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JOS. R. LONG

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TINKERING WITH THE CONSTITUTION

There has recently been formed a society, with headquarters in Brooklyn, having for its object the securing of an amendment to the federal constitution. The society calls itself a "Committee on the Federal Constitution," and the amendment which they advocate is one providing easier modes of amendment than those prescribed in Article V. They propose to "carry on a campaign of education in favor of this measure through the daily and periodical press, book and pamphlet publication, letter and circular, and pulpit and platform." Among the members of this committee are men of national reputation and of the highest rank in the intellectual world. When men of this character unite upon such an undertaking, the movement is entitled to at least respectful consideration. And this is not the first nor the only effort that has been made to accomplish the same object. During the recent period of unrest through which we have been passing, in which the courts, the constitution, and our fundamental political institutions generally, have been subjected to the attacks of the muckrakers, a number of resolutions have been introduced in congress proposing similar amendments. Such an amendment was introduced by Senator La Follette in 1912, and its adoption has been urged upon Congress by the legislature of Wisconsin. And even since the adoption of the Sixteenth and Seventeenth amendments in the single year 1913, these "gateway" amendments are being proposed.

The theory, of course, upon which this radical change in our fundamental law is being urged is that the constitution does not now express the real will of the people, and that it is practically unamenable in the modes now provided. As stated in the published platform of the Brooklyn committee, "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. We propose in this paper briefly to inquire whether this contention is true. The satisfactory solution of the problem will require some examination of the history of proposed amendments to the constitution.

When the constitution was submitted to the states in 1787 its framers did not regard their work as final but contemplated that amendments would be made from time to time. Accordingly they provided in Article V a mode, or rather two modes, of amendment. Their expectation that amendments would be proposed in the future has been amply realized. While the constitution was still before the people for adoption, numerous proposals for amendments were made by the conventions of seven of the ratifying states, and in the first session of Congress in 1789 nearly two hundred such proposals were introduced. Since that time resolutions proposing amendments have been introduced in one or more of the sessions of practically every Congress to the present time. During the first century of the constitution, that is, up to the close of the fiftieth Congress in March, 1889, over sixteen hundred such resolutions were introduced in the two houses of congress.¹ The number of amendments proposed in the several Congresses presents a wide range of variation. Thus in the case of one Congress, at least,—the thirty-fourth,—it appears that not a single resolution to amend was introduced, while in the sessions of the thirty-ninth Congress, during the troubled years 1865-1867, nearly two hundred such proposals were made. In the fifty-second Congress seventy-three amendments were proposed, and, in more recent times, during the second session of the sixty-second Congress (December 4, 1911-August 26, 1912) five amendments were proposed in the Senate and twenty-eight in the House, a total of thirty-three. And during the first session of the sixty-third Congress (April 7, 1913-December 1, 1913) twelve amendments were proposed in the Senate and forty in the House, or fifty-two in all. Of the forty amendments proposed in the House, six were proposed by a single representative, Mr. Hobson, of Alabama.

With Congress composed of about five hundred and twenty-five members, every one of whom is at liberty to introduce proposals to amend the constitution, it is not surprising that several such proposals are made at every session of Congress. It is estimated that about thirty thousand bills are introduced during each session, and the wonder is not that proposals to amend the constitution have been so numerous but rather that they have been so few.

¹ See Ames' Proposed Amendments to the Constitution.

