

4-1-1946

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Recommended Citation

Paul P. Ashley, *Constitutional Amendments—Some Current Proposals*, 21 Wash. L. Rev. & St. B.J. 53 (1946).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol21/iss2/1>

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WASHINGTON LAW REVIEW

and

STATE BAR JOURNAL

VOLUME XXI

APRIL, 1946

NUMBER 2

CONSTITUTIONAL AMENDMENTS— SOME CURRENT PROPOSALS

PAUL P. ASHLEY

Lawyers have a stake in constitutional questions beyond that of other citizens. They are concerned professionally with the framework of government. They work within it and come in daily contact with it.

More than a few people say that the organic law of the land is obsolescent. With major revisions in mind, they advocate the calling of a constitutional convention under the authority of Article V of the Constitution of the United States. Others would be content with specific amendments. As to some of them, there is a consensus that the proposals are sound and the amendments long overdue.

The purpose of this article is to catalogue currently proposed amendments for the convenience of the segment of society most competent to pass upon them. Principal contentions pro and con will be summarized or indicated.

As every lawyer knows, constitutional governments may be classified according to three types:

(1) The British type comes first. There are dicta to the effect that "the common law will control acts of Parliament and sometimes adjudge them to be utterly void" as "against common right and reason." Actually in England law and custom must yield to Parliament.¹ Nevertheless in practice all British Parliaments recognize the continuity of common law concepts of basic rights.² Clement Atlee has made this clear in public statements since becoming Prime Minister. So it is not too inaccurate to say that in England there is an unwritten constitution which Parliament does not ignore though it has the legal power to do so.

(2) Then, second, there is the European type of written constitution which spells out the structure of government but is not subject to interpretation by an independent judiciary. Such a constitution is obviously subject to the fiat of dictators.

¹In his COMMENTARIES ON THE LAWS OF ENGLAND, Blackstone says: "It (Parliament) has sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms" (Book I, § 222).

²For an ancient statement see *ibid.*, Book I, § 39.

(3) The third type is that exemplified by the Constitution of the United States, our state constitutions and those of the British dominions. These constitutions are given effect by the judicial power to declare laws unconstitutional. In his work on *Constitutional Limitations*,³ Cooley calls this type of constitution

“ the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation” is void

Using the words of Grote, a first purpose of a constitution is to put “perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be no less sacred in the eyes of his opponents than in his own ”

Desiring to shield the citizen from the oppressions of government and from the caprice of men in public office, the authors of the two constitutions under which we live were more concerned with securing and preserving liberty than with maximum efficiency in governmental administration. And so it is that when considering the desirability of proposed changes to our constitutions, the possible effect upon liberty as well as the possible effect upon administrative efficiency should be ever in mind.

In addition to the rights and freedoms reserved by the bill of rights, the fundamentals of our present form of government include:

- (a) A President elected for a fixed term by popular vote,
- (b) A bi-cameral congress wherein the house is apportioned according to population and regardless of population each state is accorded two senators;
- (c) Recognition of the principle of judicial supremacy under which the courts have the right to judge the legality of the acts and determinations of members of the executive and legislative branches;
- (d) A relationship with the forty-eight states which does not grant full sovereignty to the federal government but, on the contrary, by the tenth amendment expressly reserves to the states or to the people powers not delegated to the United States by the constitution and, finally;
- (e) Substantially universal adult suffrage⁴

Constitutional amendments not touching these would not affect the essence of our federal structure. For instance, a modification of the residential requirements for United States senators would not change the nature of our government.

So much for reminders by way of background. We now turn to specific proposals for amendments to the Constitution of the United States. The legislative branch comes first.

