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Recommended Citation
AMENDMENT OF THE FEDERAL CONSTITUTION: SHOULD IT BE MADE MORE DIFFICULT?

By Justin Miller*

The federal constitution has lately become the subject of a considerable revival of interest upon the part of the American people. This has been caused principally, no doubt, by campaigns which have been carried on for the adoption of particular amendments. There are those who fear that the prestige of the constitution has already been seriously injured and that the time has come to prevent further additions to or subtractions from the original document. This opinion has found concrete expression in the form of a joint resolution fathered by Senator Wadsworth of New York and Congressman Garrett of Tennessee, which proposes an amendment to article V of the constitution.¹ The resolution, like others of similar import which have been introduced by the same authors in previous Congresses, has the very definite purpose of making the amending process more difficult than it is at the present time. This purpose is revealed by the statements of proponents of the resolution, among friends;² and it also clearly appears from an analysis of the proposed method of procedure.

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¹Senate Joint Resolution No. 8, House Joint Resolution No. 15, 69th Congress, 1st Session.

²Special Report of Committee on Constitutional Amendments of the Association of the Bar of the City of New York, Year Book 1924, p. 236: "The Wadsworth-Garrett Amendment will make the amendment of the constitution more difficult. In retaining the state legislatures as the ratifying body, subject to control by popular vote, it will avoid the danger of hasty, uninformed, popular action. Finally it will lessen the danger of the passage of amendments through pressure on State legislatures by propaganda, organized lobbyists and other more discreditable means."

Dialogue between Senator Colt and Everett P. Wheeler representing the "Back-to-the-People Amendment National Committee" at a hearing
No change is suggested by the resolution in the method of proposing amendments. The present article V requires that the proposal shall be made by Congress, acting by a two-thirds vote of both houses, or by a convention called by Congress on application of the legislatures of two-thirds of the several states. No substantial change is suggested, either, in the formal method of ratification. Article V now requires that ratification shall be accomplished by the affirmative action of the legislatures of three-fourths of the states or by conventions in three-fourths of the states "as the one or the other mode of ratification may be proposed by the Congress." The resolution would make it possible for the convention to propose either method of ratification, in case a convention should be called by Congress for the purpose of proposing amendments.

The important changes contemplated by the resolution are three in number and consist of limitations which would be placed upon the power of the legislatures to ratify. The language of the resolution, upon these points, is as follows:

"Provided, That the members of at least one house in each of the legislatures which may ratify shall be elected after such amendments have been proposed; that any state may require that ratification by its legislature be subject to confirmation by popular vote; and that, until three-fourths of the states have ratified or more than one-fourth of the states have rejected or defeated a proposed amendment, any state may change its vote."

A persuasive argument can be made in favor of each of the three limitations. If each state were required to elect at least one house of its legislature before it could ratify, then the issue of ratification or rejection could be presented to the people of the state and a vote of instruction given to the representatives elected. Stated in more practical terms, each legislative candidate could be forced to declare himself to be for or against rati-
fication and his declaration could be made the basis of his own election or defeat. As a matter of fact, it has been urged by counsel before the United States Supreme Court that this limitation already exists in some of the states by virtue of laws existing therein. The Supreme Court, however, rejected the contention in its opinion in the case of Leser v. Garnett and denied the power of a state to determine the method of ratification of an amendment of the federal constitution. We can see then in this proposal an attempt to secure to all of the states a power which the Supreme Court has already denied to some of them.

The second limitation has also been tried out in experimental form by the state of Ohio. In that state the action of the legislature in ratifying the eighteenth amendment was submitted to the people through the medium of a referendum. The action of the people in repudiating the legislative ratification was held by the Supreme Court of the United States to be equally of no avail. Here again we can see an attempt to secure to all of the states a power denied by the Supreme Court to the state of Ohio. And here again a persuasive argument can be made in favor of the exercise of such a power by the states. If each of the states could submit the question of ratification to its voters by means

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4(1921) 258 U. S. 130, 136, 66 L. Ed. 505, 42 Sup. Ct. 217:

"The second contention is that in the constitutions of several of the thirty-six States named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislature were without power to ratify. But the function of a state legislature in ratifying 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. Hawke v. Smith, No. 1, 253 U. S. 221; Hawke v. Smith, No. 2, 253 U. S. 231; National Prohibition Cases, 253 U. S. 350, 386.

"The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective States. . . . The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in Field v. Clark, 143 U. S. 649, 669-673, is applicable here. See also Harwood v. Wentworth, 162 U. S. 547, 562."  

of a referendum, in this way, also, the proposed amendment
could be presented directly to the people instead of to their represen-
tatives. And if both methods could be used, as conceivably
they would often be so used, then there would be two popular
elections upon the issue of ratification, where now there need be
none at all.

The third limitation, too, seems at first glance to be a very
fair proposition. At the present time the rule is that if a state
once ratifies an amendment it cannot thereafter change its vote
except upon a new submission. On the other hand, if a state
rejects the proposed amendment it may thereafter change its
vote and ratify. The resolution under consideration would per-
mit a state to change its vote from ratification to rejection as
well as from rejection to ratification, at any time “until three-
fourths of the states have ratified or more than one-fourth of
the states have rejected or defeated a proposed amendment, . . . ."
Standing alone, and without reference to the whole problem, there
would seem to be no objection to permitting the people of a state
to reconsider a previous action one way as well as another. It
can be urged with a considerable display of reason that changing
social conditions, or a better educated point of view might make
it desirable for the people of a state to change their vote from
ratification to rejection.