Of the hundreds of amendments that have been introduced in the two houses of Congress only twenty-one have received the required two-thirds vote of both houses and been submitted to the states, and of the twenty-one only seventeen have been adopted. Twelve amendments were proposed by the first Congress in 1789, and of these ten were adopted by 1791 as the first ten amendments. Then followed the Eleventh (1798), Twelfth (1804), Thirteenth (1865), Fourteenth (1868), Fifteenth (1870), Sixteenth (1913) and Seventeenth (1913) Amendments. Of the rejected amendments, two were proposed by the first Congress. One of these, relating to the apportionment of representatives, failed of adoption by the ratification of only one state. The other related to the compensation of members. An amendment proposed in 1810 provided that if any citizen of the United States should accept any title of nobility from any foreign power, or, without the consent of Congress, accept any present or office from any foreign power, he should cease to be a citizen of the United States and be incapable of holding any office thereunder. This amendment likewise came within one ratification of adoption, and was for some years actually supposed to be a part of the constitution. In 1861 there was proposed by Mr. Corwin of Ohio an amendment prohibiting an amendment abolishing slavery. This amendment was referred to with approval by President Lincoln in his first inaugural address and was submitted to the states. It was ratified by the legislatures of Ohio and Maryland and by a convention of Illinois as the Thirteenth Amendment, but was then lost sight of in the confusion of war. The Thirteenth Amendment afterwards adopted was of precisely opposite import.

From the foregoing summary it appears that the constitution has been amended only eight times since its adoption in 1789. The first ten amendments, which were all adopted at one time and immediately after the constitution went into effect, may be regarded as practically a part of the original constitution. From the adoption of the Twelfth Amendment in 1804 until 1913, a period of 109 years, covering substantially the entire history of the United States as a nation, there were but three amendments, and these were adopted only as a result of civil war and practically by force of arms. Moreover, for nearly forty years after the adoption of the last of the war amendments no proposed amendment had succeeded even in passing both houses of Congress.

In the light of these facts it is not surprising that many thoughtful men deemed the constitution practically unamendable under normal conditions. Thus Professor Charles A. Beard says: "The extraordinary majorities required for the initiation and ratification of amendments have resulted in making it practically impossible to amend the constitution under ordinary circumstances, and it must be admitted that only the war power in the hands of the federal government secured the passage of the great clauses relating to slavery and civil rights."² So also Mr. Wilson, about thirty years ago, wrote: "It would seem that no impulse short of the impulse of self-preservation; no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment erected in Article Five. That must be a tremendous movement which can sway two-thirds of each house of Congress and the people of three-fourths of the states."³

These expressions are fairly representative of the opinion of students of constitutional history a few years ago. But in 1895 came the *Income Tax Case* in which the Supreme Court held that the income tax law of 1894 was unconstitutional.⁴ No decision since the *Legal Tender Cases* has attracted such general attention, and probably none since the *Dred Scott Case* has been so widely condemned. It is the one case which every soap-box orator fulminating against the courts and the constitution can certainly name, though probably very few even of the more intelligent citizens could now state exactly what was decided in that famous case. The decision may have been incorrect; certainly competent critics have thought that in it a low water mark was reached in the history of the Supreme Court. At any rate, it took hold of the popular imagination. About this time the trusts were rising into prominence. Enormous fortunes were being quickly made by a favored few and attracting the envious attention of the unfortunate and discontented. And if incomes were practically untaxable by the federal government, the rich would escape their just share of taxation. With the poor the income tax is popular for it does not affect them. Consequently the imposition of such a tax, since it would fall exclusively upon the rich or well to do, appealed strongly to the great mass of

² American Government and Politics, 62.

³ Congressional Government, 242.

⁴ *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601.

the population, who were willing enough to impose a tax which they would not be called upon to pay. A respectable sentiment was therefore developed in favor of an amendment to the constitution to authorize the imposition of an income tax, and before the close of the year in which the decision was rendered (1895), resolutions were introduced in both houses of Congress to authorize the laying of an income tax without apportionment.

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. It is not the purpose of this paper to discuss the merits of the Sixteenth Amendment. On this point opinions may differ. The supreme significance of the amendment is that its adoption proved that the constitution could be peaceably amended if the people really so desired. Forty years before the overwhelming sentiment of the country was against slavery, and, even without the war, it seems certain that slavery would sooner or later have been abolished either by an amendment to the federal constitution or by the individual action of the slaveholding states. So also, when the sentiment of the country was again aroused, this time in favor of the income tax, the necessary amendment was adopted with reasonable promptness. It would seem that three and one-half years is a sufficiently short time in which to make a change in our fundamental law. But scarcely had the country recovered from its surprise at learning that the constitution was not in fact unamendable, when it was called on to witness an even more rapid change. The Seventeenth Amendment providing for the election of the senators by the people passed the Senate on June 12, 1911, and the House on May 13, 1912, on which day it was submitted by Congress to the states. It received the ratification of the last necessary state on May 9, 1913, and on May 31, Secretary Bryan certified that it had become a part of the constitution. Thus the Seventeenth Amendment was ratified in four days less than one year from the day on which it was proposed, and in less than four years two

independent and unrelated amendments were added to the constitution.