³ (Eighth edition) p. 5

⁴ See THOMAS K. FINLETTER, *CAN REPRESENTATIVE GOVERNMENT DO THE JOB?* Reynal & Hitchcock (1945) 130

THE LEGISLATIVE DEPARTMENT

Article I, Section 1 of the Federal Constitution states:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives"

The Congress is or has been at a low ebb. Proposals for the strengthening of Congress are legion. They encompass suggestions that:

- (i) In the hope of attracting men of higher calibre, congressional salaries should be doubled and retirement pay provided
- (ii) The present overlapping committee structure (48 committees in the House and 33 in the Senate, sometimes called "little legislatures competing for jurisdiction") should be abandoned and replaced with a simplified and efficient type of organization
- (iii) The seniority rule in choosing the chairmen of standing committees should be discarded and chairmen selected on merit
- (iv) The legislators and their committees should be given sufficient and proficient technical assistants
- (v) The house should be reduced greatly in size

But none of these necessitates an amendment to the Constitution. The Congress itself can put into effect those reforms which it deems desirable. Important as they are, we by-pass all proposals of this sort because they are not constitutional questions.⁵

RESIDENTIAL REQUIREMENTS

It has been proposed that residential requirements for congressmen be abolished.

Section 3 of Article I of the Federal Constitution provides no person shall be a senator "who shall not, when elected, be an inhabitant of that state for which he shall be chosen." Section 2 contains similar language in respect to representatives.

Similarly state restrictions often require that a candidate for state legislative office reside in the district which he proposes to represent. It is of course within the power of a state to correct this. But it is not within the power of any state to authorize election of a man not a resident of that state to the United States Senate. Outstanding men cannot choose to file in a state where election would be easy, or at least probable.

Commenting on the disadvantages of present requirements as to residence, Bryce⁶ said that "since he (a defeated candidate) cannot find a seat elsewhere he is stranded; his political life is closed, while other young men inclined to independence take warning from his fate." A

⁵ See ROLAND YOUNG, *THIS IS CONGRESS*, Alfred A. Knopf; ROBERT HELLER, *STRENGTHENING THE CONGRESS*, National Planning Association; Charles A. Eton, *A Member of Congress Looks at Congress*, *THE NEW YORK TIMES MAGAZINE* (March 4, 1945)

⁶ See *I THE AMERICAN COMMONWEALTH* 191-195

more recent commentator⁷ remarks that residential requirements:

“ have made steadily for parochialism in legislation, for the security and prosperity of petty local bosses and machines, for the multiplication of pocket and rotten boroughs of the worst sort, and, above all, for the progressive degeneration of the honesty and honor of representatives ”

Amendments to the Federal Constitution have been advocated which would remove all requirements as to the residence of United States senators—Republican Hoover could file in Maine and a Vermont democrat in Alabama

TWO SENATORS FROM EVERY STATE

Our specie of the Polish Veto is much criticized. It will be recalled that anciently in Poland one negative vote doomed a measure to defeat.⁸ Because each of the 48 United States is entitled to two senators regardless of population, senators representing a small minority of the people can block legislation favored by an overwhelming majority. A senator from New York represents 125 times as many persons as does a senator from Nevada. Eight million three hundred thousand people in the prairie and mountain states have 24 votes in the senate. Twelve million five hundred thousand residents of New York have 2 votes. Thirty-three senators representing the 17 smallest states containing less than 8% of the population can block any treaty.

But Article V of the Constitution provides that “no state, without its consent, shall be deprived of equal suffrage in the senate.” This language seems too clear for construction.

SENATE APPROVAL OF TREATIES

Under Article II, Section 2, the President has the power “by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur.” John Hay cynically remarked:

“A treaty entering the Senate is like a bull going into the arena; no one can tell just when or how the blow will fall—but one thing is certain—it will never leave the arena alive.”⁹

Actually the record is not so bad. Of some 1200 treaties negotiated, 800 to 900 were confirmed, between 100 and 200 died in Senate committee and about 100 were formally rejected.

Then there is an escape mechanism in the form of presidential executive agreements which have prior or subsequent congressional authorization or ratifications. The acquisition of Texas and Hawaii are venerable instances. The Hull trade agreements authorized by the Trade Agreements Act of 1934 are recent examples.

Even further from the constitutional mandate are executive agreements without either prior or subsequent congressional approval. The

⁷ H. L. Mencken in essay on *Politics*.

⁸ See 18 *ENCYCLOPEDIA BRITANNICA* 142.

