
NOTES

THE CONSTITUTION:—SOME PHASES OF THE GROWTH AND ENCROACHMENT UPON THE RIGHTS OF STATES.

Had the separate colonies imagined that their sovereign identity would have shrunk to its present state, or had they foreseen the abolition of civil rights of their subjects by a Federal Government, it is very doubtful whether the Declaration of Independence would have been signed, to say nothing of the Articles of Confederation or the Constitution. But the most daring statesman of the time would not have dared predict the present condition, and with an intention and expectancy of developing a government by which the person amenable to the laws would have a direct vote for or against the representatives that made such laws the Declaration of Independence and the Articles of Confederation were signed.

The Articles of Confederation, adopted in 1778-9, provided that all powers not "expressly" delegated to the United States should remain in the separate States (Art. II). But these Articles were short lived. In 1786 the Legislature of Virginia suggested that the Articles be amended, and appointed a commission to meet delegates from the other States for that purpose. The commissioners from the several States met and agreed upon a report drawn by Alexander Hamilton, of New York. This report contained the rudiments and substantial parts of our original Constitution. It was adopted in form and submitted to the States soon after the election of our first President, in 1787, and was ratified by the nine States requisite by 1789 and by all States by 1790.

The first ten amendments to the Constitution were adopted soon after adoption of the Constitution, being ratified in 1791. The amendments compose the Federal Bill of Rights and con-

tain the same provisions as the Bill of Rights which the Lords Spiritual and Temporal exacted from William and Mary in 1689.

One of the noticeable features of these Amendments is that they conclude (Art. X) by guaranteeing all sovereignty to the States unless delegated to or prohibited by the United States. Such a provision makes it obvious that the States never intended that the Federal Government should exercise direct authority over the individual citizen.

After the adoption of the Constitution and the first ten Amendments, suits by individuals against the States arose, the individual filing his complaint in the Federal Court, (*Chrisholm v. Georgia*, 1793). This condition resulted in the rendition of judgments against the States in many instances, and in 1794 the eleventh amendment depriving the Federal Judiciary of jurisdiction in an action by an individual against a State was proposed by Congress. The Amendment was passed by the House and Senate and ratified in 1798. After this the new born Republic seemed to move along smoothly except that some of the seventeen States were dissatisfied with the lack of uniformity in electing the President and Vice President. As a result of this confusion and dissatisfaction the Twelfth Amendment was proposed, 1803, and adopted 1804. The Amendment specifies the methods to be used in electing presidential electors by the several States. This was not an infringement of State sovereignty and except for its unchangeableness one seldom hears intelligent criticism of it.

For the next sixty years there was no enlargement of Constitutional authority delegated to the Federal Government, and, except for the Rebellion in 1861, it is questionable whether such dangerous methods of legislation would have met with sufficient popularity to effect the amendments that followed it. In February, 1865, the Thirteenth Amendment abolishing slavery was proposed, and by the following December it had been ratified by the required three-fourths

of the States. It is generally recognized today that the question of slavery was a question of national, rather than State, policy, and that the adoption of such an amendment was not an invasion of the civil rights of individuals, but a declaration of national policy. However, it is contended, not unsoundly, that the abrupt (separation) emancipation worked a hardship on both the slave and his master.

But the victors were not satisfied to liberate the slave, and, in June, 1866, the Fourteenth Amendment with its "due process," "privileges and immunities" and "equal protection" and "proportional representation" clauses was proposed to the States, and it was adopted by the required three-fourths in 1868. It is under this amendment that a great body of our Constitutional Law has grown. The amendment was intended for the protection of the negroes in State Courts, but its provisions were so general that scores of cases not involving any phase of the slave question have found ground for jurisdiction and sound decision. Under the "due process" clause municipal ordinances have been declared valid, *Murphy v. Calif.*,¹ although they prohibit billiard halls within corporate limits, thus leaving the control of local affairs to local legislation. But the Federal Government was not so liberal in an earlier decision published in *Fallbrook Irrigation Dist. v. Bradley*,² stating that the question of whether private property taken by the irrigating company was for public or private use, was a Federal question and the Federal Courts would not be governed by any findings of the State Courts in the matter. In this respect the Federal power superseded the State's power over a purely local matter, thus paving the way for the *obiter dictum* in the Selective Draft Law Cases,³ in which the Supreme Court declared that the Fourteenth Amendment made the Federal power para-

1. 225 U. S., 623.