Now that it has been so convincingly shown that the constitution can be peaceably amended in the constitutional mode, we may from a somewhat different point of view re-examine the earlier history of proposed amendments to ascertain why amendments have so generally failed in the past. Time and again the fact that about two thousand amendments had been proposed with only fifteen adoptions, has been urged to prove that the constitution is practically unamendable. However, 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 subject of more than five hundred of the amendments proposed. More than this number have been proposed relating to the executive, especially in connection with the length of the presidential term and the question of re-eligibility. Probably one hundred proposals were made that senators should be elected by direct vote of the people before this proposition was finally embodied in the Seventeenth Amendment. Thus it appears that, while hundreds of amendments have been proposed, many of them are simple repetitions, and as a matter of fact, the number of independent propositions of consequence has been small.

Again, 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. Many of the amendments proposed are of the most trivial character or relate to matters of detail far better left to legislation. Such are provisions fixing the salary of the president, or defining the jurisdiction of the inferior federal courts. More than once it has been proposed to amend the preamble so as to include some recognition of God. What are we to think also of a proposition made by a representative to change the name of the United States to "America"? More serious perhaps is Representative Victor Berger's proposal to abolish the senate. The character of the amendments proposed is naturally largely determined by the trend of public sentiment at the time, and often popular fads find expression in resolutions to amend the constitution. Of late there has been a disposition to make the impeachment of judges easier, and even to introduce into the federal system the

recall of judicial decisions, or the referendum. Before these innovations have been given an adequate trial by the states it is proposed to adopt them for the national government. Most of the proposed amendments die in the committees to which they are referred. Very few have sufficient merit to come to a vote.

As just suggested, the proposals to amend the constitution reflect in their nature the temper of the times. At certain periods, owing to political or economic conditions, the constitution attracts to an unusual degree the attention of the people, and amendments are proposed to meet the supposed needs of the day. The most conspicuous instance of this is found in the amendments relating to slavery. Very few amendments on this subject were introduced prior to 1860, but from the opening of the second session of the thirty-sixth Congress in December, 1860, they were offered in great numbers, mainly in the vain hope of averting a conflict between the sections. About two hundred resolutions affecting slavery were proposed during this session, including the Corwin amendment prohibiting federal interference therewith. The final result of this activity was the adoption of the three war amendments. The Eleventh Amendment was occasioned by the decision in *Chisholm v. Georgia* that a state might be sued in a federal court by a citizen of another state. Again, the deadlock in the presidential election of 1800 led to numerous proposals to change the mode of selecting the president, resulting finally in the adoption of the Twelfth Amendment. In most cases none of the amendments suggested to meet needs supposed at the time to be imperative have been adopted. Generally it has been found after the temporary conditions of unrest have disappeared, that the proposed amendments were not needed and that the constitution has been adequate as it stood. Thus after the "salary grabs" by Congress in 1816 and 1873, when Congress increased its own compensation, amendments were introduced providing that such increases should not take effect until after the succeeding election of representatives. These, however, were not adopted, simpler expedients being resorted to. In the first instance the offending representatives were not re-elected and in the second case Congress itself took the hint and repealed the objectionable law. We may note, however, that an amendment to this effect was one of the twelve proposed by the first Congress but was rejected by the states. The veto power of the president has quite frequently been the