It is not necessary to admit that any one of the three proposed
limitations is desirable in itself, in spite of the persuasive argu-
ments advanced by their proponents. The fact that, after all,
the negative votes of only thirteen states, regardless of size,
population or importance can defeat the will of all the rest of
them, would seem to go a long way toward justifying the present
rule that a vote can be changed from rejection to ratification,
but not otherwise. The provision for the election of one house
of the legislature after submission of a proposed amendment by
Congress, and the provision for submitting the ratification to a
popular vote are both designed to subordinate the power and
discretion of representative legislatures and to substitute instead,
the will of democracies. Generally the votes which have been
cast in state elections, and particularly in referendums upon pro-
posed constitutional amendments, have indicated an unwilling-

61 Willoughby on the Constitution 521; see also discussion by W. F. Dodd in 30 Yale L. Jour. 346, and authorities listed in 12 Corpus Juris
681-2.
ness upon the part of the people to concern themselves with such questions. The slogan, "When in doubt, vote no!" has been applied with particular emphasis, and from the evidence available it appears that usually the number and percentage of votes cast upon proposals for amendments have been the lowest cast for any propositions or candidates on the ballot. The reason is

Wright, Selected Readings in Municipal Problems 329, "That the voting in general was conservative is evident. Almost as many of the measures were defeated as carried, the outcome for charter amendments and ordinances being about the same. Whenever they were so numerous or intricate as to puzzle the voter, he seems to have adopted in defense the slogan, 'When in doubt, vote No.'"

Holcombe, State Government in the United States 426. "When the number becomes excessive, the voters have a way of voting 'no' on all or most of the measures without much regard to their several merits. This remedy has been most conspicuously applied in Missouri. In that state the presence of much statutory matter in the constitution occasions the submission of numerous amendments, and inadequate provision is made for the information of the electorate. In 1914 eight constitutional amendments were submitted by the legislature and four legislative measures were submitted by means of the optional referendum, all of which were defeated by large majorities, though some were apparently not without merit."

Two hundred and thirteen measures were voted on in the state elections of 1924. Of this number, 163 were constitutional amendments (of which 5 were proposed by initiative petition), 17 were measures referred by the legislature, 15 were measures referred by petition, and 18 were measures proposed by initiative petition. The mood of the electorate was on the whole negative. The voters approved 90 and defeated 123. The degree of interest is measured by reckoning the total vote for and against each of these propositions as a percentage of the total vote for governor, (or occasionally the vote for United States Senator, or for presidential electors, or the total vote in the election), and by striking group averages of the individual averages. On all measures this average was 57.0%; on constitutional amendments it was 51.3%; on measures referred by the legislature, 64.5%; on measures referred by petition, 82.7%; on initiated measures, 80.5%.

Munro, The Initiative, Referendum and Recall p. 131. "The experience of Massachusetts—a conservative commonwealth with a good legislature, whose people have practised the art of popular voting on constitutional questions longer than any other community too large to meet in a general assembly—may be of interest on the two questions already discussed. Since the adoption of the constitution of 1780 there have been submitted to the people fifty-eight questions, of which thirty-nine were answered in the affirmative and nineteen in the negative. The rejection of one-third of the proposals shows that the people had a mind of their own: but the variation in the interest they appeared to take in the different measures in surprising. The votes cast at the referenda have varied from a number slightly in excess of those polled for the candidates for governor in the same year down to one-thirtieth part thereof, two measures being actually carried by less than 4,500 affirmative votes, although nearly 170,000 were cast in the election of the governor. On ten measures the number of votes polled was less than one-fifth of the number cast in the election; on forty-two measures it was less than two-thirds; and it must be remembered that only seventy-five per cent of the registered voters cast their ballots even for governor. In this connection it may be observed that the vote is almost always larger on measures which have been rejected than on those which have been adopted. In only two instances of acceptance, indeed, has the total vote
that the voters are unable or unwilling to give proper considera-
tion to such questions. They elect lawmakers for that purpose
and have a right to expect that their representatives will take
testimony, consider all of the evidence and, after due and proper
deliberation, render a reasoned decision. Many voters are not
properly trained to understand questions of the import involved
in proposed constitutional amendments, and the proponents of
the Wadsworth-Garrett resolution would be the last to admit
their proper training or qualification. Many voters have no
time or opportunity for proper consideration of questions of such
import; and, as a practical matter it is impossible to take to the
great mass of the voters the expert advice and counsel which is
necessary for the proper decision of such questions.

Nevertheless it is upon the basis of these three propositions
that the Wadsworth-Garrett resolution has been called "The
back-to-people-amendment." It can hardly be seriously contend-
ed that the name has been applied honestly or with the real con-
viction that its primary purpose is to bring the constitution any
more closely within the control of the people than it is at present.
On the contrary it is true, as previously noted, that its pro-
ponents hope in this manner to remove the constitution even farther
from the control of the people by making it infinitely more
difficult to amend.

At the present time, legislatures in session at the time Congress
proposes an amendment, may proceed at once to its considera-
tion and ratification. As a result ratification can be and in most
instances has been completed in from ten months to two years.8
If the first limitation proposed in the Wadsworth-Garrett reso-
lation were to become effective, it would be necessary in many
cases for a state to wait a full two years and where the legisla-
ture meets quadrennially, for four years9 before a first vote
could be taken. If the first legislature deadlocked or voted
adversely, in such states it would be necessary to wait for
another two or four years before another attempt at ratification
could be made. As a matter of probability, then, the time
required for consideration and ratification would be at least

8M. A. Mussman, 57 Am. L. Rev. 696-7; Kettleborough, The State
Constitutions pp. 8-11.
9See constitution of Alabama art. IV sec. 48.
double that now required; and delay and difficulty of amendment proportionately increased. Moreover, the certainty that no action could be taken in a number of such states for a period of from two to four years, would make it possible for the opponents of a particular proposed amendment to concentrate their money and propaganda in a few states, with the idea that if thirteen rejections could be secured, then the question would be finally determined and opportunity for changes of vote ended before those other states could even have a first vote.

