

AMENDING THE CONSTITUTION OF THE UNITED STATES.

"An appetite for organic change is one of the worst diseases than can affect a nation."³

The Fifth Article of the Constitution of the United States stands alone in its simplicity. It has neither sections nor clauses, and but one paragraph. Yet as it stands it is one of the most important parts of that Constitution, although it has received less attention and has been the subject of fewer discussions than almost any other portion of that document.

It has within itself the power to overturn every other provision of the Constitution; to effect the change of every fundamental and organic law; to entirely alter the system of government under which we live. The framers of the Constitution were dubious about this article for that very reason. They felt that they had struggled and agonized to get an organic law, and that within this clause was concealed the enemy which would make all that agony and all that struggle vain. Why make a constitution which should endure forever, why scrutinize its every phrase, why work over every proposition hour after hour and day after day, and then place within this very document that was to guarantee safety and liberty to every inhabitant of the land, one brief and succinct article which might nullify all the rest? Why do and undo in one breath? Yet they were wise enough to know that they could not frame a fundamental law that should be unchanging for all time. They knew that there must be in the future changes which would make it imperative that this organic law which they were so skilfully shaping would need widening and altering to suit the spirit of a later day.

It has frequently been assumed that this writing into a constitution of an article of self amendment was an original thought with the members of the Constitutional Convention of 1787. No one has more clearly pointed out the error of this idea than Mr. Sidney George Fisher in his *Evolution of the Constitution*

³ Lecky, *Democracy and Liberty* (N. Y. 1896) Vol. 1, p. 153.

of the United States.² Not to go back into history farther than the history of colonial America, we find that in Penn's Frame of Government—the Pennsylvania Frame of May 2, 1682,³ the provision,—“There shall be at no time any alteration of these laws, without the consent of the Governor, his heirs or assigns, and six parts of seven of the freemen, met in Provincial Council and General Assembly.” The next year, February 2, 1683, the clause was changed to read, “No act, law or ordinance whatsoever, shall at any time hereafter be made or done by the proprietary and Governor of this province and territories thereunto belonging, his heirs or assigns, or by the freemen in provincial Council or Assembly, to alter, change or diminish the form or effect of this charter, or any part or clause thereof, contrary to the true intent and meaning thereof, without the consent of the proprietary and Governor, his heirs or assigns, and six parts of seven of the said freemen in provincial Council and Assembly met.”⁴

November 7, 1696, a similar provision was made in the Frame of Government of that date, the proprietary being omitted from the number of those whose consent must be obtained.⁵ This is, of course, the allowance of amendment by implication, but it is clear that it was intended that the Governor and Assembly should have the power of amending the Frame of Government when they found it necessary to do so. Mr. Fisher says, “It was a natural thought, and there is no evidence that either Penn or his people believed that they were suggesting anything wonderful. But their method, as the summary shows, was repeated and repeated until, after running through many of the constitutions of 1776, the Articles of Confederation, and other American documents, it found its place in the National Constitution.”⁶ The other colonial charters did not contain pro-

² Fisher, S. G., *The Evolution of the Constitution of the United States*, Phila., 1897.

³ Colonial Records, Vol. 1, p. XXXIV.

⁴ *Ib.* pp. XXXIX.

⁵ *Ib.* p. XLVIII.

⁶ Fisher *Evolution of the Constitution*, p. 177.

visions for amendment.⁷ The clause is repeated in the Charter of Privileges of 1701. But it excepts the first article relating to liberty of conscience from any alteration forever.⁸ Franklin's Article of Confederation of 1775, provide (Art. XII) "As all new Institutions May have Imperfections, which only Time and Experience can discover, it is agreed, That the General Congress, from time to time, shall propose such amendments of this Constitution as may be found necessary; which being approved by a Majority of the Colony Assemblies, shall be equally binding with the rest of the Articles of this Confederation."⁹

This phrasing has a very familiar sound to our ears, and was, of course, a part of the common knowledge of the men who sat in the Convention of 1787. By that time eight state constitutions contained similar provisions. Five of the states conferred the power to amend upon conventions which should be held for the purpose.¹⁰ It is not possible to assert with absolute authority that the Constitution of 1787 was the first instrument to provide a method of securing amendments in the manner set forth in the Fifth Article, but it is assumed by most writers on the subject that this was an original method for securing the end intended, and many claim that it is an "American idea." Yet, when the matter was first taken up in the convention it was postponed; members did not seem interested in the proposition. Some were opposed to it, and it was not until September, almost at the end of the Convention, that it was proposed in practically its present form, and incorporated in the Constitution by the Committee on Style. The thought of the Convention on the subject of amendments appears to have been concentrated almost entirely upon the amendments which the Convention had practically bound itself to propose at the earliest possible moment after the adoption of the Constitution by the requisite number of states. The purpose of the members of the Convention was to get the Constitution rati-

⁷ Watson, Constitution of the U. S., Vol. 2, p. 1302.

⁸ Records, Vol. 2, p. 57.