⁹ As quoted by Alexander Hehmyer in *TIME FOR A CHANGE*, Farrar & Rinehart (1943) 104.

trade of the 50 over-age destroyers in September 1940 was a dramatic instance Timothy Pickering—Washington's Postmaster General—in-augurated this device with an agreement with Canada concerning the mails Since then more than 300 international agreements concerning the mails have been made by the executive department Only three—1% of them—have been submitted to the Senate for ratification

The United States Supreme Court has never declared an executive agreement unconstitutional and at least two decisions¹⁰ seem to recognize that they are legal unless and until the Congress supersedes them Their importance is indicated by these brief data:

During the first fifty years of the Republic (1789 to 1839) there were 60 treaties and 27 executive agreements, 2 to 1 in favor of treaties

During the second 50 years (1840 to 1890) there were 215 treaties and 238 executive agreements, the latter edging into the lead

During the third fifty years (1891 to 1940) there were 524 treaties and 917 executive agreements

With a world organization before us the problem is real Should treaties be subject to defeat by a few determined senators? To avoid that risk, should we evade the Constitution, call treaties by another name, and enter into some of them with and into some without congressional review and approval?

A proposal with much backing is that Article II, Section 2, be amended to read that the President—

“ shall have power to make treaties provided a majority of the members elect of both the Senate and House of Representatives concur therein ”

Ratification by 49 senators without submission to the house is also proposed Opponents of both say the present system works out well, that the control of the Senate over treaty making should be undiminished and that, in fact, the Senate should be consulted more than it has been in respect to international engagements

Now comes the executive department

THE EXECUTIVE DEPARTMENT

Article II of the Federal Constitution lodges the executive power in the President, tells how he shall be elected and prescribes his powers and duties Perhaps it is sound to assert that the most pressing of today's constitutional problems are found in the relationship, in the balance of power, if you please, between the legislative and executive departments—particularly when included in the latter are the myriad quasi-independent establishments, authorities, bureaus and boards now operated by the federal government

THE ITEM VETO

The veto power of the President is a point where opinions differ

¹⁰ *U S v Belmont*, 301 U S 324, 81 L ed 1134 (1936), and *U S v Curtiss Wright*, 299 U S 304, 81 L ed 255 (1936)

Consistent believers in the parliamentary system of government would take away his present veto power

Differing sharply is the proposal that the veto power should be enlarged so that the President may veto parts of a bill while approving the rest. The Constitution gives the President the power to veto any act of the Congress, no matter how important. But it does not give him the right to veto part of an act or, more specifically, particular items of an appropriation bill. It is all or nothing. Even an avowed collectivist¹¹ presumably not opposed to lavish public spending, agrees that the President should have the power of item veto. Writers seem to concur in the view that the federal pork barrel would be much smaller were it not for this defect in the Constitution. Many, if not most, appropriation bills include indefensible items amounting to a bounty to some special interest. Many a president would delete them, or some of them, and return them to the Congress with the spotlight of publicity upon them if he possessed the legal power to do so.

It is axiomatic that if an omnibus appropriation bill includes a little something for a numerical preponderance of the congressional districts, the bill is sure to pass. And if something be included for every district, the vote will be almost unanimous! President Arthur was not unaware of this technique. "Thus," he said in a message to the Congress, "As the bill becomes more objectionable it secures more support. The Constitution should be so amended as to give the President power to veto separate items of appropriation bills."

Ofttimes congressmen who do not oppose an appropriation before a veto will vote against that same appropriation after the veto. Regretting that appropriation bills should be "defaced by items and provisions to meet private ends," Cleveland vetoed 343 bills. Yet scarcely any bills were passed over his veto, though passed with little or no opposition before the veto. The Constitution furnishes the key to this change of vote. It provides that after a vetoed bill with the President's objections has been returned to the Congress:

" the votes of both houses shall be taken by yeas and nays, and *the names of the persons voting for and against the bill shall be entered on the journal of each house respectively*."¹²

Many eminent congressmen and several Presidents have advocated the item veto. During the past 70 years more than 45 resolutions have been introduced in the House or Senate looking toward an appropriate amendment to Section 7 of Article I of the Federal Constitution.