The provision for submitting the action of the legislature to a referendum would be even more provocative of delay and difficulty. In the first place, it would come after legislative action had been completed and hence would be cumulative in delay-producing characteristics. In the second place, in those states where no provision has been made for referendum elections, the issue might well be made to turn on the preliminary question of whether or not the state was willing to adopt the referendum as a method of election. As the amending provision, in its new form, would guarantee to each state the power and the privilege of submitting the legislative ratification to popular vote for confirmation or rejection, presumably each state would be given a reasonable time to provide machinery for that purpose. This would require action on the part of the legislature in many states and would no doubt be followed by court actions to determine the constitutionality of the new election laws. Following decisions by the state courts, no doubt, many questions could be raised which would require consideration by the United States Supreme Court. Then again, while at the present time the question of ratification is a federal question, and the procedure of ratification a uniform one of federal procedure, the new method would make the procedure of ratification one in part of federal cognizance and one in part for interpretation and decision by each state for itself. This would be true both as to the validity of the state laws governing the referendum elections and as to the propriety of attempted compliance with such laws in each case. If those who are most anxious to make amendment diffi-

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10 T. F. Cadwalader in 8 Am. Bar Ass'n Jour. 777: "These (referendum) elections cannot operate as substitutes for legislative ratification, but merely afford to the voters a practical veto power over ratifications in defiance of their sentiments. They cannot ratify what the legislature has rejected, but may reject what the legislature has ratified. Even this can only be done if the State's Constitution or statutes provide that it may."
cult were to succeed in securing the adoption of complicated and expensive election machinery, the delay and difficulty of amendment would be tremendously increased. The very item of expense in holding such elections could be used with telling effect in some states as an argument against the proposed amendment or against its consideration by the legislature.

At a time when every effort is being made to eliminate the confusion and uncertainty which results from lack of uniformity and harmony in our law, it should not be difficult to convince any intelligent person that a change which involves the scrapping of a single, certain, well-understood method of procedure and replacing it with methods of procedure which conceivably may be as numerous and varied as the states of the union, can have but one real effect and that the immeasurable increase of delay and difficulty in securing the adoption of amendments. As for the third limitation, that any state may change its vote until the proposed amendment has been definitely ratified or rejected, here again the difficulties which would be placed in the way of ratification would be greatly increased. At the present time, it is necessary that the opponents of an amendment should carry on campaigns in every state, because once a state has ratified, that ratification becomes an unchangeable record, and each state which registers an affirmation limits the number of states in which the battle can be carried on. Under the procedure of the proposed resolution, the field would be wide open

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11See in this connection the publications of the Commission on Uniform Laws and of the American Law Institute. See also the address of John W. Davis as president of the American Bar Association, 48 Reports of Am. Bar Ass'n 196: "In a federal republic, moreover, with many independent jurisdictions professing allegiance to the same body of laws, it is high statecraft to seek uniformity both in statement and in interpretation not only as a safeguard to the citizen, but as the surest bond of union itself."

12Day, Justice, in Hawke v. Smith, (1920) 253 U. S. 221, 230, 64 L. Ed. 871, 40 Sup. Ct. 495, "It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal constitution has its source in the federal constitution. The act of ratification by the state derives its authority from the federal constitution to which the state and its people have alike assented. "This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States."

13See note 6.
and until definite rejection or ratification had taken place, it would be possible to pull states back and forth from one column to the other, indefinitely extending the time and increasing the expense and difficulty of securing the ratification of amendments.

The important question, then, is whether it is necessary or desirable that the procedure for amending the constitution should be made more difficult. The thesis of this discussion is that it is not. Let us test first the arguments of those who contend that it is.

The first main argument is that the constitution sets out in final and permanent form certain fundamental principles of government which are common to all constitutions and are in a sense immutable, beyond the control or power of any agency to change. The argument proceeds, that at the present time there is danger of interference with those fundamental principles through a too easy amending procedure, by means of which "reds," professional reformers and busybodies impose upon an ignorant or indifferent people to secure additions to or subtractions from the constitution. These fears are illustrated by reference to the apparent ease with which the adoption of the last four amendments was secured, and by examples of widely prevailing ignorance or evil motives upon the part of many people.

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14 See statements of proponents of resolutions at the hearing before a subcommittee of the Committee of the Judiciary of the U. S. Senate, January 16, 1923, on S. J. Res. 40, 67th Cong. 4th Sess.
15 Extract from an article by Charles Willis Thompson, entitled "That Dark Secret-The Constitution" which appeared in the New York Times, June 29, 1924 and which is quoted in 9 Mass. L. Quart. 7:

"In an article written by a clever Jesuit for a little monthly published by the Church of Our Lady of Mercy appears the statement that the question whether a Catholic can be constitutionally elected president of the United States is asked in every city from New York to San Francisco at election time. This is a staggering statement, but after spending thirty years in traveling through all the principal cities of the United States I am convinced that the Rev. Paul L. Blakely, S. J., understated the case. I think full half of the population, Protestant and Catholic, alike, imagine that there is some such clause in the constitution. In saying this I do not mean only morons or half-educated people, but college graduates as well—men who forget after commencement everything they are not specially interested in. It is as easy for a college graduate to forget the constitution as it is for him to forget the First Book of Caesar. There are many college graduates who think the people elect the president by direct vote and have forgotten all about the Electoral College. I have met them. The majority of college graduates, I am pretty sure, do not know what the Bill of Rights is. Lawyers are not exempt. They are supposed to know all about the constitution, but it is easy to stump an average good lawyer with a prosperous practice by asking him a simple question about it unless his
An analysis of this argument reveals first, that the supposed great danger to which the constitution is exposed, results from the ignorance, indifference and evil motives of those very people in whose behalf the resolution has been called the "back-to-the-people amendment." No more complete answer should be needed to the pretense involved in this euphonious nick-name. Next, it may fairly be questioned whether the last four or any of the line of practice is such as to make him keep in constant touch with it. He has studied it, of course, but in the course of years he has retained only those parts of it which he uses in his daily business. Most people believe that the constitution provides for every emergency that might arise except woman suffrage and prohibition. What is to be done about it? You can lead a horse to water but you can't make him drink. To most people the constitution is a sacred relic in a glass case, not to be taken out or looked at. It might as well be a goldfish. 