⁹ Watson, Constitution of the U. S., Vol. 2, Appendix 2, p. 1687 (1775).

¹⁰ Watson, Constitution of the U. S., Vol. 2, p. 1302.

fied and the government set going, then, if necessary, the machinery for amending the instrument could be put in better shape and made practicable. Strangely enough it has not been found necessary to make the anticipated changes. The plan as it came from the Committee on Style, while not debated at such length as other parts of the Constitution, seems to have grown into the national Constitution, as so many other apparently new propositions did, through the provisions of the state constitutions, so recently formed and debated in the states themselves;—the colonial charters, the Frame of Government of Pennsylvania, the Articles of Confederation. These had all been models one after another, and the provisions of these written documents, each expressing in its own form the ideas of the citizens of the various parts of the country, had sunk into the minds of the men who had had to live under them, and many of whom had debated publicly and privately, as to the wisdom or unwisdom of their provisions. The subject matter of this clause had become a part of the civic consciousness; the citizens had learned the necessity of amending charters or frames of government. Franklin was sitting in the Convention and could urge once more that it was necessary to amend "those imperfections which only time and experience can discover." It may well have been that there was more talk about the matter outside than inside the room where the Convention sat, and that Franklin did some of the talking. But indeed it does not appear that there was felt to be any novelty about this idea to those sitting in the Convention; they were used to it; they acknowledged that they were not all-wise; that indeed they were very far from omniscient, and that the work of their hands might very well be found imperfect. Indeed they said so¹¹ and were very far from claiming that

¹¹ "I had no idea, that all the wisdom, integrity, and virtue of this State, or of the others, were centered in the Convention." Luther Martin, Farrand, Records, Vol. 3, Appendix, p. 173. "The plan now to be formed will certainly be defective." Mason, in the Convention, June 11, *ib.* Vol. 1, p. 202.

See also Iredell's speech before the North Carolina Convention which ratified the Constitution, 4 Elliott's Debates 176: "The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who

they had fashioned a work that would endure for generations in the exact terms in which they sent it forth. They did not seem to have conceived the idea that they were, on the other hand, framing that wicked thing called "a rigid Constitution." The foreign critics of our Constitution after finding that one after the other the fatal flaws in that instrument, which were to cause the failure of the scheme for self government set up by it, in some limited or unlimited number of years, had not resulted in what they could claim to be utter failure, united in declaring that the Constitution must fail as soon as it became certain that it was practically unamendable. The advocates of the "flexible Constitution" assumed the virtuous attitude of those who were in a superior position and predicted the end of the government of the United States under its present Constitution as inevitable. An example which is a fair sample of the usual criticism may be given from A. V. Dicey's *Law of the Constitution*:

"Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable."¹² A note to the eighth edition of Mr. Dicey's work (unedited and presumably placed there by Mr. Dicey himself), asks the reader to "Note, however, the ease with which the provisions of the Constitution of the United States, with regard to the election of Senators by the Legislature and the transference of such election to the people of each state,

framed this Constitution thought with much more diffidence of their capacities; and, undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious."

¹² Dicey, A. V., *Law and the Constitution*, p. 145 (1915).

have been carried through by Amendment XVII, passed in 1913." So our foreign critics settled down comfortably into the belief—or at least into the formal statement of the belief—that our government, although free in form, was incapable of that expansion, and that conformity to the inevitable changes in the life and the thoughts of the people, which is absolutely necessary to the continuing life of a government. We were told that the method of amending this rigid constitution was so clumsy, so impossible of management; so ill-conceived a method of providing for the necessary changes in the Constitution, that we were forever at a disadvantage in comparison with those countries which were favored with a flexible or unwritten constitution. The early amendments were treated merely as a part of the first frame of the Constitution; the amendments of the mid-nineteenth century were said to be but "war amendments" and were often used as an added argument that it would take another war to secure any further amendments. This, as we have seen, was one of Mr. Dicey's prophecies. We are a people apt to take seriously any criticism of ourselves or our government. We credit the critics with being as wise as they claim to be. For some time we were quite inclined to adopt this view of the matter as very possibly correct. The current comment upon these criticisms and upon the impossibility of amending the Constitution which appeared in the ephemeral literature of the period show that there were many Americans who inclined to the belief that the Constitution was practically complete as it stood, and that it had assumed the shape in which it was to continue for so long as time would allow an unchangeable instrument to endure. Our critics were quite hopefully sure this would not be very long.

As late as 1891 Dr. Herman V. Ames, writing on Amendments to the Constitution of the United States, said, "Certainly the facts plainly show that the method is not sufficiently facile to meet our wants. The cause of the difficulty is, to use the words of Chief Justice Marshall, that 'the machinery of procuring an amendment is unwieldy and cumbrous,' the majorities are

too large.”¹³ This statement is but the restatement of the thoughts of many minds of the time, especially of the last twenty-five years before the era of the sixteenth amendment. It apparently did not occur to these same critics or to the many who listened to them so trustfully, that it might be that the Constitution had not been amended for sixty-one years, and then again not for thirty-nine years, for the reason that the people of the United States, in whom resided the power to amend the constitution of their country, had not desired such amendments. A portion of the people had undoubtedly desired many and various changes, but that majority of the people to whom was left the decision had not desired them. This was much too simple a solution for acceptance; much more profound reasons were sought for and apparently found.

