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REJUVENATING THE CONSTITUTION

The Committee on the Federal Constitution has said in its platform: "The people of the United States have not control over their fundamental law at the present time, save in a minor degree. The consequence is, our institutions do not reflect the popular will, but in reality other forces over which we have only a measure of control. Our community life, therefore, is not what it would be had we the power to shape it in our own way." In the May issue of the *YALE LAW JOURNAL* Mr. Joseph R. Long took issue with this statement. The purpose of this article is first, to consider Mr. Long's argument; second, to point out his bias; third, to state the facts.

Mr. Long quite properly eliminates the first ten amendments, added when the constitution may be said to have been still in flux. From 1804 until 1913 but three amendments were adopted and these "practically by force of arms." Mr. Long claims that a new era in the amendment of the constitution entered with the consideration of the Income Tax Case in 1895, when the Supreme Court held the law of the year before to be unconstitutional. Before the end of that year resolutions were introduced into both houses looking to the adaptation of the constitution to the sentiment of the people. To quote Mr. Long: "From time to time other resolutions to the same end were offered, and in July, 1909, the Sixteenth Amendment as we now have it was passed by both houses of Congress and submitted to the states. On February 25, 1913, Secretary of State Knox certified that it had been ratified by the required number of states and was a part of the constitution. The amendment was thus adopted within about three and one-half years after it was proposed by Congress, and so for the first time in forty-three years the constitution was amended, and for the first time in over a century it was amended except as a result of civil war."

The contention that fifteen adoptions out of two thousand proposals to amend the constitution would indicate that it is unamendable is met by Mr. Long as follows: First, "Upon a study of these proposals it is found that they relate to a comparatively small number of different subjects. Slavery alone, and the questions arising out of its abolition, have been the sub-

ject of more than five hundred of the amendments proposed. * * * Probably one hundred proposals were made that senators should be elected by direct vote of the people." Second, "When we consider the character of the amendments proposed we find that they frequently do not represent any real and permanent public sentiment, but embody merely the notion of some individual Congressman or a temporary popular emotion that passes with the exciting cause."

If the reader be bewildered, Mr. Long harmonizes these contradictions with the contention, "The trouble is that the people have rarely come to any general agreement as to what changes they wished made in the constitution." This observation is supported by the following illuminating data, "Up to 1889 thirty-seven amendments were proposed for the election of the president by the direct vote of the people, the first of these having been offered in 1826." On the length of the presidential term and the question of reëligibility Mr. Long says: "Up to 1889 about one hundred and twenty-five amendments had been submitted on these subjects, and others are added at practically every session of Congress. The favorite proposition is to fix the term at six years, usually with a provision that the president shall not be eligible to reëlection." After showing how many times the same subject has been proposed without result, Mr. Long's commentary is, "The people have shown that they can promptly amend their constitution by doing it." Lest this might not seem proved by the preceding instances, it is followed by the statement regarding the Sixteenth and Seventeenth Amendments: "It is true that these amendments were first proposed long before they were adopted, but this lapse of time was not because the process of amendment is difficult but because time is inevitably required to develop a sentiment in favor of a proposed change however simple the mode of adoption may be. The Sixteenth Amendment was adopted eighteen years after the decision in the Income Tax Case, which in normal times is as promptly as could be expected."

If this separation of sentences from their context seems to do violence to Mr. Long's characteristic legal method of presenting the case, the reader must turn back to the original article. He will then be grateful for having had separated from the historical survey of constitutional amendment the personal predilections of the author. Referring to the Income Tax Case, that was decided, it may be remembered, by a vote of five to four (six weeks after a tie vote, four to four, Justice Jackson having returned, but

Justice Shiras reversing his vote), Mr. Long dispassionately says, "It is the one case which every soap-box orator fulminating against the courts and the constitution can certainly name." This method of measuring the desirability of ease of amendment by one's own preferences Mr. Long evidently supposes will be shared by everybody. He says later: "The burden is upon those who claim that the constitution is inadequate or outgrown to show wherein this is true. What amendments would they propose? Would the amendments proposed by one critic be acceptable to another?" Is it impertinent to ask, what has the preference of the reader or the author to do with the permanent value of a document devised in the eighteenth century for an eighteenth-century civilization? When 2760 proposals have failed to pass, is it necessary to ask which ones any individual prefers?