Excerpt from an address by R. E. L. Saner, before the Iowa Bar Association, Report of Proceedings of Annual Session, 1923 pp. 76, 91:

"An optimist by nature, I am alarmed by the pessimism which against my nature filters into my brain when I think of the disturbing and un-American influences which are insidiously attacking the greatness of America and undermining the honor and the glory of my country."

* * *

"In my humble way, I stand before you, and warn you of incipient blazes of Bolshevism, of anarchy, of disregard for law and order, of disrespect for established institutions, and of organized effort to destroy the fundamentals of our government."

Excerpt from report of Committee on American Citizenship of the Minnesota State Bar Ass'n, Annual Proceedings, 1925. p. 132:

"There exists, however, throughout this country a small but active minority devoting its time and its resources to propaganda seeking to destroy our government. I refer to the Communist organization. Until recently the activity of this organization has been viewed with very little concern. However, when it is found that in the State of Minnesota more than fifty Communist 'Sunday Schools' are established chiefly in the larger cities of the state, but also in a number of smaller communities, which schools are teaching principles inimical to our government, the time has arrived for counter action. . . . There are in every community many people with little or no understanding or knowledge of our constitution. Until recently there has been little effort put forward to impress upon the people of the different communities the real importance of the American constitution. On the other hand those who would destroy free government have been busily engaged in circulating propaganda throughout the country. . . . The anti-constitutional, radical and poisonous stuff that is made accessible in some way or other, at practically no cost, to those who do not understand the constitution is circulated very freely, and in language which these people seem to understand; whereas that grand old constitution, upon which the laws of the country are based, is not made accessible, or popular enough. . . ."

Excerpt from a special report of the Committee on Constitutional Amendments of the Association of the Bar of the City of New York Yearbook, 1924, p. 235:

"To substitute a popular vote for action by the State legislatures, in the opinion of your committee, is a more radical change than is advisable. The Wadsworth-Garrett amendment, while retaining the state legislatures or conventions as the ratifying body, by its additional requirements, secures to the people the fundamental power of amending the constitution." (Note that, on the contrary, it merely secures to the people power to defeat ratification.)
other amendments were secured with great ease. The first ten amendments were adopted practically as a part of the original document.\textsuperscript{18} We have left a total of nine which have been adopted during one hundred thirty-five years of most remarkable social and political change. That fact is a testimonial to the sterling quality of the American constitution and it is also a testimonial to the fact that amendment is not easy. During that one hundred thirty-five years, approximately twenty-four hundred proposals for constitutional amendments have been offered in Congress.\textsuperscript{19} Those which have been adopted represent but an infinitesimal proportion of those offered, and most of them recall long educational campaigns, national issues and thorough consideration by the people of the United States.\textsuperscript{20}

The idea seems to be generally accepted that the framers of the constitution thought they were devising a method of amendment which would be simple of operation and frequently used.\textsuperscript{21} The great difficulty of securing amendments to the articles of confederation according to the procedure outlined therein was one of the great weaknesses of that document which caused its

\textsuperscript{18}Andrew C. McLaughlin, in 1 Cyc. of Am. Gov't, p. 418 and authorities there cited. M. A. Mussman in 57 Am. L. Rev. 695 and authorities there cited.


\textsuperscript{20}John W. Davis, in 48 Report of Am. Bar Ass'n 201 (1923):

"Turn your thought for a moment to the process of amendment itself. There have been days when men averred that the constitution was incapable of amendment by the machinery set up for the purpose. Usually these complaints arise from the utter refusal of a majority of their fellow citizens to follow the complainants rather than from any mechanical defects in the process of amendment. In any event recent experience has dispelled all such doubts. There can be no charge of mechanical torpor in face of the fact that the 17th Amendment was ratified within 12 months and 16 days after its submission, the 18th within 13 months and 10 days, and the 19th within 14 months and 25 days. But with this definite proof that amendments can readily be made, a new fear has arisen, based in part upon the belief that recent amendments have been procured through pressure exerted by organized minorities upon facile and timid members of state legislatures. I confess that I see little in current history to warrant this belief; for though men may still debate the wisdom or unwisdom of a general income tax, of the popular election of Senators, of prohibition, or of woman suffrage, it cannot be denied that each and all of these things came not over night but as the result of a long continued agitation in their favor; and it is not unjust to say that each decision fairly represented the considered opinion of a majority of the American people."

\textsuperscript{21}Andrew C. McLaughlin 1 Cyc of Am. Govt. 417; Ames. Proposed Amendments etc., 2 Am. Hist. Ass'n Annual Report 18 (1896) 5 Papers of the American Hist. Ass'n 353; 5 Elliot's Debates 182.
abandonment, and inclined the members of the convention toward a more usable procedure. However, as the years went by with practically no amendments, it came to be realized that amending the constitution was no easy matter. Most of the suggestions for changing the procedure of amendment which were made prior to the Wadsworth-Garrett resolution, seem to have been suggestions for making the procedure more easy rather than more difficult. In fact the testimony of the years seems to

221 Bryce, The American Commonwealth 19; Vol. 2 Elliot’s Debates 549; 5 Elliot’s Debates pp. 112 et seq., 128, 157; articles of confederation, Art. XIII, “And the articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state.”