Sixty-one years after the twelfth amendment the country had passed through a great strain,—the Constitution had been put to that test which, according to all the self-appointed prophets of constitutional disaster, it would not be able to survive. It had survived; it had stood the test. The affairs of the country were left in an unsettled state and it was felt “necessary” (to use the phraseology of the amending Article) to pass amendments which should confirm the verdict of war. Even then it is improbable that the thirteenth amendment would have succeeded in passing the test of three-fourths of the state legislatures had it not been for Mr. Lincoln’s determination that in order to prevent future war it must be passed.¹⁴ Finally enough states were secured; the thirteenth amendment broke the long “sleep” of the inert monarch, and the fourteenth and fifteenth amendments logically followed. The people had again spoken, once again they became silent. Thirty-nine years they allowed to pass before again arousing themselves to the necessity of changing the organic law. In those long years something like an industrial revolution had been taking place in the life of the nation, and the first

¹³ Ames, *Amendments to the Constitution of the United States*, Papers of the American Historical Association, Vol. 5, part 4, pp. 19-29, p. 29 (1891).

¹⁴ C. A. Dana, *Recollections of the Civil War*, pp. 174-177. Also quoted by C. A. Beard, *American Government and Politics*, pp. 208-209. N. Y. 1914.

amendment to pass after this long period was one that touched upon the economic side. The increase of large fortunes brought to the people the idea that the possessors of great wealth should share in the burdens of an increasingly expensive government to a greater degree than the poorer portion of the population. That was undoubtedly the idea in the minds of the people when they voted for the Income Tax amendment. Whether it has been administered with that thought in mind is not a matter for discussion here; we have only to deal with the popular reasons for ratifying proposed amendments to the Constitution. The people control the passage of their amendments more closely than they control the administration of the laws passed to give them effect. There was no difficulty in securing the passage of this amendment; no popular agitation took place; no one seemed to realize that the apparently impossible was taking place. John W. Burgess in his *Changes in Constitutional Theory*,¹⁵ credits the passage of this amendment to a "Democratic Administration." This seems to be an error since in July, 1909, President Taft was in office and remained there until March, 1913. The amendment was proposed in July, 1909, and declared ratified in February, 1913. It may fairly be called a democratic measure in the broader sense, and the people in approving it did believe themselves to be at least attempting to relieve the burdens of taxation from the portion of the population least able to sustain the heavy burden of taxation. If the rigidity of our constitution was what it had been declared to be, the country should have been passing through the throes of a titanic struggle. But the "impossible" was accomplished, slowly and without any show of popular enthusiasm it is true, and with a good deal of rather languid opposition, but also without apparent effort, and the Constitution was again amended,—certainly without war or rumors of war. Slowly the fact of the possibility of amendment had entered the public mind, and when it was proposed that it was more in accordance with the spirit of the Constitution and of the democratic spirit of the country that senators should be

¹⁵ Burgess, John W., *Recent Changes in American Constitutional Theory*, p. 45 (N. Y. 1913).

ected by direct vote of the people, the idea met with popular approval. The practical difficulties in electing senators through the state legislatures, and the abuse of the power to elect by those bodies also helped to carry the amendment. It was proposed in Congress, May 11, 1912, and declared ratified in May, 1913. The historical influence was all for the change. The popular election of senators had been urged in the Convention of 1787 by some of the ablest members, Mr. James Wilson being one of the most urgent for the measure, but those who wished for this form of the election of senators had yielded to an obstructive element which feared the people, and had accepted the Constitution with the provision for the indirect election of the senate, because they feared to lose the whole by being too insistent upon a part. The wisdom of those who had wished for the more popular election of senators had become apparent and the people were really desirous for the change. A second time the impossible had happened without friction, without agitation, almost without effort. By this time it had become apparent that the Constitution, however rigid it might be, might yet be shaped to meet the people's ends.

There were a very great many who had been working in season and out of season, and with an incomparable devotion in the cause of the legal prohibition of the manufacture and sale of intoxicating liquor. The people of the separate states had taken up the idea and had held to it for various periods of time, passing and repealing prohibition laws. Maine, however, stood firm. The South and the West took up the plan of local option, and with that idea slowly won county by county, then state by state. When they had won a state they held the representatives of that state in Congress firmly pledged to vote for a prohibition measure when the time came. Enough states were thus secured for the measure before the resolution came up in Congress. The result there was without doubt. The result in the state legislatures was equally certain; the state legislatures ratified with a rush unknown to the passage of any other amendment. It was proposed in Congress in December, 1917, and was declared ratified in January, 1919. But this time there had been ample dis-

