE CONVENTION.—Two methods of ratifying amendments to the Constitution of the United States are provided for in Article V therein,¹ but the mode exclusively employed up to and including the Twentieth Amendment has been ratification by State Legislatures. The "Repealer"² of the Prohibition Amendment recently proposed by Congress, and submitted to the states for ratification, represents the initial use of the second method: viz., ratification by conventions in the several states.

Admitting no longer of any doubt, is the proposition that the Constitution expresses the will of the people and not that of the several states.³ From the people, through the Constitution, and only through it, are federal powers derived, either expressly or impliedly.⁴ To the extent of the powers so delegated, the Federal Government is supreme.⁵ Quite naturally, the proposed amendment presented the question—"Is Congress to dictate the formation of the conventions?" Has that power been delegated to Congress, or, impliedly, has reservation of it been made to the states?

The answer to the question is contained, directly or indirectly, in the extremely broad and general terms of Article V of the Con-

¹ CONSTITUTION OF THE UNITED STATES, Art. V: "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."

² Joint Resolution of both Houses, February 20, 1933:

"Proposing an amendment to the Constitution of the United States.

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein)

"That the following article is hereby proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

"Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution *by convention in the several States*, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Italics ours.)

³ *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816); *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495 (1920); *M'Culloch v. Maryland*, 4 Wheat. (U. S. 316) 1819.

⁴ *Dillon v. Gloss*, 256 U. S. 368, 41 Sup. Ct. 510 (1921); *Dodge v. Woolsey*, 18 How. 331 (U. S. 1855); *Martin v. Hunter's Lessee*, *supra* note 3.

⁵ *Hawke v. Smith*, *supra* note 3; *M'Culloch v. Maryland*, *supra* note 3; *Dillon v. Gloss*, *supra* note 4.

stitution. If any power has been delegated, it must be found therein. Congress, as the people's sole representative, is directed to propose amendments whenever two-thirds of both Houses shall deem it necessary, or "on the application of the legislatures of two-thirds of the several states," and to determine the one or the other mode of ratification; whether "by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof."⁶

In forming the Constitution, the realization of the impossibility and impracticability of specifying in detail each of the delegated powers, together with the perils and dangers accompanying the same, resulted in the people embodying therein fundamental principles and general delegations of powers only.⁷ Not for a limited existence, but for ages, was the instrument created. Changes in conditions, wrought by time, were unforeseeable; and, that specifications and restrictions would present a serious and a constant menace to a continuous existence was evident.⁸ What a hundred and fifty years ago was expedient, is today obsolete and unusable, and, likewise, what today is appropriate, is tomorrow discarded as worthless. Necessarily, therefore, the Constitution does not go into detail, and much depends upon implication. What is reasonably to be implied, is as much a part of the Constitution, as that which is expressly stated.⁹

Because legislatures are existent and determined representative groups of the people, a choice of that mode results thereby in a complete setting up of the ratification machinery. That, however, is not so when conventions are concerned. Some agency is required to create them. An extensive grant of power to Congress resides in Article V.¹⁰ The President of the United States possesses no

⁶ CONSTITUTION, Art. V, *supra* note 1; *Dodge v. Woolsey*, *supra* note 4, "It is Supreme over the people of the United States aggregately and in their separate sovereignties because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States when two-thirds of both Houses shall propose them; or where the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress."

⁷ *Dillon v. Gloss*, *supra* note 4, at 376, "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions require."

⁸ *Martin v. Hunter's Lessee*, *supra* note 3.

⁹ *Dillon v. Gloss*, *supra* note 4; *Drexel v. Bailey*, 276 Fed. 452 (D. C. W. D. N. C. 1921), *aff'd*, 259 U. S. 20, 42 Sup. Ct. 445 (1925); *Martin v. Hunter's Lessee*, *supra* note 3, at 326, "Hence its powers are expressed in general terms, leaving to the legislature to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests should require."

¹⁰ *Dillon v. Gloss*, *supra* note 4, at 373, "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments."

right to veto a proposed amendment.¹¹ A proper federal function was the placing of a time limit for ratification of a proposed amendment.¹² Implications favor federal authority. Uniformity in ratification is desirable¹³ and can be gotten solely by federal action.