Though Congress refrains from passing a resolution to submit an amendment to the states, Congress does think the item veto a desirable check on other legislative bodies. By act of congress the Governor

¹¹ Harold Laski

¹² Art. I, § 7

of Alaska "may veto any specific item or items"¹³ in any appropriation bill So may the Governor of Hawaii¹⁴, the Governor General of the Philippines¹⁵ and the Governor General of Porto Rico¹⁶ The Congress trusts these governors with this salutary power, but not the President

Rather recently at least one state¹⁷ has streamlined the item veto by a specific authorization to the governor to *reduce* or veto any item As stated by the Supreme Court of California:¹⁸

"Under the old system the governor could eliminate, but could not reduce an appropriation He may now reduce or eliminate any one or more items of appropriation money, while approving other portions of the bill "

"Under the new plan he is not forced to choose between vetoing an item of appropriation for a meritorious purpose, or approving it in an excessive amount Without entirely rejecting it, he may reduce the amount "

Theoretically, an amendment to the Constitution is unnecessary—the President could veto or reduce items if Congress would insert in each appropriation bill a clause (or pass a general act) to that effect But what Congress gives Congress may take away What the country needs is the constitutional right of the President to reduce or disapprove any item or items

The amendment might read something like this:

"The President shall have power to disapprove or reduce any item or parts of items in any bill appropriating money in the same manner and subject to the same limitations as he may, under Section 7 of Article I of the Constitution, disapprove as a whole any bill which shall have been presented to him

"So much of such a bill as he approves shall upon his signing the same become law "

With this should be an amendment forbidding riders to bills which have no connection with the title or the aim of the bill

Some forty states already have the item veto James Bryce said "the change (to item veto) seems a small one" and favored it greatly So do most observers of the problem Seemingly all that stands in the way is a certain congressional inertia¹⁹

CHECKS AND BALANCES VS THE PARLIAMENTARY SYSTEM

The constitutional structure of our government has been changed but little in 155 years Organizationally speaking, there have been three revisions The 12th Amendment changed the manner of choosing the

¹³ 48 U. S. C. A. § 86

¹⁴ 48 U. S. C. A. § 581

¹⁵ 48 U. S. C. A. § 1052

¹⁶ 48 U. S. C. A. § 825.

¹⁷ CALIF. CONST. Art. IV, §§ 16 and 34

¹⁸ Wood v. Riley, 192 Cal. 293, 219 Pac. 966, 969 (1923)

ington, Art. 3, § 12) do not limit the item veto to appropriations And that is as it should be But limiting item veto to appropriations may facilitate passage of an amendment to the Federal Constitution

President The 17th provides for the popular election of senators The 20th changes inauguration day from March to January

No dynamic people made so few organic changes in governmental structure during the 19th and this first half of the 20th century Yet looking at ourselves as others see us it is interesting to note that none of the several self-governing nations which emerged after World War I fashioned its constitution after that of the United States in respect to basic relationships between the legislature and the chief executive These nations owed their emancipation to us; they revered Woodrow Wilson We were at a zenith of power But none copied our system of checks and balances ²⁰

Despite their recent emergence from tyranny, these nations preferred the possible greater efficiency and smoothness of a parliamentary system—even at the risk of unbridled power in government For (following the language of Mr Justice Brandeis) it must be remembered that our plan of government was adopted not to promote efficiency, but to preclude the exercise of arbitrary power

Others have pointed out that our government is cast in rigid chronological molds With the passing of the seasons when the moon has waxed and waned forty-eight times, we must elect a new chief executive—no matter how inopportune the time And until four full years have passed, we cannot force an election no matter how ineffective the President may be It is said that except in South America no constitutional arrangement so lacking in flexibility is now to be found anywhere in the world ²¹

To this point Henry Hazlitt of the New York Times says:

“If the President and Congress disagree, there is a deadlock Neither can appeal from the verdict of the other to that of the country Congress cannot force the resignation of the President, as the British Parliament can that of the Prime Minister, by voting a lack of confidence The President, on his side, cannot force Congress to adopt a policy that he considers vital by dissolving Congress and appealing from its verdict to that of the country Congress can prevent the President from doing as he wishes but cannot make him do what it wishes Responsibility is divided and lost even within the Congress itself The Senate can block the overwhelming will of the House, though that will may reflect an equal sentiment in the country”²²

Writing some 75 years ago, Walter Bagehot said:

“The American government calls itself a government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot *find* the supreme people You have got a Congress elected for one fixed period, going out perhaps by fixed installments, which cannot be

²⁰ Frank I Cobb, *Is Our Democracy Stagnant?*, HARPERS MAGAZINE (June, 1923).