cussion, agitation, opposition. Yet there was nothing revolutionary about the agitation on the one side or the other; the minds of the people were divided, but a very great majority were quite clear as to what they wanted and had been wanting for a long time; they held their representatives to the task that had been set for them, and another amendment became a part of the Constitution. Anyone who has carefully studied the amending Article of the Constitution, its history, and its growth, and who has also watched the gradual gathering of sentiment for prohibition through the something like one hundred years of the agitation for it, must concede, whether the subject matter of the amendment is to their liking or not, that this is the one amendment of all throughout the history of federal Amendments that was fostered, tended, and carefully protected throughout its whole course in a way that carried out every intention of the framers of Article Five. If the people did not know what they were doing it was not for want of a steady, slow, unrelaxing campaign of education, or information, of every sort of legitimate influence. The Eighteenth Amendment did not, however, bring on any war, and it was not passed because of any threats of war. Peaceful amendments seemed really possible in a rigid constitution.

Another large section of the people had been for seventy years advocating another constitutional change. This was the most radical of all in a social and political point of view; it might almost be called revolutionary. The suffrage Amendment, proposed July, 1919, was declared ratified August 26, 1920. It had caused stormy meetings in some of the state legislatures, and there had been bitter denunciations of the proposed change from many quarters, but there was no extra-legal action taken by either of the opponents, although they accused each other of various illegal acts. The validity of this amendment was attacked in an action before the United States Supreme Court.¹⁶ The Supreme Court upheld the legality of the Amendment on the ground that "the function of a state legislature in ratifying

¹⁶ *Leser v. Garnett*, 258 U. S. 130 (1922).

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" (p. 137). The people attacking the Amendment had set up a state constitution in opposition to the Federal Amendment. The Amendment became the nineteenth Amendment to the Constitution, and thus this unamendable Constitution of the United States, held up as a menace to all who advocated written or rigid constitutions, had been amended four times in ten years; the two latest amendments having been passed within two years of each other.

Having now been convinced that their Constitution is not only amendable, but that it is almost miraculously easy to amend, it is natural that people who wish to have their own particular reforms or movements placed upon the statute book, conceive the idea that it is easier to amend the National Constitution than to get the state legislatures to pass the laws they desire. This is because many people, instructed in Constitutional law or not so instructed, have come to consider that an amendment is like any other legislation. They confuse the idea of the ir-repealable fundamental law with that of easily repealable legislative enactment. That this confusion of mind is a very serious matter not only because of its error as a theory, but also because of its danger as a matter of fact, is shown by the history of the result of this mental attitude upon the constitutions of the individual states. The constitutions of the states not only have been subject to constant change, new constitutions being superseded by still newer ones, but, as one writer claims, through the system of constant amendment for comparatively ephemeral purposes, "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."¹⁷ The Federal Constitution has thus far escaped being revised as a whole,

¹⁷ Long, *Tinkering with the Constitution*, 24 YALE L. J. 573, 580.

and the number of amendments has heretofore been inconsiderable. This has not been because there has not been any thought of amending it. During the first one hundred years from the adoption of the Constitution, sixteen hundred proposals were made in Congress to amend the Constitution. In nearly all of the sessions one or more were proposed. One Congress only, the thirty-fourth, escaped. The conditions produced by the Civil War were the cause of a flood of proposed amendments; only three succeeded in getting the approval of the people of the states, and these succeeded by reason of the great agitation of the public mind. The people until recently have not shown themselves anxious to amend, certainly not when the proposition to amend is one which is local, ephemeral, or only desired by a section of the people, however strongly that section may feel upon the subject. An amendment proposing that any person accepting a title of nobility should cease to be a citizen of the United States went to the states for ratification in 1810, and came within one ratification of being adopted; it is said that for some years it was actually supposed to be a part of the Constitution. In 1861, we are told, Mr. Corwin, of Ohio, proposed an amendment prohibiting an amendment abolishing slavery. This amendment was referred to with approval by President Lincoln in his first inaugural address,¹⁸ and was submitted to the states. This proposed amendment was ratified by two states, Ohio and Maryland, and by a convention in Illinois. But the Civil War intervened and the subject was settled in quite another fashion.

Many of the presidents have desired that amendments embodying certain ideas of their own should be passed. Jefferson asked for one in 1806, authorizing the expenditure of surplus national funds for reduction throughout the states, for the con-

¹⁸ "I understand a proposed amendment to the Constitution—which amendment, however, I have not seen—has passed Congress, to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconception of what I have said, I depart from my purpose, not to speak of particular amendments, so far as to say that, holding such a provision to now be implied Constitutional law, I have no objection to its being made express and irrevocable." Nicolay and Hay, *Abraham Lincoln*, Vol. 3, p. 341.

struction of roads, the opening of roads and the digging of canals. Monroe in 1817 suggested the propriety of an amendment regarding the establishment of seminaries throughout the land. Jackson, in 1829, asked for one permitting the distribution of surplus revenues among the states. Buchanan, in 1860, proposed an "explanatory amendment" regarding slaves. Johnson, in 1868, proposed the election of the president by direct vote of the people. Grant, in 1875, desired an amendment allowing the president to veto any item of a bill without involving the whole bill. Arthur, in 1882, asked for a similar amendment.