23 Frank J. Goodnow, Social Reform and the Constitution 4; Woodrow Wilson, Congressional Government 242; 1 Bryce, American Commonwealth 359 et seq.; Marshall, Chief Justice, in Barron v. Baltimore, (1833) 7 Pet. (U.S.) 242, 249; 8 L. Ed. 672, in holding the fifth amendment to the federal constitution not a limitation on the power of the states, used the following language: “The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister states, could never have occurred to any human being, as a mode of doing that which might be effected by the state itself.”


a. Proposal by a simple majority of Congress; ratification by two-thirds of legislatures; H. V. Ames, 5 Papers of Am. Hist. Ass’n 362.

b. Proposal by a number of the states; 1 Senate Reports 63rd Congress 2nd Session 1913-1914, Miscellaneous, Report No. 147 Part 2.

c. Proposal by Initiative Petition, idem:

“The members of the committee who sign these views are not in entire agreement with respect to all parts of the resolution. Some of them are of the opinion that the legislatures of a reasonable number of the States should have the right to require the submission of an amendment, and that it is not wise to extend the right to primary voters to be exercised through petition. Others believe that the right of initiation should be given not only to state legislatures but also to the voters under proper restrictions. They are, however, of one mind in this, that there should be submitted to the states for approval or rejection an amendment providing that either a proportion of the states or a proportion of the people, or both, should have the power to initiate amendments to our constitution.

Alfred B. Cummins.
Henry F. Ashurst.

While differing from some of the conclusions and principles asserted in the foregoing, I am in favor of an amendment to the Constitution permitting it to be amended on conditions much less onerous than those imposed by the Convention of 1787, and accordingly join in opposing the report of the committee.

T. J. Walsh.
Wm. E. Borah.

*I am in favor of so much of the resolution as permits the legislatures of the several States to propose amendments.

Knute Nelson.
Lee S. Overman.
join with the recent result in the campaign for the ratification of the child labor amendment, in demonstrating the fact that amending the constitution is not easy but very difficult.

Finally, it seems appropriate to examine the contention that the principles set out in the constitution are necessarily fundamental, or that they are in final and permanent form, expressive of concepts of government which lie back of all constitutions and all law. The constitution was prepared and adopted by the members of the convention as a compromise measure. It contained many of the propositions formerly contained in the articles of confederation, which was scrapped because it wouldn't work. The declarations of such men as Franklin indicate that it was not regarded by those who framed it as being a perfect or final

"Thirty-two Members (one-third of the Senate's membership) can delay and debate a resolution to amend the constitution indefinitely; therefore it is the power of one-third of the Senate, even a less number, in fact, to prevent the submission of an amendment. I think, therefore, that to give a reasonable number of states the power to submit an amendment for ratification is wise and is demanded by the present situation..."

W. E. Chilton.

d. Recall of Judicial Decisions, Wm. Draper Lewis, Ann. Am. Acad. Pol. & Soc. Sc. Sept. 1912 p. 311. And see the many suggestions which have recently been made to limit the power of the Supreme Court to declare legislative acts unconstitutional.

251 Bryce, American Commonwealth 22; Vol. V Elliot's Debates 553:

"In Convention—The engrossed constitution being read,—Dr. FRANKLIN rose with a speech in his hand, which he had reduced to writing for his own convenience, and which Mr. Wilson read in the words following:

'Mr. President: I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them. For, having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions, even on important subjects, which I once thought right, but found to be otherwise. It is therefore that, the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. Most men, indeed, as well as most sects in religion, think themselves in possession of all truth, and that wherever others differ from them, it is so far error. Steele, a Protestant, in a dedication, tells the Pope, that the only difference between our churches, in their opinions of the certainty of their doctrines is, 'the Church of Rome is infallible, and the Church of England is never in the wrong.' But though many private persons think almost as highly of their own infallibility as of that of their sect, few express it so naturally as a certain French lady, who, in a dispute with her sister, said, 'I don't know how it happens, sister, but I meet with nobody but myself that is always in the right—il n'y a que moi qui a toujours raison.'

'In these sentiments, sir, I agree to this constitution, with all its faults, if they are such; because I think a general government necessary for us, and there is no form of government but what may be a blessing to the people if well administered; and believe further that this is likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted
thing. Some of the members of the convention refused to sign the completed document and the states ratified with considerable reluctance, exacting the first ten amendments as the price of ratification. We cannot but admire the patient, heartbreaking work which went into the framing of the constitution, and the real statesmanship displayed in securing its adoption and ratification. We cannot but marvel at the remarkable piece of work which was done, but it is hard to find in the utterances of its sincerest supporters or admirers or in the attitudes of the ratifying states any suggestion of finality, perfection or immutability.

as to need despotic government, being incapable of any other. I doubt, too, whether any other convention we can obtain may be able to make a better constitution. For, when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me, sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies, who are awaiting with confidence to hear that our councils are confounded, like those of the builders of Babel; and that our states are on the point of separation, only to meet hereafter for the purpose of cutting one another throats. Thus I consent, sir, to this constitution, because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born, and here they shall die. If every one of us, in returning to our constituents, were to report the objections he has had to it, and endeavor to gain partisans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects and great advantages resulting naturally in our favor among foreign nations, as well as among ourselves, from our real or apparent unanimity. Much of the strength and efficiency of any government, in procuring and securing happiness to the people, depends on opinion—on the general opinion of the goodness of the government, as well as of the wisdom and integrity of its governors. I hope, therefore that for our own sakes, as a part of the people, and for the sake of posterity, we shall act heartily and unanimously in recommending this constitution (if approved by Congress and confirmed by the conventions) wherever our influence may extend and turn our future thoughts and endeavors to the means of having it well administered.

