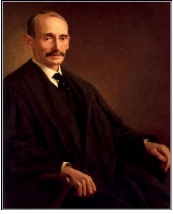
General Discussion
HAWKE v. SMITH, 253 U.S. 221 (1920)


Day

William Rufus Day, (Associate Justice 1903-22, Secretary of State, 1898, Judge, U.S. Court of Appeals, Sixth Circuit, 1899-1903), delivered one of the most sweeping Court opinions regarding Article V, Hawke v Smith, 253 U.S. 221 (1920) (hereafter Hawke). This decision resolved several questions about Article V. Primary among these questions was the Court's finding that states operate under the authority of the *federal* Constitution not their own state constitutions when involved in the amendatory process. Thus, an Article V Convention is a *federal* process, not a *state* process.

Many legal theories advocate "state" control of the convention meaning state legislatures or political groups which control them, control the convention. All these "alternative" theories ignore Hawke and several other Supreme Court rulings to arrive at their one common proposition: state legislatures, by authority of their state constitutions, possess the right to pre-determine all aspects of a convention—including delegate selection, agenda and amendment proposition. In their theories, a convention is no more than a figurehead event with all real power held by the state legislatures (or special interest groups controlling the legislatures) rather than the people. Hawke rejected all these theories nearly a century ago.

Hawke is the first of several Court decisions describing the amendment proposal process based on the actual language of Article V which the Court quotes, "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…"

In describing this provision of the Constitution, the Court said, "The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of *the people of the United States*. [Emphasis added]. McCulloch v. Maryland, 4 Wheat. 316, 402 (hereafter McCulloch). The states surrendered to the general government the powers specifically conferred upon the nation, and the Constitution and the laws of the United States are the supreme law of the land."

Having concluded the Constitution is a constitution of the people (not the states) and is supreme *law* of the land, the Court then addressed the specific issue of Article V. The Court said,

> "This article [Article V] makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the Legislatures of two-thirds of the states; thus

securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

The Court then stated,

> "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, and is limited to two methods, by action of the Legislatures of three-fourths of the states, or conventions in a like number of states." … "The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."

The Court then dismissed the action of the state of Ohio which had permitted ratification of a proposed amendment by use of a state referendum saying,

> "…ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." … "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 authority from the federal Constitution to which the state and its people have alike assented."

Hawke makes it clear Congress is bound to the text of the Constitution. It can take no action contrary to the textual language of Article V. Thus, when the Constitution demands Congress call a convention it has no more choice regarding a call than it, or the states, have regarding the mode of ratification—Congress and states are limited to the modes of amendment described in Article V with no variance of any description permitted.

In the case of a convention call, the language is therefore as peremptory as the choice of mode of ratification. The Court describes conventions as "deliberative assemblages *representative of the people* which it was *"assumed would voice the will of the people."*" The Court gave no reason for discrimination between a ratification convention being a "deliberative assemblage representative of the

people and an Article V Convention having the same characteristics. Finally, as mentioned earlier, Congress has, by passage of appropriate law, accepted the premise an Article V Convention shall be a "deliberative assemblage representative of the people" with the obvious intent of voicing "the will of the people." Thus both court ruling and federal law preclude tyrannical control of an Article V Convention in which state legislatures eliminate the people entirely from the amendment process.

Moreover the Court did not provide any basis to presume its finding as to the source of authority for ratification (the federal Constitution) did not equally apply to amendment proposal. The stark nature of the question before the Court—whether state action can control part of the amendment process for the federal Constitution—required the Court to describe any variance in its utter rejection of such state control if such variance was permitted. If, for example, state control of an Article V Convention based on the authority of state constitutions were permissible *clearly* the Court would be obligated to state this exception. Instead the Court states the text of Article V is "plain" using the word in such context as to obviously mean no further explanation is required on the part of the Court.

Therefore the states operate *at all times* under the authority of the *federal* Constitution which *expressly* describes the limits of state authority and in the case of amendment *proposal* limits the states to submission of application for a convention call by Congress with the consequent convention making the actual proposal of amendments. Further, the text of Article V, together with its determination in Hawke make it clear the call is obligatory on the part of Congress and based exclusively on a numeric count of applying states with no terms or conditions. As previously noted in this Appendix, this interpretation has already been officially expressed by Congress.