Mr. Long says of the numerous amendments relating to marriage and divorce: "This class of amendments may be even more objectionable in that they impair the sovereignty of the states without any commensurate gain. * * * Marriage is recognized as the very foundation of society, and this matter is too vital to be surrendered by the states." How inconsequential is public opinion anyhow to the trained legal mind is shown by the appended statement: "An amendment prohibiting polygamy has been several times proposed in order to enable the federal government to suppress polygamy in states where it is sanctioned or tolerated. *To this amendment there would seem to be no serious objection, but probably there is not sufficient general interest in the subject to secure its adoption.*" (Mr. Long is innocent of the italics. They are inserted to show the similarity of this kind of fiat objection to the reported attitude of the Kaiser and the late President Baer.)

"Lest we forget" the author also commends the accidental and distorted use of the Fourteenth Amendment by saying, "The first section of the Fourteenth Amendment is a most important and meritorious addition to the constitution, though open to criticism in respect to its provision relating to citizenship." Mr. Long, in his enthusiasm for private property as against human rights, seems momentarily to have overlooked his mission of defending the state against the federal government. He says of the Fourteenth Amendment: "It gave the Supreme Court the veto power over all state legislation and greatly increased its appellate jurisdiction over the proceedings of the state courts.

* * * the authors of this amendment unwittingly effected a revolution in our government." As the great merit of the constitution is to maintain stability, according to the best traditions of the past, it is a shock to find this defender of the antique rejoicing in revolution, but it is made intelligible by the fact that the people did not want the revolution. It was as irrelevant and unpopular and unexpected as was the first draft of the constitution itself.

It would not be fair to attribute to all conservative minds the contradictions of this author. They do unhappily represent the attitude of those who are governed by precedent rather than science. After threading our way through this maze of personal prejudice, it may be profitable to consider the facts regarding the constitution and the possibility and need of amendment. There is hardly anything in American life about which there has been so much confusion as the United States Constitution. Mr. Long says, "The great principles of human liberty which it embodies are eternal." It is one of the issues involved in the desire to modify the constitution: Does it embody the eternal principles of human liberty? What is oftener at stake in the minds of the unthinking is revealed in Mr. Long's statement, "New amendments tend to impair the dignity of a constitution." One of the most pathetic social phenomena is the endeavor of the genteel poor to maintain their dignity. One of the fertile sources of needless wars is the traditional necessity of decadent nations to maintain their dignity. Surely the merit of the constitution must be that of maintaining liberty rather than dignity. The question which Americans must increasingly answer is: Can any venerable document, however traditionally honorable, meet the needs of a changing society? The issue in this discussion is: Can the constitution of 1789 be amended with the speed and success essential to efficient government?

It is hardly possible to discuss the desirability of ease of amendment without considering whether the constitution has really achieved what its eulogists claim. It must not be forgotten that the constitution is an artificial product. The colonies had rebelled against a mother country, where the latest ideas in self-government were concerned chiefly with the limitations of monarchy. A rising commercial class merited and demanded fewer restrictions upon their activity. They were financially dominant. They wanted corresponding political power. It did not occur to them to share self-government with the masses.

The American constitution makers felt free from the danger of hereditary royalty and aristocracy. The responsible men who framed the constitution, however, distrusted the multitude. Besides, there was no guarantee as yet that the crowd had the capacity for self-government. It is true a number of the colonies had had democratic constitutions, but there was in them an intense localism and no need of a strong government to defend them against foreign oppression. The federal government must be stable, while not menacing the, as yet, unassimilated states. It was inevitable that the propertied individuals, who supplanted the democratic leaders of the American Revolution in the Constitutional Convention, should seek some method of stability that would seem safe while not being hereditary. It was thought desirable to protect the constitution against the emotional outbreaks of the people. This was done by the so-called system of checks and the difficulty of amendment.

Those who fear the incorporation into the constitution of the passing whim of the multitude underestimate the most important psychological fact in the political education of the American people. The difficulty of amendment and the remoteness of their legislators have unfitted the people for clear thinking on statute and constitution making. The difficulty of articulating the will of the people has not been relieved by the steady multiplication of commonwealths with their several sets of statutes. Innumerable bills are presented to the state legislatures and Congress at every session. It has been estimated that every time Congress and all the state legislatures meet—that is biennially—they collectively add 25,000 statutes for the legal guidance of the American people. The mother country passed 21,000 in the nineteenth century! With such a bewildering array of legislation it is not surprising that the collective mind is foggy. Between the voter and the law he demands and is expected to obey there stand a primary or caucus, a convention, a campaign, a committee to receive bills, a lobby to direct, fight, or modify bills, a House, and a Senate (in each of which these processes must culminate), the passage of the bills in a mutilated form, if at all, from one House to another and back again, the possible election of another or several Congresses, the election of the president by afore-mentioned methods, and the securing of his signature, followed in most cases (if the law is significant), by submission to a Supreme Court appointed for life and above any revision by the people or their representatives! Lest this tedious course should not sufficiently handicap the will

of the mob, the amendment of the constitution was made more difficult than it is in any other country having a representative government.