'On the whole, sir, I cannot help expressing a wish that every member of the convention, who may still have objections to it, would with me, on this occasion, doubt a little of his own infallibility, and, to make manifest our unanimity, put his name to this instrument.'"

281 Bryce, American Commonwealth 23.

a. Virginia—Ayes 89; noes 79. 3 Elliot's Debates 654.
b. Massachusetts—Ayes 187; noes 168. 2 Elliot's Debates 181.
c. New York—Ayes 30; noes 27. 2 Elliot's Debates 413.

282 Bryce, American Commonwealth 24: 2 Watson on the Constitution 1362; 2 Elliot's Debates 411; Vol. 3, p. 655, 656; Vol. 5, p. 157; and see reports of ratification in other states.

283 See note 25; see also, 1 Bryce, American Commonwealth 25:

"The Constitution of 1789 deserves the veneration with which the Americans have been accustomed to regard it. It is true that many criticisms have been passed upon its arrangement, upon its omissions, upon the artificial character of some of the institutions it creates. Recognising slavery as an institution existing in some States, and not expressly nega-
When we examine the instrument itself, where do we find eternal fundamental principles? The reservation to the states of powers not delegated to the United States, appears in the tenth amendment, an afterthought of reluctant states. The separation of powers of government arbitrarily into three divisions is not found in the English constitution or in others under which governments are functioning successfully. This conception and others frequently referred to as fundamental are considered by some eminent thinkers as constituting a real handicap on social progress.\(^{29}\) The present day growth of administrative government, both in the states and in the federal system, is producing an undoubted confusion and consolidation of legislative, executive and judicial functions of government. Well known examples are to be found in the cases of the Interstate Commerce Commission and of state governmental bodies variously designated as Industrial Accident, Public Utility, Warehouse and Railroad Commissions. This undoubtedly constitutes a repudiation of the idea that an absolute separation of powers is a fundamental essential of good government. In the face of such a repudiation it is difficult to find much of a foundation for suggestions of fundamentalism. The principles set out in the so-called "bill of rights" included in the first ten amendments, are not sufficiently fundamental so that they are held to be controlling except in federal matters, and the states have dealt with them as they pleased in their own constitutions and legislation. Washington\(^{29}\) and Linton the right of a state to withdraw from the Union, it has been charged with having contained the germ of civil war, though that germ took seventy years to come to maturity. And whatever success it has attained must be in large measure ascribed to the political genius, ripened by long experience, of the Anglo-American race, by whom it has been worked and who might have managed to work even a worse drawn instrument. Yet, after all deductions, it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details."

\(^{29}\)J. Allen Smith, The Spirit of American Government 28; Frank J. Goodnow, Social Reform and the Constitution 4; Roscoe Pound. An Introduction to the Philosophy of Law 1:

"The perennial struggle of American administrative law with nineteenth-century constitutional formulations of Aristotle's threefold classification of governmental power, the stone wall of natural rights against which attempts to put an end to private war in industrial disputes thus far have dashed in vain, and the notion of a logically derivable super-constitutions, of which actual written constitutions are faint and imperfect reflections, which has been a clog upon social legislation for a generation, bear daily witness how thoroughly the philosophical legal thinking of the past is a force in the administration of justice of the present."
both freely conceded unlimited power in the people to amend the constitution. John W. Davis in an address delivered as president of the American Bar Association in 1923, expressed the present day view of legal scholars in these words:

"Law which deals with human life, must live itself; its fabric is ever changing; it can never be reduced to the cold rigidity of permanent formulae."\(^{32}\)

In the same address he indicated how in many respects the so-called fundamental principles of the constitution had given way before the onward push of civilization. The motif of his address is well illustrated by the following excerpt:

"Changing conditions in the material world, new conceptions of human rights and the relations growing out of them, the struggle to translate into law economic ideas both new and old, and not least of all the governmental experiments made necessary by the war, have profoundly modified and are profoundly modifying doctrines once accepted as settled and dogmas believed to be fundamental."

Intelligent people are no longer satisfied with the imperfect generalizations of mediaeval scholars or with the metaphysical explanations which they offered to support their hypotheses. We may well admit the existence of ultimate truths and of divine origins, but no amount of natural law assumptions will take the place of scientific demonstration. Even the so-called fundamental principles of science to which we have been accustomed to turn for comforting analogy seem liable to proof of error in the laboratories of competent scientists. The recent discovery of the structure of the atom\(^{33}\) has apparently knocked the bottom out of a supposed finite basis for the science of chemistry, and Einstein's studies in connection with the so-called principle of "relativity" seem to be seriously endangering that cornerstone of science, the law of gravity.\(^{34}\) After all, the major premises of the law have been or must be developed out of the experiences of men and it sounds rather absurd in this day to hear men talking in the terms of the apologists for governmental orders long since

\(^{30}\)"Farewell Address." "The basis of our political systems is the right of the people to make and to alter their constitutions of government."

\(^{31}\)"First Inaugural Address." "This country with its institutions belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

\(^{32}\)\(^{48}\) Reports of Am. Bar Ass'rn 196.

\(^{33}\)Bertrand Russell, The A. B. C. of Atoms.

