THE INHERENT SAFETY IN CALLING A CONVENTION FOR THE PURPOSE OF PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

By

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Under the provisions of Article V of the Constitution of the United States amendments may be proposed in either one of two modes: by passage by two-thirds of those present in each of both houses of the Congress, a quorum being present in each house, or by passage by a convention called by the Congress in response to resolutions adopted by two-thirds (or thirty-two) of the several State legislatures memorializing the Congress to call such a convention. A convention may merely propose. It not only has no power to ratify, but also has no power to provide which of the two modes of ratification (by State legislatures or by State conventions) shall be used. The latter power is lodged in the Congress. It is the singular purpose of this paper to prove conclusively and for all time that the calling of such a convention is not analogous to the opening of a Pandora's box.

The calling of a convention for the purpose of proposing amendments to the Constitution is, according to Professor Hugh Evander Willis, by a simple majority of the Congress and is also without the necessity of obtaining the approval of the President. The question arises as to whether the method of selecting delegates to the convention would be determined by the Congress or by the States and whether the convention would vote by population ratios or by States. Professor Lester Bernhardt Orfield declares that: "If the precedent of the Constitutional Convention were followed, the call would be addressed to the states, and would leave to them the method of selecting delegates; and the convention would vote by states." Mr. Wayne B. Wheeler states that: "In the Convention of 1787 that framed the present Constitution the delegates were elected by states and voted by states. This precedent would probably be followed in a future constitutional convention if one should be held. As a matter of political expediency, a convention call would probably be addressed to the states and leave to them the method of selecting delegates."*

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3 Hollingsworth v. Virginia, 3 Dall. 378, 1 U. S. 644 (1798); Hawke v. Smith, 253 U. S. 221, 229 (1920).
Another problem which confronts us is whether a convention called by the Congress under the terms of Article V could undertake to promulgate an entirely new Constitution for the United States. Professor Orfield declares that: "Perhaps the most important question concerning a convention is as to the extent of its powers. Could it propose a wholly new constitution? Article V says that Congress 'shall call a convention for proposing amendments.' If this rule were interpreted literally, it might be argued that the convention could not propose an entirely new constitution in the form of a single document superseding the existing Constitution." Mr. William A. Platz states that: "But if the convention were to have such power (to propose a new Constitution), would not Article V so state, without leaving the matter to inference?"  

Still another question which manifests itself is whether a convention which goes beyond the scope of its powers, as, for example, attempting to usurp legislative functions, can be restrained by legal process. The Supreme Court of Pennsylvania declared in 1874 in *Wells v. Bain* that: "The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to delegate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an OPEN Court to redress at our hands." The Supreme Court of Michigan stated in 1908 in *Carton v. Secretary of State* that: "Should the convention attempt to exercise authority not conferred upon it, its action can be restrained the same as can any other body acting illegally."  

"A convention has no inherent rights, in the words of the Supreme Court of Pennsylvania. Therefore, the inherent safety in a convention! The fact that the authority of delegates to a convention is not set forth in Article V is no cause for alarm. The Supreme Court of New Hampshire declared in 1889 in *Opinion of the Justices* that: "*** the authority of the delegates is not set forth. They are not endowed with the entire sovereignty of the state. Their agency, like every branch of the public service, is not marked on all sides by fixed bounds."  

Yet another problem, one of especial significance, which poses itself is whether the subject matter contained in the memorialization resolution represents to a convention only the power of suggestion or whether such subject matter constitutes

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8 Wells v. Bain, 75 Pa. 39, 57 (1874).  
10 Wood's Appeal, 75 Pa. 59, 69, 73 (1874).  
11 Opinion of the Justices, 76 N.H. 612, 613, 85A. 781, 782 (1889).
the only topics for proposed amendments which the convention may consider and act upon by adopting or rejecting. The Supreme Judicial Court of Massachusetts declared in 1833 in Opinion of the Justices that: "If, however, the people should by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified."

The Court of Appeals of South Carolina (now the Supreme Court of South Carolina) stated in 1834 in The State ex rel. M'Cready v. Hunt that: "If **** the people, electing delegates in their primary capacity, had, by a majority of their ballots, specified a particular measure to be considered and decided in the convention, will it be pretended that the convention would have possessed authority for any other purpose?"

The authorities are in agreement and support the foregoing judicial opinions to the effect that the subject matter contained in the memorialization resolutions constitutes the only topics for proposed amendments which the convention take under consideration and act upon accordingly. Professor Thomas M. Cooley declares that: "The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass."

Professor Henry Campbell Black states that: "A constitutional convention has no authority to enact legislation of a general sort, and if the convention is called for the purpose of amending the Constitution in a specified part, the delegates have no power to act upon and propose amendments in other parts of the Constitution."

Historically, the only subject matter ever contained in State resolutions memorializing the Congress to call a convention consists of the following topics for proposed amendments:

1. Against protective tariff
2. Direct election of Senators
3. Prohibition of polygamy

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12 Opinion of the Justices, 60 Mass. 573, 575 (1833).
4. Direct election of President, Vice President and Senators
5. Control of trusts
6. Constitutionality of State enactment
7. Imposition of twenty-five per cent limitation on income, gift and estate taxes
8. World federal government.

Number 2 and one-third of number 4 of the foregoing as outstanding subject matter for the consideration of a convention called by the Congress would seem to have been cancelled out by the adoption of the Seventeenth Amendment. The continuation of number 1 as subject matter for the consideration of a convention seems largely to have been negated by the establishment and pursuance of a policy of reciprocal trade treaties between the United States and the several Pan American republics. Likewise, the pendency of number 3 as subject matter for a convention's consideration seems for the most part to have been avoided by the institution and pursuance of a policy of disapproval of polygamy by the Church of Jesus Christ of Latter-Day Saints. Also the preservation of number 5 as subject matter was impaired by the passage of the Sherman\(^{16}\) and Clayton Anti-Trust Acts.\(^{17}\)

Thus, the foregoing process of elimination would leave only two-thirds of number 4 and numbers 6, 7 and 8 as legitimate and prevailing subject matter today for the consideration of a convention called by the Congress for the purpose of proposing amendments to the Constitution of the United States.

\(^{16}\) July 2, 1890, ch. 647, 26 Stat. 209.

\(^{17}\) Oct. 15, 1914 ch. 323, 38 Stat. 730.