In the sixty-seventh Congress from April to November, 1921, there were offered in the first session twenty-five resolutions to amend the Constitution. One was the favorite proposal to change the term of office of the president; in this case six years was proposed with no re-election. Another was a repetition of the grant of power to veto an item in a bill without affecting the remainder. Another was to regulate the employment of children under sixteen years of age; another to make the word "election" include primaries; another to extend the Constitutional definition of treason, and so on, with any pet idea of any individual from the president to the least important private person, or to a group of persons with a favorite panacea. To very few, if any, of them did it seem to occur that they were in most of these cases asking for legislation and not for a proper constitutional amendment. Since it had become a fixed idea in the period between the passing of the fifteenth and the passing of the sixteenth Amendment, that the Constitution was practically unamendable, the irresponsible proposing of amendments to please their constituents may have been merely a pleasant pastime for Congressmen. So serious was the thought in regard to the rigidity of the Constitution that there came a call in the public press for a new Constitutional Convention to amend, or more probably to entirely abolish, a Constitution that was so fixed and so rigid that no change could "ever" be made in it. As late as 1914 Mr. Charles A. Beard, in *American Government and Politics*, declared that "The extraordinary majorities re-

quired 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." ¹⁰ Ten years have gone by and through the passing of the four amendments in rapid succession the pendulum has swung in swift vibration from the theory of the rigidity and unamendability of the Constitution to the perception of a danger from the too great ease by which amendments may be added to the Constitution.

The Constitution can indeed be amended with swiftness and with ease. But from the manner of securing the passage of these last amendments a lesson may be learned which can be utilized when we have to confront those who are so eager to secure the insertion of their own personal opinions in the Constitution that they demand instant legislation in the form of an amendment.

The four amendments that have been passed since the war amendments have been in regard to matters which had become thoroughly well known to the people. The Income Tax amendment and the popular election of senators had been a part of the public consciousness since the beginning of the national government. The campaign that preceded the prohibition amendment has been spoken of and is well known to all who have studied the subject. The campaign of the suffragists lasted from the early days of the republic to its first organized movement in 1848 through the following seventy years to 1920. The Constitution can be amended and in the end easily, but not until the necessary conditions have been complied with. Those conditions being a people prepared, as it was intended they should be, by a previous serious and prolonged consideration of the subject, and prepared through the action of their own states through legislation upon the same subject. Because it has been shown that the Constitution is not rigid, that it can be amended, it is by

¹⁰ Beard, C. A., *American Government and Politics*, pp. 62, 63 (N. Y. 1914).

no means shown that it is easy or desirable that every sort of legislation, rejected by the states, or declared unconstitutional by the Supreme Court of the United States, should be made a part of the National Constitution by way of amendment.

The fundamental law still remains the fundamental law; matters not of paramount importance to every state of the union have not as yet been injected into it. No subject of merely ephemeral or local interest has as yet gotten through the defenses of the Constitution provided by that instrument itself. Hundreds have been proposed, as we have shown; some have gotten as far as the state legislatures, but they have all failed of ratification by the states. If we are as wise as those who have preceded us, such measures will continue to fail. No matter how much we may approve the cause which we put forward as the object of national amendment; no matter how desirable we may think it to be that it should become a part of the fundamental law, irrevocable, embracing every part of the country in its provisions, we should be very sure that it can stand the test hitherto demanded by the people of every amendment presented to them; the preparation by every known method of educational campaign, including the school, the pulpit and the written word. The making of the subject matter of the amendment known to as many of the citizens as possible, so that their approval may be with a knowledge of what they are doing and a full and free consent to the doing of it. If this can be done and if it is a sufficient safeguard, then our now apparently flexible Constitution may escape the dangers of such instruments; the too swift movement of the Parliamentary form of government, involving a crisis at very short periods,—crises which may be handled by governments with the conservative safeguards of aristocracies and castes, but which are ill adapted to a democratic form of government, such as ours.

But even if this can be done, are there no other limitations which were set up in the beginning, to this "tinkering with the Constitution" which seems now about to be a favorite employment of busy minds? What are the limitations which have been placed upon the too free employment of legislation in the form

of amendment of the Constitution? It has been usual to say that there is practically no limitation to the amending power. But can there not be drawn from the long history of the amendments themselves and the construction placed upon them, some directive rules and decisions in regard to this apparently unlimited power, which may guide us in the future as to action upon proposed amendments?