²¹ WILLIAM MACDONALD, *A NEW CONSTITUTION FOR A NEW AMERICA* (1921)

²² *A NEW CONSTITUTION NOW*, Whittlesey House (1942) 4

accelerated or retarded—you have a President chosen for a fixed period, and immovable during that period; all the arrangements are for *stated* times. There is no elastic element, everything is rigid, specified, dated. Come what may, you can quicken nothing and can retard nothing. You have bespoken your government in advance, and whether it works well or works ill, whether it is what you want or not, by law you must keep it.”²³

It is argued that no corporation would tolerate a president who is unable to work in harmony with its board of directors. The conflicts and delays would be written in red ink. But when it comes to government, it is said that while delay is the enemy of efficiency it is the friend of stability. And so, in the interest of stability and, we hope, liberty, the country has endured deadlocks between the Congress and the executive such as the deadlock on fundamental questions of foreign policy during 1919, 1920 and 1921 and upon economic questions during the last half of the Hoover administration.

Numerous proposals are in the air. Some forthright people boldly advocate a full shift to the parliamentary or cabinet system, such as prevails in Great Britain. Such proposals usually contemplate the perpetuation of the office of president. He would dedicate hospitals, review troops, and generally do what the titular head of a state is supposed to do. Real executive power would be lodged in a first minister and cabinet, chosen as is the British cabinet, and similarly subject to change.

Other observers advocate modifications designed to give some of the benefits of the parliamentary system without abandoning our traditional organization. For instance, it has been advocated that the President be selected by the newly elected House and Senate, in joint session assembled, for a term certain, presumably the present term of four years. This proposal is a gesture in the direction of the parliamentary system. But it is not much more because the very essence of the parliamentary system is that the chief executive (often called the prime minister) resigns after a vote showing lack of legislative confidence in him.

In his book called “Can Representative Government Do the Job?”²⁴ Thomas K. Finletter advocates a joint Executive-Legislative cabinet coupled with a constitutional amendment giving the President the right to dissolve Congress and call a general election whenever a deadlock arises. But the President would not be required to go to the people merely because he is disappointed with certain legislation. Inherent in this proposal is the requirement that the terms of the President, the Senators and the members of the House of Representatives should be the same. Mr. Finletter thinks six years preferable to four.

²³ *Id.* p. 27

²⁴ Reynal & Hitchcock (1945)

The expression "Joint Executive-Legislative Cabinet" is not a familiar one. It goes much further than, for instance, the Kefauver resolution which calls for an amendment of the House rules so as to provide for the regular appearance of cabinet members and agency heads on the floor of the House to answer questions. It is different from the suggestion that the Constitution should be amended to make every cabinet member *ex-officio* a member of the House or Senate, with full privileges of the floor, but no vote.

A joint Executive-Legislative Cabinet means a cabinet representing the two branches—Executive and Legislative—so that Congress would (the proponents hope) actually collaborate with the Executive in the making of overall policies. Something like a joint cabinet on foreign affairs is already found in the joint committee representing the State Department, the Foreign Relations Committee of the House and the Foreign Affairs Committee of the Senate.

The proposal is that this joint Executive-Legislative Cabinet be composed of nine congressional leaders (chosen as the House and Senate may determine) and the nine members of the President's cabinet. Subject to congressional approval, this cabinet would determine the grand pattern of legislative and executive policy. Important recommendations concerning legislation would not be handed the Congress as if by executive mandate, as now is often the case. Recommendations would come from the joint Executive-Legislative Cabinet just as under the parliamentary system administration bills are proposed by the cabinet.

With a somewhat different approach, Henry Hazlitt²⁵ believes the minimum changes necessary to the attainment of the minimum flexibility essential to the preservation of our government to be:

(a) The selection of executive leadership by the legislative branch, with responsibility to the legislative branch. The elimination of the veto power would be a corollary of this.