Overlooking any country, like Great Britain, having an unwritten constitution, it is illuminating to notice that the constitution of France may be amended by the passing of a measure through the upper and lower houses and then jointly through both. In Switzerland amendment may be secured by the combined vote of both houses or on the initiation of the people. In the Australasian commonwealths it is scarcely more difficult.

Not only is it harder to amend the constitution in this than in other countries, but the system of checks has become a more onerous burden on the people by the gradual usurpation of legislative powers by the Supreme Court. Alexander Hamilton justified the appointment of Supreme Court judges by the president for life on the ground that "the complete independence of the courts of justice is peculiarly essential in a limited constitution." It was not, however, intended, even by the conservative framers of the United States Constitution, that the legislative bodies should lose their independence. As Jefferson said, "For intending to establish three departments, coördinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation." The Supreme Court has steadily assumed legislative powers so that the people not only have to run an almost interminable gauntlet of legislative method, buttressed by a constitution difficult of amendment, but they may have the legislation they desire nullified by a body over which they have no control and which was not designed for this function. It is not possible, therefore, to say offhand: Are certain proposals desirable amendments to the constitution? One must first observe the difficulty of the people in knowing what laws or amendments are desirable when they live under a constitution that inhibits thought.

Whatever the prejudices of the members of the Constitutional Convention of 1789, there is no doubt that they honestly thought that it should be made difficult to amend the constitution. This was partly due to their ignorance of social psychology so that their timid distrust of the people imposed upon the people limitations that helped to make them untrustworthy. The constitution makers were also harassed by two bodies: the slave holders and the small states—special privilege seekers whose motives were none the less menacing because they were sincere. This power

of the slave holders, embodied organically in the constitution, proved to be a red herring across the path of American thought for over half a century. It was so overpowering that the people had no encouragement to think intelligently about the adaptation of the constitution to the national needs. This enervating force has been partially overcome, but continues in a measure its sinister influence in the persistent emasculation of the Fourteenth Amendment. The power of the small state remains undiminished in the structure of the Senate. One cannot face frankly the prejudices and special privileges clogging the minds of the constitution makers, when they framed the amendment act, without believing that it does not represent the final word in political intelligence.

It is a shallow mind indeed that tries to measure the merit of an amendment system by the particular amendments that it would or would not like to have incorporated in the constitution. To measure the craftsmanship of Alexander Hamilton, James Madison, Gouverneur Morris, and the rest by one's own preferences regarding prohibition, equal suffrage, or divorce is pathetic.

It is imperative that we consider the 2777 proposals to amend the constitution in less than a century and a quarter from the standpoint of the change in the country in that time, even more than from the motives of the constitution makers. Dr. Tanger, in a study of the proposed amendments of the past quarter of a century, enumerates 1800 proposals to amend the constitution from 1789 to 1889 (15 of these were passed); 977 from 1889 to 1913 (2 were passed). Of the 2760 proposals that failed of their purpose, 10 passed one house, all of them concerned with the method of election and terms of office of president or senate. Dr. Tanger notes that the amendments proposed increased from 66 in 1889-91 to 130 in 1911-13.

Mr. Long rightly says that the desire for amendment reflects the mood of the times. That might be considered a reason for making amendment difficult if the times did not change so much that amendment becomes imperative. Those amendments that were introduced at once and may be almost considered an organic part of the original constitution were manifestly due to fear of the federal government. In spite of the extraordinary powers given to the states, twelve amendments were promptly incorporated to protect the states and their citizens against the encroachment of the federal government. The second period from 1804 to the Civil War represented an experimental application of an artificial constitution to a growing country. As has been previously noted, the popular mind was tyrannized over by slavery.

There was as little clear thinking about constitutional or governmental affairs as there is in Texas while the prohibition agitation is on. Four hundred amendments were proposed in fifty-eight years, no one of which passed the labyrinth in which it was designed to be lost by the framers of the constitution. It is quite probable that most of these proposals were vagaries of the time. Nevertheless, forty-four amendments changing the method of electing the president were proposed. It would surely take a hardy standpatter to justify the electoral college, but no one of these proposals had the vigor to run this marathon.

While the people found themselves unable to amend the constitution to meet their uncertain needs, popular confusion and the multiplication of laws put the art of law making unhappily in the hands of those who practise law. The dominance of the profession which profits by the interpretation of the law has certainly not made it easier for the layman to become a statesman. In no country in the world are there so many lawyers in proportion to the population and in no country are useless laws so rapidly multiplied to the confusion of the science of government.