2. 164 U. S., 112.

3. 245 U. S., 336.

mount and dominant instead of subordinate and derivative.

It is clear to all right thinking people that levying war and maintaining or raising an army is purely a national proposition, but it would be very difficult to convince the author that the unqualified application of the rule as stated by the Court, *supra*, would not be the beginning of the end of the world's greatest nation. We do not want the National Government to grow weak in its power to hold the States in a compact and co-operative group; neither do we want the National Government to diffuse itself among the States and by rapid growth or a sweeping decision so eclipse the local power of the States as to cause them to lose their identity, sovereignty, and executive or legislative authority. Under the "privileges and immunities" clause it has been held that a State can not choose its grand or petit jurors without interference from the National Government. While the ruling in *Neal v. Delaware*⁴ and *Rogers v. Alabama*⁵ that jurors can not be disqualified because of race or color, is easy to avoid; yet it seems unnecessary to force State authorities to resort to subterfuge or dishonest methods in the administration of its own laws. However, as a general thing, it is conceded that our Government would have thrived in its intended dual form if the power and growth of the Federal Constitution had stopped at the Fourteenth Amendment.

But the war crazed victors were urged on by the "carpet baggers" and ignoble office seekers who saw means of obtaining their desired end by making the emancipated negro a voter. Thus the Fifteenth Amendment was proposed in February, 1869, and ratified March, 1870. The legislators of the Southern States tried to retain control in the white races by passing the so-called "grandfather laws," providing that any citizen whose father or grandfather had been a slave or was of Ethiopian origin was not entitled to vote, but the

4. 103 U. S., 370.

5. 192 U. S., 226.

United States Courts held the laws unconstitutional, *Guinn v. United States*,⁶ and the people were obliged to resort to private illegal acts in order to save the States from control by unscrupulous office seekers.

It is probable that the Fifteenth Amendment was one of the greatest errors ever made by a great national legislative body. And especially is this true under our dual system. The franchise (voting) has been recognized as a privilege granted by the Government—crown—since the Seventeenth Century. After the revolution that right passed to the States and should have remained under their respective controls, but the effect of the Fifteenth Amendment was to transfer that power from the State to the nation; thus, saying, in effect, to the States that the Federal Government was better qualified to judge the qualification of voters than the citizens of the separate States. It is interesting to note that the amendment by its phraseology, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State, etc," admits that the right of franchise (voting) for State purposes belongs to the State, but acts as a type of mandatory injunction compelling the State to grant the franchise. This loss of power by the States has had a tremendous influence in race riots and Southern industrial developments, besides violating one of the soundest and best established principles of government. It would be possible under the same principle for the Federal Government to deny the State the power to refuse its citizens or inhabitants the right to vote on account of age, sex, mentality, or crime. In theory, the Federal Government should have power to determine the qualifications of voters for National officers, and in theory the Federal Government grants the franchise (voting) for that purpose, the States supervising the use of such franchise. But it is quite clear that the franchise for

6. 238 U. S., 347.

both purposes should be granted upon the same qualifications, and the State, being the party with greatest interest, should retain that power.

Following the capital blunder of 1870 the Federal Government took forty years of prodigious growth by placing favorable constructions on the late amendments, namely, 13th, 14th and 15th. But with the development of industry and the concentration of wealth in the great cities of the Northern States, a great deal of dissatisfaction arose over the inequality of taxation. The Panic of 1907 intensified this unrest and the result was the Sixteenth Amendment, July, 1909, giving Congress power to tax all incomes without apportionment among the several States. It was quite clear that the purpose of the amendment was to place a large amount of the tax burden on the cities and rich States of the North. The Southern States cast aside their State sovereignty theory and ratified the amendment in rapid succession, Alabama leading in August, 1909. The Northern and some of the Western States were slow to ratify, however, and it was February, 1913, before the required number of States had ratified.