(b) The extension of the normal term of members of the House of Representatives to, say, four years, with no constitutional assurance of such a term. The chosen leader of the legislative branch would have the power to dissolve that branch whenever an impasse is such that he believes that an election should be held.

(c) The reduction of the Senate to a position comparable with the House of Lords. Mr. Hazlitt says: "As long as the two houses of Congress have equal powers, any cabinet formed must have the constant support of both houses." Because of the radically different method of selection, the House and Senate may be, and often are, at odds.

The plans just sketched are examples of the kinds of constitutional surgery which, it is said, will be required if the present system of periodic and prolonged conflict between the legislative and the executive

²⁵ A NEW CONSTITUTION NOW, 103 *et seq.*

branches is to be avoided. There are other proposals with the same end in view, and all are subject to many variations²⁶

No space was given to the internal reorganization of the President's cabinet and the sprawling executive departments are here ignored. Those are legislative, not constitutional matters. This joint Executive-Legislative Cabinet, too, could be created by legislation and requires no amendment. It is here considered as an incident of the proposal that the President be given the power to dissolve the Congress if and when he finds the executive and the legislative branches at cross purposes.

PRESIDENTIAL SUCCESSION

Brief mention of presidential succession seems appropriate. Presidents elected at 20-year intervals die in office:

1840—William Henry Harrison succeeded by John Tyler

1860—Abraham Lincoln succeeded by Andrew Johnson

1880—James A. Garfield succeeded by Chester Arthur

1900—William McKinley succeeded by Theodore Roosevelt

1920—Warren G. Harding succeeded by Calvin Coolidge

1940—Franklin D. Roosevelt succeeded by Harry Truman

A common proposal is that the office of vice-president be abolished and that the president be succeeded by the speaker of the House to serve until an election be held within, say, six months.

THE JUDICIAL DEPARTMENT

Perhaps the majority of current proposals for the improvement of the federal judicial system have to do with judicial review of the decisions of administrative agencies. These proposals are of paramount importance. But their nature is legislative rather than constitutional. Hence we pass Article III of the Federal Constitution²⁷

Sections 3 and 5 of Article IV of our state constitution provide for the election of supreme and superior court judges. In practice, most judges are first appointed by the governor and are then elected and re-elected until the Grim Reaper takes them from the bench and a successor is appointed.

We do not grant the judges the security of tenure of life appointment which enables a mediocre man to forget things of the world and—secure in his position—dedicate all his energies to being the best judge possible. Nor do we put inferior judges out. Experience shows it to be almost impossible to defeat an incumbent judge, no matter how incompetent he is.

There are several possible modifications of the appointive system designed to give the electorate some control, yet take the judges out of

²⁶ See WILLIAM YANDELL ELLIOTT, Professor of Government, Harvard University, *THE NEED FOR CONSTITUTIONAL REFORM* (1925), and ALEXANDER HEHMEY, *TIME FOR CHANGE*.

²⁷ Thus by-passing proposals which would do away with judicial review of legislative and executive acts. See, for instance, discussion of *Judicial Review and the Power to Govern*, WILLIAM H. HESSLER, *OUR INEFFECTIVE STATE*, Henry Holt & Co. (1937) c. 7.

politics and remove economic hazards This problem has been studied and reports made by bar association committees But it has never been the subject of inquiry by the Judicial Council of the State of Washington An official study with recommendations from that authoritative body might prove constructive

THE RELATIONSHIP BETWEEN FEDERAL AND STATE GOVERNMENTS

Article IV of the United States Constitution has to do with the relationship between the Federal and State governments²⁸

Federal impingements upon the former autonomy of states usually have been justified under the commerce clause or the general welfare clause, both appearing elsewhere in the Constitution The activities of the federal government have been enlarged by legislation They may be constrained by legislation Hence, it may be correct to say that federal invasion of states rights has become an economic, legislative and political problem—constitutional barriers having been largely eliminated by construction of the Constitution No important proposed amendment to Article IV has been found