"By the principles of general law, the right of a people, at any time, to recast their political institutions, cannot be denied. The questions upon which difficulties arise, are, as to the extent to which it may be done, under given circumstances, without endangering the entire system, as to the modes of doing it, and the instruments through which it shall be effected."²⁰

The questions "upon which difficulties arise" as to the extent and modes of making such alteration have been discussed over and over again. At this point in our history there seems to be no need of further discussion on these lines. The people for many years had settled down also to the belief that there was no danger that the fundamental law would be lightly changed, and therefore there was little discussion of the matter. After the passing of the sixteenth Amendment some persons were quite violently agitated, as they believed that a serious break had been made in the strong safeguards of the Constitution. The latest attack upon this amendment is that of John W. Burgess in his monograph on the Recent Changes in American Constitutional History. He regards that Amendment as "signifying a very long step in advance towards governmental despotism and the extinction of the original constitutional immunity of the individual against governmental power in the realm not only of his property, but also of his culture."²¹ Mr. Burgess, however, does not suggest any mode of preventing such legislation. He appears to believe in limitations but does not state what the limits should be. Mr. Stimson, however, does make a suggestion. He says, "Our ancestors were careful to put nothing that is even debatable within

²⁰ Jameson, *Constitutional Conventions*, p. 546, sec. 526 (4th ed. 1887).

²¹ John W. Burgess, *Recent Changes in American Constitutional History*, p. 54.

the body of our Constitution. It concerned the frame and scope of government, the guarantees of the individual, not his conduct of life. Its matter was nowhere what I have called *substantive* . . . It never occurred to our ancestors that this very written Constitution could be used like a mould into which to pour the hot thought of the moment and leave it as cast iron. Yet this is the recent political discovery; and there is no constitutional answer to it." ²²

"Not only that, but it is far easier to get laws into the 'perennial bronze' of our fundamental law than to pass them as statutes in all the forty-eight states." ²³ And further, "The suggestion, the precedent, of thus including substantive matters in the permanent fundamental law was given by the faulty construction of our modern State Constitutions." ²⁴

These modern state constitutions show in a very striking way the folly of attempting to legislate on every sort of subject by means of constitutions. The constitutions of many of the Western states, notably those of Oklahoma and California are more like codes than constitutions. In Oregon it is said to take "no more effort nor any greater care to amend a clause of the constitution than it does to enact, alter, or repeal a statute." ²⁵ It is apparent that such a constitution cannot be considered a permanent law. That is, such a constitution has lost its character altogether as fundamental, and the distinction between organic and enacted law no longer exists. This is the same as saying that under such circumstances we no longer have any constitutional law, since all law is reduced to one level.

"A constitution to be respected as fundamental law must possess in a reasonable degree the quality of permanence. . . . 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." ²⁶

²² F. J. Stimson, *The American Constitution*, pp. 210, 211.

²³ *Id.*, p. 211.

²⁴ *Id.*, p. 211.

²⁵ *State v. Schluer*, 59 Ore. 18, 27, 115 Pac. 1057 (1911).

²⁶ Long, *Tinkering with the Constitution*, 24 *YALE L. J.*, 574, 581.

The limitations to this practically unlimited and unrestrained power of amendment as suggested are, first, that only amendments political in effect should have place within the Federal Constitution; that no matters of purely substantive law should find place there. Mr. Stimson who makes this distinction concedes that all amendments before the eighteenth are political in nature and therefore may be said to be rightfully within the Constitution. There are a number of writers—too many to cite, as they write voluminously and frequently for the periodicals—who claim that the Eighteenth Amendment has practically reduced the Constitution to the level of legislation. Others not so numerous declare that all amendments up to the nineteenth are proper subjects for amendment, but that the nineteenth is the entering wedge for all the evils that can attack the Constitution. We have to take the declaration of one writer that "it is not law" on his own statement, since it has been declared to be law. It may very well be that these later amendments apply to matters which the framers of the Constitution never contemplated; yet they contemplated quite as drastic amendments. They foresaw that this article was capable of overturning the government, of forcing the slave states to free the slaves—hence proviso one. They foresaw that it was capable of upsetting the equality of states—hence proviso two. They thought that it would invade the rights of the states, hence the suggestion that Mr. Sherman made²⁷ that no state should be affected in its internal police. This is what the opponents of the nineteenth Amendment claim has been done by that amendment. It is not possible to reject proposed amendments because the framers would not have thought them necessary. They had apparently no intention of exercising that control over the future. Mr. Iredell²⁸ believed that (the method being what it was), the amendments "would speak the genuine sense of the people." And they left it there. The "genuine sense of the people" seems to be the last appeal for safety for the Constitution.

²⁷ Watson, *Const. of the U. S.*, Vol. 2, p. 1308, n. 51, p. 1309.

²⁸ 4 *Elliot's Debates*, 176.

The theory that amendments must be germane to the subject matter of the Constitution itself, is a good one, considered in the light of what amendments should be. But the National Constitution itself was said to be invalid for that reason. The Convention that framed it was called to amend the Articles of Confederation, and they met and immediately considered articles of union already prepared. They framed an entirely new Constitution, and that Constitution was violently attacked because of this fact. There were many murmurs in the Convention itself—how many we may never know; there were still more murmurs and louder ones from the people at large. The Convention certainly did overstep the limits of their delegated powers. They would probably sympathize with their descendants who resist this claim of the overstepping of the powers to amend. The Supreme Court upheld the legality of the nineteenth Amendment by the most effective argument by which they could have upheld it, and that argument goes to the groundwork of the Fifth Article. They said "The power of amendment is a federal function derived from the Constitution, and it transcends any limitations sought to be imposed by the people of a state."²⁹ It is a very far-reaching doctrine; it remains for the future to decide how far it will reach. It would seem to be an indication that the Supreme Court does not consider that the states can place any limits on the subject-matter of national amendments.