subject of proposed amendments. The frequent use of this power by Presidents Jackson and Tyler led to a number of attempts to curb the power. On other occasions the agitation has been for the enlargement of the power, especially by enabling the president to veto certain items in a bill, notably in appropriation bills, while approving the rest. Again, upon the failure of the impeachment proceedings against Judge Chase in 1805, John Randolph, in his disappointment, immediately introduced a resolution for the removal of judges on the joint address of both houses of Congress, and the next year re-introduced the same amendment. In the next six years nine other amendments for the removal of judges were proposed. Then the excitement on this line subsided, and except for several such proposals scattered over a long period of years, no such agitation has occurred until the recent notorious attack upon the judiciary began. It now seems that the recent removal of one judge by impeachment and the disciplining of several others have taken the point out of the proposition to amend the constitution in this particular. The amendments proposed illustrate what Carl Schurz describes as "the dangerous tendency of that impulsive statesmanship which will resort to permanent changes in the constitution of the state in order to accomplish temporary objects."⁵

The federal constitution has so far been a fairly stable document. It has never been revised as a whole, and has been changed by amendment in only a few particulars. It has happily escaped the fate that has befallen the constitutions of the states. Not only are they subject to constant change, but they have long since ceased to be constitutions in a true sense. Instead of embodying broad general propositions of fundamental permanent law, they now exhibit the prolixity of a code and consist largely of mere legislation. No one now entertains any particular respect for a state constitution. It has little more dignity than an ordinary act of the legislature. In Oregon, according to Judge Moore of the Oregon supreme court, "it requires no more effort nor any greater care to amend a clause of the constitution than it does to enact, alter, or repeal a statute."⁶ In similar strain the attorney general of Oklahoma once declared in a public address that it was easier to amend the constitution of that state than to amend a statute of the state legislature and took

⁵ Quoted in Ames' Proposed Amendments to the Constitution, 132.

⁶ *State v. Schluer*, 59 Ore. 18.

less time. If this be correct, it would seem that the degradation of the state constitution could no further go. The constitution of the United States is justly regarded as the greatest instrument of government ever ordained by man. For more than a century it stood almost unchanged. Some of the greatest judges in history have interpreted and applied its provisions and in their decisions have developed an unequalled system of constitutional law. It is not true, as is often asserted, that Marshall and his associates and successors have strained the constitution and wrested it from its original character and made a new constitution. The constitution, in essentials, means to-day what it meant one hundred years ago. The great principles of human liberty which it embodies are eternal; new conditions may arise calling for new or enlarged applications of these principles, but, with the exception of a few matters covered by the three war amendments, no important addition to the constitution has been made in a century and none has been imperatively needed.

A constitution to be respected as fundamental law must possess in a reasonable degree the quality of permanence. Of course it should not be incapable altogether of being changed to meet new conditions, but just as each new exception weakens the force of a rule, so new amendments tend to impair the dignity of a constitution. Any unnecessary amendment is a distinct injury, and wherever the object sought can be accomplished in some other way, the constitution ought not to be amended. Thus if Congress has the power to do by legislation what the amendment is intended to accomplish, it is both useless and harmful to alter the fundamental law for this purpose. For example, amendments prescribing the details of the jurisdiction of the inferior federal courts, which have been proposed, are objectionable on this ground, since the jurisdiction of these courts is already entirely subject to the control of Congress. So also of proposed amendments fixing the salary of the president, or the compensation of members of Congress. Amendments of this character are subject to the further objection that they relate to details. To admit such amendments in a constitution which, "from its nature deals in generals, not in details," would cause it soon "to partake of the prolixity of a legal code." Equally objectionable on this general ground are amendments to accomplish results which may be accomplished by state action, of which conspicuous instances are found in the numerous amendments relating to woman's suffrage, prohibition, and 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.