It is generally conceded by proponents of the dual system of government that the amendment is wrong in principle and dangerous in effect. However, it is unlikely that any serious effects will result directly from the amendment or the legislation passed under it. Without doubt one of the fairest and most expedient methods of taxation is to tax the income of the individual, corporation, or organization. But the question of who should have control of the method, is another problem arising under our dual system. The sound contentions of all students of legislation are uniform in holding that the person taxed should be an inhabitant of the unit that makes the laws governing the taxation. A violation of this principle is a dangerous step toward unhindered arbitrary control of a majority. Especially is the precedent bad when taxes levied under income tax laws are so *onerous* as to be confiscatory in

nature. If communists should come into power in America there is nothing to prevent them from confiscating one's entire income on the same principle. The difference would be in degree only.

Before the Sixteenth Amendment had been ratified the Seventeenth Amendment, providing that each State should elect two senators instead of appointing them through their legislatures, as provided by Article I, Section 3 of the Constitution, had been proposed. It required little more than a year for ratification and it was recorded by the Secretary of State May 31, 1913. There is little just criticism of the change. The only dangerous thing about the change would be that senators may feel their opportunities for re-election depended on their attitude while in office, and because of this condition would be inclined to vote a popular rather than a sensible vote. It is likely that the Senate will lose its conservative nature within the course of a few years and degenerate into an aggregation of husbands of rich wives and wealthy bachelor ladies who live in Washington six years, have the last word on some things, but can't propose money bills. Thus with the destruction of our conservative body and the growth of national power at the expense of the States we tend more and more toward the liberalist doctrine. And with our "yea" and "nay" public votes, coupled with the capitol lobbying system and the Women's Gallery Vigilance, the Senator becomes little more than the mouthpiece of the Vigilance Committee or such other "political boss" group as controls his re-election. The natural steps from this would be referendum and recall, pure democracy, socialism, anarchy, and destruction. Complacent Americans can not see such folly while surrounded with every strength and security; yet, it may be well to remember that no great nation has ever fallen until she became feeble within her own walls. There seems to be no present remedy for the evil from an elective standpoint, but the lobbying and spying could be

disposed of by a few house rules and a change or alteration of the Constitution regarding the entering of "yeas" and "nays" on the journal. When all sides are considered it becomes a nice problem, but it is generally conceded that the Senator must be given opportunity to exercise his intelligence and personal judgment if the nation is to be placed on a firm legislative foundation.

The four years following the adoption of the Seventeenth Amendment were peaceful from a Constitutional viewpoint. The Seventeenth Amendment was self-executing and there was little chance of attacking anything during this period other than the administration of laws passed under the Sixteenth Amendment. But in December, 1917, the Eighteenth Amendment, prohibiting the manufacture, sale, transportation within, importation into, or exportation from the United States of intoxicating liquors for beverage purposes was proposed. The Amendment was given seven years for adoption and was to become effective within one year after ratification. It was ratified January, 1919, and has stood all legal tests to the present date. The Amendment is recognized by legal thinking men as the most monstrous and unsuccessful legislative work ever enacted by a great law-making body. Exclusive of the infringement of personal liberties, and the impracticability of enforcement of such laws, the amendment is exceedingly objectionable for the reason that it indignifies and degrades the greatest legal document the world has ever known and reduces it to the quality of village ordinances and police regulations. Because to carry a flask of wine across the street is to transport liquor within the United States, and, as such a violation of the Federal Constitution no part of the Constitution has ever touched so intimately upon the daily life of the citizen and the ratification of this Amendment was the death knell to State rights. The question of regulating and inculcating morals by legislative enactments is disputed by sages and affirmed by the mobs and fanatics,

but the question of whether that regulation should flow from a source over which the regulated does not have a direct influence by vote is not disputed by any unbiased person who is qualified to speak on the subject. And it is this phase of the Amendment that must ever condemn it. The Amendment has been attacked from many angles. One action was commenced to test the constitutionality on the ground that it was inconsistent with the foregoing parts of the Constitution; that the seven year ratification clause made it illegal and that the Amendment was such an infringement of State rights by its exercise of direct control over the individual that it deprived the citizen of that sacred right of having a voice in the making of the laws by which he was governed and as such repudiated the purpose of our Government. But the Court upheld the constitutionality on each point and left the abominable phrases to besmirch our Constitution and create disrespect for our laws.