\(^{34}\)Bertrand Russell, The A. B. C. of Relativity. 120 Nation 686.
ended. To the extent that the hypotheses of the natural law scholars prove workable today, they are fundamental principles. If the legal scholars of tomorrow find defects in them, they will substitute more workable hypotheses and the march toward ultimate truth will go on. To that extent and to that extent only are the principles of the constitution fundamental. Men who are recognized as being most conservative in their attitudes and certainly most reverent in their regard for the constitution, are from day to day urging new and substantial amendments to the constitution. Among such men are to be found Calvin Coolidge, Warren G. Harding, Charles E. Hughes, and John W. Davis.

Even the proponents of the Wadsworth-Garrett resolution, it must be remembered, are themselves urging a change in one of the original untouched articles of the constitution. Are the principles expounded in that section less fundamental, less perfect, less immutable than the others? Who is to judge? Surely it is a convenient argument which permits of resort to an intangible, unverified "natural law" which defines as fundamental certain principles desired to be preserved and condemns as wrong those which are desired to be destroyed.

The second argument usually advanced in support of tightening up the procedure of amendment is that frequent amendment, and especially the addition of provisions relating to highly controversial issues has a tendency to break down the respect of the people for the whole instrument. In support of this argument it

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35 Roscoe Pound, An Introduction to the Philosophy of the Law p. 36 et seq.; Frank J. Goodnow, Social Reform and the Constitution p. 1 et seq.; Jacob Tanger, Amending Procedure of the Federal Constitution, 10 Am. Pol. Sc. Rev. 689. "The early colonial charters kept alive the fiction that a form of government once established was supposed by its creators to last forever. Only the slow change of custom or the violence of a revolution could modify or destroy such a system of government, except, as in the case of the charters granted by the crown, a modification came as a consequence of the exercise of the royal prerogative. In the Frame of Government drawn up by Penn and his colonists in 1683, appeared an amending provision for the first time in the history of written constitutions: ..."

36 Message of December 7, 1923, urging amendment to prohibit issuance of tax-exempt securities. See 8 Const. Rev. 114.

37 Message of December 8, 1922, urging same amendment referred to in note 36. See 7 Const. Rev. 123.

38 Address as President of American Bar Ass'n, 50 Reports of Am. Bar Ass'n; see 11 Am. Bar Ass'n Jour. 563.

39 Address as President of American Bar Ass'n, 48 Reports of Am. Bar Ass'n 199. Suggestions include changing date of assembling Congress and inaugurating president; ratification of treaties by majority vote of Senate instead of two-thirds vote; permitting president to veto separate items in appropriation bill.
is pointed out, as an example, that the proponents of the eighteenth amendment expected to capitalize the great respect which the people felt for the constitution and to give added dignity to prohibition by writing it into the constitution; but, that while they perhaps added to the prestige of prohibition they undoubtedly destroyed a great deal of popular respect for the document itself. It must be conceded that there has been much loose and disrespectful talk and action concerning the constitution and law generally, and that on the part of people who should know better.

It must be conceded that when a certain definite written document is set up as an object of respect and veneration beyond the rest of the body of the law, any enlargement of such a document to include pronouncements of law which are not so generally accepted by most of the people will break down the respect felt for that document to a point nearer the level of respect felt for the whole body of the law. It must be conceded too that an active minority, loudly proclaiming itself, can make a substantial majority wonder about the validity of its own position.

In other respects the argument is unsound. Many of our social conventions are so well established and thoroughly respected that even without laws they would be almost universally respected. Some of the principles set out in our written constitution are no doubt of that type, but at one time those so-called fundamental principles were vital human issues, fought for at great cost. We respect them now because they have so grown into our lives and our beliefs that they are no longer fighting issues. Today we have new vital issues which must be answered one way or the other, tentatively and experimentally at first, and then as the answer in each case becomes more clear and is subscribed to by a sufficient majority of the people it is written into the body of our law. In countries which have no written constitutions this process is a more gradual, unapparent one. In the United States, where our method of writing new parts into the body of our law requires long continued educational campaigns and many tentative, many abortive efforts, the process becomes a very obvious one and for the defeated minority—once a majority—it becomes a very painful process. Nevertheless the process of growth must go on. A constitution which contained principles universally subscribed to, but at the same time contained methods of procedure so difficult of application that it blocked necessary social de-
velopment would become as useless as the articles of confedera-

tion. As John W. Davis has well said:

"Admitting that probably no disaster so profound could over-
take this country as an attempt by convention or otherwise to
overhaul the entire framework of its constitutional structure, is
it not better that it should be amended by friendly and skillful
hands than to run the risk of finding it wanting in any time of
national crisis? Indeed is it not quite as much a duty to improve
and adapt as to defend and preserve, and does it not come to the
same thing in the end if the hand is sure and the judgment
true?" 40

But, the proponent of a more difficult amending process insists,
the present tendency is to divert the logical and orderly develop-
ment of the constitution into a new path and that a path leading
toward "an imperial government of bureaucrats with the author-
ity to regulate the life of every person in the nation." 41 These
contentions indicate the motive behind the resolution and reveal
a dissatisfaction upon the part of its proponents with present
tendencies in constitutional development. In order to give to
certain principles greater protection than they now have, it is
proposed to make far more difficult the whole process of growth.
In other words a group of statesmen who feel the support of
majorities slipping away from them, propose to build walls
around their favorite ideas as fearful monarchs have done in the
past around such ideas as "the divine right of kings." The ques-
tion at this point becomes merely one of judgment. Who is to
decide which principles shall survive? Men who represent the
most conservative political thought in the United States are urg-
ing the necessity of additional constitutional amendments. Would
anyone question the motives of Calvin Coolidge, Warren G. Hard-
ing, Charles E. Hughes, and John W. Davis in their suggestion
for constitutional changes? If the proponents of particular prin-
ciples cannot muster the support of thirteen state legislatures to
repulse attacks, should they be permitted to prevent that proper
improvement and adaptation which growth requires, by further
restrictions upon the amending process? Certainly unless there
is need of restriction as applied to the whole procedure, the
answer must be no.