No one would contend that an amendment embodying the real will of the people should not be added to the constitution provided the same object cannot readily be attained in some other way. The trouble is that the people have rarely come to any general agreement as to what changes they wished made in the constitution. Probably no matters have been more frequently the subjects of proposed amendments than the mode of electing the president and the presidential term. These topics seem to be of perennial interest. It has been stated that no question gave the framers of the constitution so much trouble as the question of the method of choosing the executive. The indirect method finally selected by the convention worked smoothly only so long as Washington consented to serve as president, and even before the electoral vote in the election of 1796 had been counted, an amendment changing the mode of voting was proposed. The question was not settled by the adoption of the Twelfth Amendment in 1804. Since then many amendments have been proposed on this subject. 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. But the abolition of the present mode of electing the president seems not probable in the near future. No other plan yet proposed has met with general approval, and the fact that the constitution is already practically changed in this respect and the president elected by popular vote seems to satisfy the people. Amendments to change the mode of election are still being proposed but the people are not interested in the subject. Of late much more attention has been paid to the presidential term and the question of re-eligibility. 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 reelection. But even on these questions the people have not made up their minds, or rather they seem to prefer to determine these questions as to any particular president upon the merits of the individual case. If they think the term of a particular executive too short, they reelect him for another four years. If they think he ought

not to be reelected, they, by their vote, declare him ineligible. And perhaps it is best to leave the matter as it stands. Certainly no formal prohibition of a third term has yet been necessary.

Another favorite amendment is that giving the president power to veto a single section of a bill which he otherwise approves, particularly to veto items in appropriation bills. There seems to be much in this proposition to commend it, but the subject does not appeal to the people. It excites no popular interest and will therefore probably not soon be adopted. And there is high authority against it. Mr. Taft in his speech at the University of Virginia in January, 1915, said: "While it would be useful for the executive to have the power of partial veto, I am not entirely sure that it would be a safe provision. It would greatly enlarge the influence of the president already large enough. I am inclined to think it is better to trust to the action of the people in condemning the party which becomes responsible for 'riders' than to give in such a powerful instrument a temptation to its sinister use by a president eager for continued political success." In the same address Mr. Taft favored a limitation of the president's tenure of office to a single term of seven years.

The two proposed amendments now most prominently before the public are those relating to woman suffrage and national prohibition. As both these subjects appeal strongly to large numbers of persons, the proposition to amend the constitution along these lines has aroused unusual interest. So great is the interest in prohibition especially that it is not impossible that the prohibition amendment may be ultimately adopted. In the writer's judgment neither amendment would be proper. Without any reference to the merits of the two questions in the abstract, it would seem that there is no occasion to amend the constitution to secure either of the objects aimed at, for both are attainable without a constitutional amendment. Any state that desires woman suffrage can adopt it for itself whenever it wishes to do so. No national aid is required. Moreover, the franchise is a matter which belongs peculiarly to the states, and unless it is desired to impair the autonomy of the states and centralize the government even more than has yet been done, a provision on woman suffrage has no place in the federal constitution. The experiments with the suffrage question in the Fourteenth and Fifteenth Amendments were not so successful as to invite other adventures in that field. The practical nullification of these provisions meets with general satisfaction, and their

formal repeal has more than once been proposed. The first woman suffrage amendment, it may be remarked, was likewise a product of the reconstruction period, having been introduced in 1866. Since then numerous amendments on this subject have been proposed, and on January 12, 1915, such an amendment was rejected by the House of Representatives by a vote of 204 to 174.

The first prohibition amendment was proposed in 1876, but no special interest was taken in the subject until quite recently, such amendments being quite frequently proposed at present. On December 22, 1914, Mr. Hobson's resolution proposing an amendment for nationwide prohibition received a majority of 197 to 189 votes. The strength shown in this vote indicates the hold which the prohibition sentiment has gained, and it would not be surprising to see this amendment adopted. However, it is unnecessary, and for that reason at least is objectionable. As in the case of woman suffrage, each state may adopt prohibition for itself, as many have done, and reenforced by acts of Congress state prohibition can readily be made effective, if, indeed, any prohibition law could be enforced. But even if it be desired to control the matter by a national law, Congress already has power to enact the necessary legislation. Through its control of interstate commerce and the postal service, and by the exercise of the taxing power, if necessary, Congress can put an end to the liquor traffic just as it has suppressed lotteries and oleomargarine disguised as butter and regulated the trade in foods and drugs. The prohibition of the transportation of liquor in interstate commerce or by mail, and the refusal to carry liquor advertisements or orders or newspapers containing such advertisements in the mails, and also the imposition of a prohibitive tax on the manufacture and sale of liquor, would soon put an end to the business. This, at any rate, seems as far as the federal government should go in the matter. National prohibition was vigorously denounced by Mr. Taft in a recent speech in Boston, in which he said: "It would revolutionize the national government. It would put on the shoulders of the government the duty of sweeping the doorsteps of every home in the land. If national prohibition legislation is passed, local government would be destroyed. And when you destroy local government you destroy one of the things which go to make for a healthy condition of national government. National prohibition is not enforceable; it is a confession