Complete control of proposing amendments and of selecting the mode of ratification, unhampered by any express restrictions, is given Congress.¹⁴ No claim of any power based upon an express provision may be made by the states: "As the one or the other mode of ratification may be proposed by Congress" is language more than sufficiently broad to justify congressional control of the entire amendatory procedure. No limitations are placed upon congressional powers therein found. In Congress has been vested the discretion of determining which mode constitutes the more appropriate means of realizing the general will of the people.¹⁵ Upon it rests the burden of obtaining the people's sanction through truly representative assemblages.¹⁶ That alone can represent the true import of the article. To say that Congress has a choice between legislatures and conventions is meaningless, if the formation of the conventions has been impliedly reserved. Such an implication derogatory of federal powers militates against the clear, unambiguous language of the supreme law of the country. Ratification might have been left to popular vote or some means other than that selected, but that was not desired.¹⁷

Hawke v. Smith,¹⁸ a case concerned with the Eighteenth Amendment, is decisive of the question. Slightly more than twelve years have elapsed since that decision, but in that short space of time it has become recognized as an authority on ratification. The constitution of the state of Ohio, the thirty-sixth state to signify assent to that amendment, reserved to the people of that state the right to adopt or reject the legislative act of ratification of a constitutional amendment by a referendum. An injunction was sought to restrain the Secretary of State from submitting the act of the legislature to a popular vote. The Supreme Court held that the framers of the Federal Constitution, clearly understanding the terms of that instrument, had made the Federal Government the exclusive, irrevocable agent for the people to amend; that the people and the states, having assented to its provisions, could not alter or change

¹¹ *Hollingsworth v. Virginia*, 3 Dall. 378 (U. S. 1798).

¹² *Dillon v. Gloss*, *supra* note 4.

¹³ *Infra* note 22.

¹⁴ *Hawke v. Smith*, *supra* note 3; *Dillon v. Gloss*, *supra* note 4.

¹⁵ *Dillon v. Gloss*, *supra* note 4.

¹⁶ *Ibid.*; *Hawke v. Smith*, *supra* note 3, at 226, "Both methods of ratification call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress."

¹⁷ *Hawke v. Smith*, *supra* note 3.

¹⁸ *Ibid.*

the method selected by Congress.¹⁹ The act of the State Legislature, in ratifying or rejecting, is derived from the Federal Constitution, and is a federal act as distinguished from an act of state legislation,²⁰ and as such not subject to challenge by the state or its people.²¹ Similarly, the acts of the conventions represent the exercise of a federal power. Since the acts are federal, of a like nature are the conventions themselves. Their very existence is dependent upon the will of Congress.

With a feeling of regret, is noticed the refusal of Congress to exercise its implied power. Perhaps, motivated by a desire to avoid litigation, it has resolved to remain passive. The wisdom of so doing will soon be manifest. Uniformity of conventions will be lacking.²² The ratification of the amendment is left to the slow, impassive wills of state legislatures,²³ which, it is ventured, will cause delay exceeding that which might have been occasioned by any litigation. Moreover, an undesirable precedent has been established.

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¹⁹ *Ibid.*; National Prohibition Cases, 253. U. S. 350, 40 Sup. Ct. 486 (1919).

²⁰ *Ibid.* at 229, " * * * ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word."

²¹ *Hawke v. Smith*, *supra* note 3; *Leser v. Garnett*, 258 U. S. 130, 137, 43 Sup. Ct. 217 (1921), "But 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 function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."

²² *Hawke v. Smith*, *supra* note 3, at 230, "Any other view might lead to endless confusion in the manner of ratification of Federal Amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states."

²³ A. B. HART, *EPOCHS OF AMERICAN HISTORY* (1925) 140, "The Federal Convention was determined that the consideration of its work should not depend, like the Articles of Confederation, upon the slow and unwilling humor of the legislatures, but that in each State a convention should be summoned solely to express the will of the State upon the acceptance of the Constitution."