But while the power of amendment is beyond all limitations sought to be imposed by the people of a state, we may still be allowed to seek for any limitation upon the general power to amend. It is a momentous question; it is one that is pressing upon us now that the popular idea is that an amendment must be sought for as a panacea for every passing and local evil. Owing, probably, to the fact that it was thought that amendments were so difficult to secure, there is very little, almost no literature on the subject. Why seek for limitations when the power of amendment was already so limited as to be unusable?

The writers on the Constitution have given us a little; Curtis

²⁹ *Leser v. Garnett*, 258 U. S. 130, 137 (1922).

says, "It seems to me, therefore, that while it is within the amending power to change the framework of the Government in some respects, it is not within that power to deprive any state, without its consent, of any rights of self-government which it did not cede to the United States by the Constitution, or which the Constitution did not prohibit it from exercising."³⁰ In *Van Horne's Lessee v. Dorrance*,³¹ in answering the question, "What is a constitution?" the Court said, "It is the form of government, delineated by the mighty hand of the people, in which the first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. . . . What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. . . . The Constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator and the other of the creature." Here we have a striking illustration of the difference between the Constitution and the legislative function. We can see why all that is ephemeral, all that is local, all that is not fundamental should be left to the lesser branch of government. As Mr. Long has put it, "To admit local and temporary amendments to a constitution is indeed to make it partake of 'the prolixity of a legal code.'"³²

We may perhaps say then that we have here something that may be called a test for the admission of amendments to a constitution, especially the National Constitution. It is not conclusive, it is not as yet settled what is to be considered local and temporary and what fundamental; yet it does not seem like an unreasonable or an impossible test.

³⁰ Curtis, Constitution of the United States, quoted by Huling, in Pa. Bar Ass'n Report, 1922, p. 16.

³¹ 2 Dall. 304, 308 (1795).

³² Long, Tinkering with the Constitution, 24 YALE L. J., 581.

In trying to make a groundwork for the separation of legislation from the fundamental law we have no assistance from the writers on constitutional law. They assert over and over again that they are diametrically different, but there had not at the time any of our authorities were writing on the Constitution such a situation arisen as is before us today.

The people alone have given us any answer. Amidst the myriad of amendments proposed in Congress for nearly one hundred and fifty years we still have a Constitution unhampered with the ephemeral and the local. Democratic government was arraigned because the people did not speak. It was supposed that they must want to speak; that they were so hampered and encumbered that they could not speak. Yet we have seen that when they wanted to speak they spoke. May we not assume that when they do not want to speak they will not speak. That is, when the futile, the temporary, the local, the matter fit only for legislation, was presented to them as an amendment to the Constitution they would have none of it. When matter fit for placing in the fundamental law was presented to them they recognized the necessity for such amendments and placed them in the fundamental law. Are they not still able to judge of the necessity for amendments? It would seem so, but we have to remember that in that case there will be no amendments carried again for a good many years. Not one of the amendments approved by the people has been so approved until that amendment has been the subject of study, thought, education, absorption into the minds of the people. The history of the amendments from the beginning proves it. Ten amendments asked for by the states were passed at once. These were by no means all the amendments asked for. Even then the ephemeral, the local, the "foolish" if we may say so, were demanded. It was by a process of sifting the permanent from the impermanent that these ten amendments were chosen. They satisfied the people. They did not demand that the rejected should be placed before them. The eleventh and twelfth grew out of a "necessity" that faced the country. It could not—or thought it could not—allow a state to be sued by a citizen. It certainly could not allow its will to be over-

ridden as Burr and his partisans attempted to override it. The will of the people spoke in those amendments. Possibly even the "war" amendments may be conceded not to be in line. As we read back into their history it does not seem that they were passed by the "necessity" of the case, but through the instrumentality of what we in our day have learned to speak of as the "war mind." It will not do to say that there has not been, there is not, even at this late day, a great deal of dissatisfaction with them, and a feeling among those who object to some of the later amendments that these "war amendments" opened the door to many constitutional evils. But there has been no open and organized resistance; the propositions to repeal anyone of them have never been taken with great seriousness; the mass of the people are satisfied. The sixteenth amendment, as we have seen, is still a bone of contention. It is, perhaps those who do not class themselves with "the people" who are most vociferous against the provisions of the Amendment. The seventeenth is a popular amendment; there is no question but that the people wanted it. The eighteenth is a people's amendment, as has been shown. The nineteenth also had the endorsement of state after state before it became the national amendment. Not one of these amendments, despite the arguments of their opponents, is a local, a passing, an ill-considered, amendment. If there is such a thing as a *stare decisis* of the people's decisions we have it in the history of the amendments to the Constitution from the first to the last. With the exception of the "war amendments" none of them have been passed at the behest of a particular political party, of a president, or a powerful clique of any kind. The eighteenth and the nineteenth amendments were passed over the most strenuous efforts of almost the entire press of the country. The long educational campaign, if so long continued an effort can be called a campaign, took to the minds of the people the knowledge of the facts, and no amount of counter effort could distract their minds from the main issue, which was what they believed to be the thing that was for the best interests of their homes and their country. Thus have the people rendered their decisions, and in so doing have both by their silence and their