The third period of change, when really significant amendments were carried, was the direct consequence of the war and cannot be said to be normal. It is true that the passage of these amendments and the subsequent failure of nearly one thousand proposals led to the belief that the constitution was unamendable. It is not a sufficient answer to this skepticism to indicate that two amendments were passed in quick succession. One of these was passed eighteen years, the other eighty-seven years after it was first proposed.

It is idle to overlook the fact that the fourth period (from 1870 to date) is one of revolutionary industrial and commercial changes. The nation spread not only across the continent, but beyond the seas; the population doubled; capital increased incredibly. A new form of industrial organization—the trust—appeared; labor was organized on a hitherto unknown scale; the most extensive transportation system of the world was developed. The physical and intellectual means of communication assisted to homogeneity the most diversified peoples. These colossal changes necessitate an attempt to adapt the constitution of 1789 to an entirely different kind of civilization from the one for which it was planned. The only significant change made to meet this new civilization is the great American maid-of-all-work, the Inter-State Commerce Commission.

It is not only the civilization that has been transformed. The political organization of the country has been modified in defiance

of the constitution. The nation must meet today political situations that could not possibly have been anticipated by the most far-sighted and impartial constitution makers. Nothing but the perpetual reading into the constitution by the Supreme Court of new principles could have enabled it to hold the respect and loyalty of the people. Political evolution has followed three unexpected paths: (1) party government has been invented since the adoption of the constitution; (2) states' rights have assumed entirely new forms; (3) new international problems have arisen.

The constitution has never been adapted to the political party, which came in response to the necessity of some kind of national organization in the days of feeble federal power. The party gave the voters of the different states a bond. Since it has no organic place in the form of government it is constantly running counter to the intention of the constitution. That ancient document is inflexible. Congressmen are elected for two years; senators for six years; the president for four years. The new Congress begins to sit only after the Congress rejected by the people has held another session. The whole purpose of the constitution makers was to avoid quick response to the people. The consequence is the party is irresponsible. Platforms and campaign pledges are national jokes. The thoughtlessness of the public, induced by inexperience in adapting their form of government to changing needs, is nowhere better exemplified than in their unconsciousness of governmental inefficiency due to the conflict of constitution and party.

States' rights in the newly organized republic consisted almost exclusively in putting the small states and the slave holders on the defensive. In these latter days national extension and commercial unity have completely altered the functions of government. The election of senators by direct vote was the first step taken to relieve the legislatures of obligations requiring them to sacrifice state to national interests. Some of the states have begun to emancipate themselves for state efficiency by giving municipalities home rule. Nevertheless, an entire reassignment of functions to community, state, and nation seems inevitable if each geographical area is to have home rule and scientific government. Perhaps the constitution does not stand in the way so much as previous interpretations would indicate. It is sometimes overlooked that the section which assigns to the states all those functions not delegated specifically to the federal government concludes with the significant words, "or to the people." It is possible that the arrogance of the Supreme Court has prevented

the representatives of the people from using the constitution to the full, but it is only another indication that the principle of states' rights originated in the endeavor to placate inharmonious colonies and remains an incubus upon governmental development today. Freedom of amendment might have led to some undesirable amendments, as doubtless the present method has, but the people would have learned their way in the complexities of dogma and precedent.

Whatever form the international relations of the future may take, it is evident that the forty-eight commonwealths are still so independent of the federal government that national integrity is difficult. The limited federal powers embarrass the government in dealing with foreign nations. Cities and states are experimenting in new constitutions and charters. Many of these experiments are vain endeavors to put new wine into old bottles, but some of them illuminate the highway of governmental efficiency. When the amended constitution of the state of Ohio provides that a law passed by the representatives of the people can be declared unconstitutional only by a unanimous vote of the Supreme Court, it may not provide the final answer to the Dartmouth College case, the Dred Scott decision, and the Income Tax decision, but it indicates that the opportunities for thinking in terms of Ohio are more abundant than in terms of the United States. When several hundred cities alter their government organically, substituting for the arbitrary separation of the executive and legislative a scientific hierarchy with executive subordinate to legislature (the council or commission), they reflect not only the best parliamentary traditions of Europe, but the business experience of America. That these democratic and well-nigh universal changes in governmental efficiency should find so little reflection in Washington must ultimately compel the thoughtful citizen to give attention to his remoteness from the constitution.

As Emerson said of creeds, constitutions "show how far the waters once came." The Constitution of the United States is a venerable and unintelligible document to most citizens and to many statesmen. It will become familiar and vital only when it can readily be made contemporaneous.

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