PROVISIONS FOR AMENDING

Under Article V of the Federal Constitution amendments are submitted to the states for ratification "whenever two-thirds of both houses shall deem it necessary"²⁹ Or an amendment may be submitted by a convention called for the purpose of proposing amendments "on the application of the Legislatures of two-thirds" of the states This method has never been used Several thousand proposals for amendments have been submitted to the Congress But only twenty-six have been approved by the Congress for submission to the states and of these only twenty-one have been ratified

Quoting Jefferson as saying that "the earth belongs always to the living generation" some observers urge that there would be less legislative and judicial evasion of the Constitution were it easier to amend³⁰ Others assert that if the Constitution were easy to amend the "habit of amendment would turn into the habit of tinkering" A sense of constitutional security would be impossible

The difficulty of amendment is advanced as a reason for "interpreting" the Constitution to mean something it had never been thought

²⁸ It contains the full faith and credit clause It says that the citizens of each state shall be entitled to all the privileges and immunities of citizens in other states It guarantees to every state a republican form of government In it, the United States guarantees to protect all states against invasion and (when requested to do so) against domestic violence

²⁹ The United States Supreme Court holds the two-thirds to be two-thirds of a quorum

³⁰ James Madison remarked in *THE FEDERALIST* (No 43) "That useful alterations will be suggested by experience could not but be foreseen" He said that although he wished to guard against "that extreme facility which would render the Constitution too mutable," he thought it would be well to guard also against "that extreme difficulty which might perpetuate its discovered faults"

to mean Backers of the court packing plan said in justification that 13 states containing 5% of the voting population can block an amendment although 35 states with nearly 95 per cent of the population are in favor of it

Advocates of easier methods of amendment variously propose:

(a) That a majority of the *elected* membership of both houses may submit a proposed amendment to the states This has been called a "psychological change" because two-thirds of a quorum may be less than half of all But the change would prevent blocking by a minority

(b) That an amendment shall be submitted if approved by two-thirds of either house for two or three consecutive sessions

(c) That an amendment be submitted upon the request of half the state legislatures

(d) That ratification be by two-thirds of the states containing two-thirds of the voting population or that a proposed amendment be submitted to a direct vote of the people and adopted if approved by a majority of the voters in a majority of the states

And there are advocates of a mandatory constitutional convention to be held, say, every thirty years

THE STATE CONSTITUTION

The dilemma in respect to the state judiciary was touched (quite out of order) under Article III of the Federal Constitution We now turn to proposals in respect to other articles of the Constitution of the State of Washington

There are proponents of a unicameral state legislature whose theory may be epitomized as follows:

There should be a unicameral legislature of from 40 to 50 members (receiving a per diem of perhaps \$25 when occupied with legislative duties) with regular annual sessions of from 90 to 120 days Between sessions there should be a continuing committee of legislators to represent the legislative branch and to prepare groundwork for important legislation to be considered during the next legislative session

Disciples of a unicameral system say that the woeful weakness of the American system is in the legislative branch They point out that the governor of Washington is in a much stronger position, relative to the Washington legislature, than is the President of the United States in relation to the Congress The remedy, they say, does not lie in lessening the efficiency of the state executive but in encouraging the legislative branch to attain a higher degree of efficiency

In Washington the voters must elect eight state executives³¹ The average elector may find it somewhat difficult to discern between the

³¹ Art III, § 1, of our State Constitution provides that: "The executive department shall consist of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands"

merits and demerits of sixteen candidates in the November election and between more in the primary. A shorter ballot might result in better state government.

Advocates of the shorter ballot concede that the auditor should be free from gubernatorial influence but suggest that this can be attained either by having him elected by the legislative branch or appointed by the governor with legislative confirmation to serve for a term considerably longer than that of the governor.

The direct primary is another much criticized institution of our state government. Some observers say that it is responsible for a progressive degeneration in the quality of state officials. Some would abolish it completely and return to the convention system. Others see value in the direct primary and would supplement it with provisions for official party recommendation so that, through its convention, the party is actually sponsoring a candidate. Anyone so inclined would still be able to file in the primary irrespective of party sponsorship. Suggestions of this sort are sometimes coupled with the thought that the primary should no longer be indiscriminate. A voter should not be able to vote in both primaries at the same election.

The state constitution contains limitations in respect to the salaries which may be paid certain officials. It has been urged that these limitations are archaic and that the pressure to evade them has led to constitutional immorality on the part of the legislature and the courts.