4048 Reports of Am. Bar Ass'n 200.
41See address of Senator James W. Wadsworth before a meeting of
the Women's National Republican Club at the Waldorf Hotel reported in
the daily press under a New York date line of Jan. 16, 1926.
There is very substantial reason for insisting that there is no present need for any greater strictness in the procedure of amendment. A method which has operated safely and successfully over a period of one hundred and thirty-five years of tremendous social and political change, and which until very recent years has excited no comment except that it is a too difficult method, finds no conditions existing today which call for greater difficulty. We may well put the question to ourselves: Have we any more reason to limit the freedom of action of those who follow us than our predecessors had to limit us? What of our boasted educational system, of enfranchised women, of years of extensive investigation and experimentation in the science of government? Do they call for further limitations which assume greater ignorance and incompetence?

For many years scientific research was hampered by governmental and societal taboos of one kind and another. Heresy hunting and library burning were the order of the day. That day has largely passed in the field of science, and as a consequence the world is reveling in a wealth of radios, automobiles, airplanes and thousands of other such discoveries. In the field of public health, similar advances have been made. Even in the field of judge-made case-law there has been an advance which approximates fairly well the giant strides of economic and business development. Municipal government has been thoroughly overhauled, reorganization of state government is regarded as sufficiently vital to provide major campaign issues. Is it altogether impossible that federal government—itself a comparatively new experiment—needs no growth and development? We can hardly desire the same freedom of experimentation in governmental organization that prevails in science and business. But at least this is no time to check such freedom as has hitherto prevailed. What we need is rather more education, more training in the business of government. It is highly desirable that great national issues should be thoroughly discussed and thoroughly considered, and if the proponents of change are required to convince two-thirds of Congress and three-fourths of the state legislatures that changes should be made in the broad basic principles of government, surely that is safeguard enough against premature or hasty action. The argument that legislatures are

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425 Elliot's Debates 157.
being subjected to vicious propaganda implies that Congress too is being subjected to the same influences, for in each case Congress must submit a proposal before a state legislature can ratify. Taking away responsibility from legislative bodies will not increase their sense of responsibility or improve their quality. One of the strongest arguments in favor of placing unlimited power of amendment in the hands of Congress is that it might give us more able congressmen.

It has been said that the process of amending the constitution is already so difficult that the people must be practically in a state of revolution before they can secure an amendment. Able and responsible men assure us that the people of this country are practically in a state of revolution at the present time. They assure us also that the power of amendment is our safeguard against the use of force and violence. Charles E. Hughes has recently said:

"In the last twelve years we have had four amendments of far reaching effect, providing for a federal income tax, for popular election of Senators, for prohibition of the manufacture and sale of intoxicating liquors, and for woman suffrage. It is not my purpose to criticize any of these amendments, much less the broad power of amendment. That power is our essential means of adaptation, our answer to the inciters of violence, our assurance of meeting peacefully—without any good reason for resort to revolution—all demands to which new exigencies may give rise. But that power and the proved facility of its exercise warn us not to put our trust in papers or in legalism.

Putting additional handicaps in the way of amendment would be a splendid example of misplaced "trust in papers and (or) in legalism," and in a crisis would constitute an invitation to impa-

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43J. Allen Smith Spirit of American Gov't 46; Jacob Tanger, 10 Am. Pol. Sc. Rev. 689; Goodnow Social Reform and the Constitution 5, quoting Dicey and Trayer; Woodrow Wilson Congressional Gov't 242. "It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbersome machinery of formal amendment erected in Article Five. That must be a tremendous movement of opinion which can sway two-thirds of each House of Congress and the people of three-fourths of the states. Mr. Bagehot has pointed out that one consequence of the existence of this next to immovable machinery 'is that the most obvious evils cannot be quickly remedied,' and 'that a clumsy working and a curious technicality mark the politics of a rough-and-ready people.'"


45Address as President of Am. Bar Ass'n, 50 Reports of Am. Bar Ass'n ...., see 11 Am. Bar Ass'n Jour. 563; see also 1 Burgess, Political Science and Const. Law 151.
tient people to adopt violence as a method instead of the slow, quiet processes of today. The increasing density of population in this country, the disappearance of the frontier, the control and regulation of the exploitation of natural resources, of public utilities and of business generally is continually limiting outlets for the tremendous energy and initiative of our people. Increasing education is making them more conscious of themselves and of the life about them. Such conditions are far more apt to bring groups of people to the explosion point than conditions of a century ago. If we can guide and control, and provide proper outlets for such accumulations of human energy, social development will go ahead with increasing rapidity. If it is checked and hampered by walls built around certain postulates which are arbitrarily designated "fundamental and immutable principles" by people who fear change, largely because it is change, then we may expect to see that energy expend itself in explosions, some of them futile, and all of them wasteful. In view of the responsibilities of world leadership which the United States is just beginning to assume, it behooves us to avoid explosions and to keep our domestic affairs in smooth running order, that we may be able effectively to play the double role for which destiny has cast us.48

48 Charles E. Hughes, Address to N. Y. State Bar Ass'n, Jan. 11, 1918, 4 Am. Bar Ass'n Jour. 109. "We are at the beginnings of history. It is only a few hundred years since the dawn of what we call modern civilization. It is a very short time since science changed the habits of centuries and swept us into a world of new intimacies... And our nation, the great republic of the West, is just at the beginning of its career. The dream of isolation is at an end. We are now to take our part in a new world, which we are assisting in creating—a world where law is to be supreme, where force shall be only the minister and agent of justice as expressel in law... To the new order America could not escape relation if it would."