on the part of the state governments of inability to control and regulate their own especial business and duty."

Another proposed amendment somewhat akin to the foregoing is the amendment to authorize a national marriage and divorce law. At present, of course, Congress has no power to legislate on the subject of marriage and divorce, and the extent of the divorce evil is a matter of general notoriety. Also it is well known that marriage may be held valid in one state and void in another, thus giving rise to various complications as to inheritance, and other questions. But public attention has been especially directed to the evil of the practice of obtaining divorces on a pretended residence in a state other than the domicile of the plaintiff, as in the case of many of the divorces obtained at Reno and other jurisdictions having loose divorce laws. It is likely that this particular branch of the divorce evil is of far less consequence than is commonly supposed, that such divorces constitute a small part of the total number of divorces granted, and that the divorce evil is due far less to differences of state laws than to other causes. But even admitting the evil of the so-called "migratory divorces," no national legislation is necessary to put an end to them. As the law now stands no state is compelled to recognize a divorce obtained in a state where the plaintiff was not *bona fide* domiciled. This has been expressly held by the Supreme Court in several cases.⁷ That such divorces are tolerated and the parties permitted to marry again without being prosecuted for bigamy, is simply because public sentiment sanctions such marriages and no one cares enough for good morals to have the parties prosecuted. Further, marriage is recognized as the very foundation of society, and this matter is too vital to be surrendered by the states. A national law would have to operate uniformly over the entire country, and a majority in Congress could easily force upon the southern states, where negroes are numerous, the intermarriage of whites and blacks by the votes of representatives from states where there are few negroes. So also California might be compelled to recognize the intermarriage of whites and Chinese by the votes of representatives from other states where there are practically no Chinese. 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.

⁷ *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179.

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.

It might have been expected that the almost uniform failure of proposed amendments to secure adoption would lead to frequent attempts to simplify the mode of amendment. Such, however, has not been the case. The first proposal to change the method of amendment was made by the Rhode Island convention which ratified the constitution in 1790. This proposal was to make amendment more difficult by providing that no amendment should be made without the consent of eleven of the original states. No effort to make amendment easier seems to have been made until 1864 and again in 1873, in which years resolutions reducing the veto required for adoption were introduced. These resolutions never came to a vote in Congress. Of late several such resolutions have been proposed, as already mentioned above. Prior to the adoption of the Sixteenth and Seventeenth Amendments there may have appeared to be some necessity for an amendment providing an easier method of amendment, but that there was in fact no such necessity experience has now abundantly shown. And in the judgment of the writer such an amendment is not only not necessary but dangerous.

No amendment embodies so much potential danger as an amendment making the constitution so easily amended that it may be changed by a minority, or even by a majority, of the people to suit every passing fancy. The constitution would soon be reduced to practically the level of the constitutions of the states if a very easy mode of amendment were adopted. At one time, as we have seen, thoughtful men were of opinion that the constitution was practically unamendable and that a simpler mode of amendment was necessary unless the constitution were to remain unchanged except by judicial amendment and practical evasions. There is no longer reasonable ground for any such opinion. The people have shown that they can promptly amend their constitution by doing it.