action, shown what they consider to be the fundamental law. May we not say then that the test is that nothing that has not been presented to the minds of the people for a long period of time, so that the principle of the change demanded may have become familiar to them through discussion, argument, reading and thinking, should be brought before the Congress as a proposed amendment; that when this has been done that the question before the people should be: Is this a matter for legislation, state or national, or is it so necessary, that it should be placed in the irrepealable fundamental law, there to remain to control the entire country? That test alone would prevent the irresponsible, the eager reformer, the impatient people who must have their will done at once, from rushing into a campaign for a national amendment, when a national law, state laws, or a longer discussion of the matter would be sufficient for all practical purposes. Many matters pressed for constitutional amendment today are of merely local interest. By local is meant that they interest a group of states, not the entire country. Some of them are entirely industrial in their nature, and an amendment is asked, citing the reluctance of the non-industrial states, or agricultural states to pass laws regulating industry, when their industries are either not organized at all or are very slightly organized. They have not become a part of the life of the people of the states where legislation is asked. Time and a little patience would cure all that, as the necessity for amendments which would interest only the Eastern, Western, or Southern states, would cease to be of such impelling need that amendments should be asked for. It is the desire for immediate action that animates most of the proponents of such amendments. They claim that while they wait for aid from the states or from Congress, the especial reforms they desire fail of accomplishment. They refuse to see that by undermining the Constitution of their country they will bring far greater evils on the country, and that these evils will ultimately react upon the very causes they desire to aid. It is in this impatience of spirit that these earnest, admirable, persons of high ideals differ from the same type of people who framed the Constitution. In the grinding of mind

against mind, interest against interest, in that noblest of political battle grounds, the men who fought there forced each other to forego their personal panaceas, their local pettinesses, the prejudices of their day and time. They sacrificed their present to the future of their country. Those who were not great enough to do so left the convention; their impatient spirits could not brook that cautious looking forward into the future which was demanded of them. They saw the evils of their day and demanded instant redress. A Constitution that could not instantly redress all evils was an imperfect constitution. Today we do not judge those men, we forget them. The names of the men we remember are the names of those who could think for the future and build, not for the moment but for all time, as men count time. Impatience and impermanence go together. If we would keep what was won for us in struggle and in pain and yet in patience, we must also learn before we change our fundamental law to let mind grind against mind, prejudice fight it out against prejudice, personal desires defeat personal desires, until a solid ground is reached where the necessity of the desired change is either proven or disproven.

Article Five formulates the method by which the sovereign power expresses its will that the fundamental law it has established shall remain unchanged, as it does when an amendment is rejected, or shall be changed as it is when an amendment passes. It is the article under which that sovereign uses the power with which it never parts. It is for that power to use the facilities so provided with all care and all seriousness. If for the moment the sovereign is being urged to use its power carelessly and without due thought, undoing the great work of the past, it is urgently necessary that the difference between constitutional amendments and legislation be again made perfectly clear to the minds of those to whom the ultimate appeal must be made. It is imperative that the public mind shall be no longer confused by appeals made to their sympathies or to their prejudices, and that the distinction between legislative enactment and constitutional amendment, left indistinct in the minds of the electorate because of the lack of discussion of the subject for so

many years, shall once again be so clearly defined that when a proposed amendment is placed before it, the discussion shall first turn upon the question whether this matter is one which should be placed in the fundamental law, or whether it is a matter for legislative action. If it is not a matter for constitutional revision there is still the action by the separate states, which should have, and do have, the power to judge what legislation is necessary for their local needs, and also there is the legislative power of Congress upon subjects not local but universal. But such legislation is repealable with a reasonable amount of ease, and can be changed as it should be changed with the swift passing of time and the rapid changes in social and economic conditions. Not so the Constitution. It is only to be changed when it becomes "necessary." By the use of this word "necessary" we are carried back to the Declaration of Independence and the use there made of the word. It is no light piece of phraseology as there used. It is no light and easy thing to dissolve "the political bands" which have connected peoples with each other. The necessity which causes them to do so must be of a very serious and deeply important nature. It was in that same sense of the importance and the seriousness of the meaning of the word, we may well believe, that the same men who had used the word in the Declaration of Independence used it in the Constitution. Thus we may infer that their intent was that only when the necessity became urgent, and the subject-matter one of vital importance to the entire nation, should there be an amendment to the Constitution.

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