SUNDRY PROPOSED AMENDMENTS

It has seemed convenient to close with a quick inventory of sundry proposed amendments, rather than to fit them into their proper places in the articles already discussed.

(a) There are plans to divide the nation into economic regions or commonwealths such as the New England region, the Rocky Mountain region and the South Atlantic region.³² In deference to tradition, historical state lines would be retained for local administrative purposes. But representation in the Congress would be regional.

(b) To many, the electoral college seems just so much numbo-jumbo and should be abolished. If so, the country would have to face the fact that a president might be elected by a plurality instead of a majority, or provide a mechanism for deciding between the highest two candidates in case neither of them had an absolute majority.

(c) Reference has been made to the rigidity of our election procedure in respect to the calendar. It may be that some future November in a year divisible by four will come at a time when it is almost impossible to hold an election. We are no longer free from the threat of physical invasion by means of rockets and other devices. It has been proposed that Congress should be given the power to postpone an election by

³² See, for example *States or Regions*, TIME FOR A CHANGE, c. 11.

two-thirds vote with the limitation, for instance, that the election can be postponed only once and not for a period exceeding, say, six months

(d) Two proposals to limit the franchise must be noticed. One is that voting privileges should be taken from office holders and pensioners. Proponents argue that these blocs exercise a disproportionate influence, look strictly to their own purses rather than the public welfare and make vote getting and lobbying their major occupations.

Aside from the merits, opponents point to difficulties in definition and administration. Is a teacher an "office holder" and a disabled veteran a "pensioner"? If others economically dependent upon government should be disfranchised, what about a business man holding government contracts?

The second proposal follows John Stuart Mill³³ to the effect that "the assembly which votes the taxes, either general or local, should be elected exclusively by those who pay something toward the taxes imposed. Those who pay no taxes, disposing by their votes of other people's money, have every motive to be lavish and none to be economical." Proponents say that neither excise taxes nor sales taxes are sufficiently felt to make a voter budget-conscious. The voter, they say, should pay a property or income tax or meet specified educational requirements.

(e) Our state elections come in presidential years. Often they seem of secondary importance. If we voted for a governor in the even numbered years not divisible by four, the race for the governorship would be the top race on the ticket. Candidates for the governorship might be considered more on their own merits and less because of allegiance to the then prevailing national ticket.

Obviously not all constitutional problems have been touched upon. A most glaring omission pertains to taxation. Though much improvement could be made by legislation, some constitutional unscrambling of the muddle of sales, excise, income, inheritance and property taxes may be desirable. But that is a subject in itself with not a few books devoted to it.³⁴

It is not unfitting to close with the familiar words from Gladstone:

"As the British Constitution is the most subtle *organism* which has proceeded from the womb and long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man."

So if there are here assembled a host of possible amendments to the Federal Constitution it is not with the thought that the 1787 model is worn out and should be discarded in favor of a new 1946 model. This

³³ REPRESENTATIVE GOVERNMENT (Everyman's Edition) 281-282

³⁴ Among them, A TAX PROGRAM FOR A SOLVENT AMERICA, by Roswell Kent, former Undersecretary of the Treasury, as spokesman for the Committee on Post War Tax Policy.

writer has full confidence that the 1787 product is far better than any which would be written today. It has worked pretty well. Nevertheless we should not be blind to the possibilities of improvement.³⁵ Some of the proposals referred to in this article were advanced more than three-quarters of a century ago by John Stuart Mill and by Walter Bagehot, said to be the most penetrating analyst of government that the English speaking world has known.³⁶ Their comments have been echoed and confirmed in times of repose as well as during times of peril by many coolheaded and conservative students of our institutions, both foreign and American.

³⁵ For general discussions, see WOODROW WILSON, CONGRESSIONAL GOVERNMENT, and CARL BRENT FISHER, Stran Professor of Political Science, Johns Hopkins University, AMERICAN CONSTITUTIONAL DEVELOPMENT, Houghton Mifflin (1943), particularly c 39, *The Constitution Today and Tomorrow*

³⁶ From A NEW CONSTITUTION NOW, supra p 15