There is no great difficulty in securing the adoption of any amendment that a decided majority of the people of the United States really want, and certainly no other amendment should be added. It has been assumed by the advocates of some of the proposals for simplifying the method of amendment that a majority ought to determine the organic law, but this view

ignores one of the fundamental objects of a constitution, that is, the protection of the minority against the majority. This is amply secured by the requirements of Article V. It is impossible to amend the constitution without sufficient deliberation to enable the people to form an intelligent opinion on the subject. The constitutional safeguards of our liberties cannot be overthrown at the passing whim of a fickle majority. It is fortunate indeed that it was not possible to put through some of the amendments aimed at the judiciary during the recent wave of insanity on that subject that is only now subsiding.

It has more than once been pointed out that a small minority of the voters of the country, by being aptly distributed in the smaller states, may defeat an amendment favored by a great majority of the people. It might with equal propriety be suggested that the proper distribution of a few votes might sometimes change the result of a presidential election. But such a possibility is inevitable unless state lines are to be wiped out and the country treated as a unit. Moreover it is none the less true that it is theoretically possible to adopt an amendment to the constitution against the wishes of the twelve most populous states having an aggregate population of more than half the population of the United States. That is, an amendment might be adopted by a minority of the voters of the country. But juggling of this sort constitutes no argument.

The prompt adoption of the Sixteenth and Seventeenth Amendments proves that the constitution can be amended within a reasonable time even under normal conditions. 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. Even the Spanish War did not so embarrass the government as to make the need of an income tax seem urgent. Great nations think slowly, and taxation is a dull subject.

The development of a sentiment for the Seventeenth Amendment was naturally not so rapid; the question involved was far more complex. The election of senators by popular vote was first proposed in 1826, but for nearly fifty years the proposition excited little interest. Previous to 1872 nine resolutions on the

subject were introduced, but about that time the subject took a strong hold upon the people and in the next seventeen years the change was proposed about thirty times. In the first session of the fifty-second Congress twenty-five resolutions on the subject were introduced. The legislatures of several states recommended the amendment.⁸ Finally under the pressure of increasing popular demand the amendment was several times passed by the House, and at last, in 1911, passed the Senate also. Within one year of its final passage by the House (May 13, 1912) it was ratified by the last necessary state, and on May 31, 1913, declared in force. Considering the nature of the question it would seem that in this case also the amendment was adopted with reasonable promptness. When the ratification of the required three-fourths of the states can be obtained within twelve months there is little room to complain. In the words of Mr. Justice Holmes, "a state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English chancery, with all deliberate speed."⁹ If this remark is apt when applied to one of the states, it is even more so when applied to the United States.

The great lesson of the war amendments is that amendments should not be made hastily or in the height of popular excitement. Already it has been proposed to repeal the Fifteenth Amendment and certain portions of the Fourteenth. They have never really been operative. 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. But that this amendment should have merit is a happy accident. It did not accomplish the purpose for which it was forced upon the states, but, in a way of which its authors doubtless never dreamed, it has had a tremendous and, on the whole, a beneficent effect. It was intended to secure certain rights and privileges to the negro; it failed of this purpose, but it revolutionized the relations of the state and the national governments. 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. Thus in their efforts, under stress of passion, to promote, as they supposed, the interests of the negro, the authors of this amend-

⁸ Ames' Proposed Amendments, 61.

⁹ *Virginia v. West Virginia*, 222 U. S. 17.

ment unwittingly effected a revolution in our government. Yet they did not accomplish what they aimed at.

It is a serious matter to amend our fundamental law. As in the case of the Fourteenth Amendment, momentous consequences may lurk unsuspected in amendments innocent on their face. 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? We suspect that most of the changes advocated by the various critics have already been proposed time and again in Congress without attracting serious attention. Such changes could not be secured however simple the mode of amendment. As already shown, changes really desired by the great body of the people may be made by the present method without serious difficulty. The constitution is not perfect. The result of compromise in the first instance, it is not the embodiment of a philosophic scheme of government but a working instrument of practical statesmanship. In the hands of the Supreme Court it has been admirably fitted to the needs of successive generations of our people. When necessary, or when the people really desire it, it can be amended. The present mode of amendment assures its stability while permitting natural evolution; a simpler mode might work its destruction.

Jos. R. Long.

LEXINGTON, VA.