It is contended by some that the Amendment was the salvation of many poor children and helpless wives, but if this were true to the extent of its most ardent proponents it would not compensate for the evils arising from such laws. Because the total loss of those who may suffer some hardships as a result of intemperance could not be as disastrous to the nation as the widespread disrespect for law caused by the Amendment and the laws enacted for its enforcement. The nation's paramount purpose is to preserve and strengthen itself and not to look after the individual welfare of its inhabitants at the expense of its own well being. The States, having no direct responsibility to provide for their life, may enact such laws as are best suited to care for the inhabitants within their boundaries. But it should always be the purpose of law, State or National, to promote the interests of the entire body affected and to sacrifice the individual for the benefit of the group. But if the dangers resulting from dissatisfaction, disobedience of or disrespect for a law is greater than the benefits

derived from the law, the law is *malum in se* and should be repealed for the benefit of the State. Yet, there seems to be little hope of repealing the Amendment, although it has gone through three years of unsuccessful enforcement and continues to grow more unpopular and create more disrespect.

Immediately following the ratification of the 18th Amendment, June 5, 1919, the 19th Amendment, prohibiting the United States or any State to limit the right to vote on account of sex was passed by a two-thirds majority of both houses. The proposal was the result of two decades of agitation and seven years of intensive lobbying and picketing. The legislatures of the States were busy with post war troubles and little coercion was necessary to bring about ratification, which was recorded by the Secretary of State August 26, 1920. The Amendment has met with a great deal of criticism because it is a further encroachment upon the freedom of the States by the Federal Government. Other legal criticism is based on the contention that the Amendment is contrary to the purpose of our government as established by our forefathers and is inconsistent with that phrase of the Preamble to the Constitution, "insure domestic tranquility." However, the *mal* effects of the Amendment have not had time to reach their greatest extent, although they have been very general and noticeably detrimental. Divorces have increased some 20 per cent the nation over, and have doubled in some sections, since the enactment of the Amendment. Besides this, laws are being passed by the Legislatures of most the States making divorces more easy to obtain and more attractive to prospects by their oppressive and unconscienceable alimony laws. Whether this is a direct result of the Amendment in whole or in part can never be absolutely determined, but that it is following upon the heels of the Amendment is a certainty. The result of such a condition is uncertain. A judge in a Court of Domestic Relations, City of ———, states: "The women will prove to be the undoing of our government. That they

are temperamentally unfitted for legislative, judicial and executive work is a fact known to every person familiar with American womanhood. by giving them the vote their entrance into government necessarily follows as a consequence." * * * (cites examples of bad effect) "There is no possibility of any substantial good effects and the bad effects arising from the divorce courts alone would more than offset all the benefits derived." It may be worth while to note in this respect that the Pharaohs of Egypt paved the road for the downfall of that nation when they employed women secretaries and royal entertainers. Greece fell after limitless sanction of divorce and the entrance of women to the Baths—the Government. Rome sanctioned divorce prior to the fall of the Republic, and before that time Caesar is known to have cautioned the matrons to cease interference with the Senators and the Ides. A more modern example would be the beginning of the decline of Ilam after Sulieman the Magnificent had given the franchise to Roxalana, and she by fascinating cajolery had induced Sulieman to make Selim the Sot heir to the throne. Whether the fall of these nations, *supra*, was due to the entrance of women into their governments, or whether human nature is constant and unchangeable are debatable questions; but that all nations have either fallen or declined immediately following the influence of women in government is an indisputable historical fact.

There is no sound argument in favor of the Amendment except that those who are amenable to laws should have a voice in their making. But the contention fails for the reason that children are amenable to laws: yet they have no vote. The "franchise is a special right or privilege vested in the State (Crown) which the State may grant to any person or body for the betterment of the State." But if bestowing the franchise will work a harm, confusion, or any detriment to the State, there is no moral obligation to grant the franchise. And regardless of benefit

there would be no legal obligation to grant it in this case. But the 19th Amendment has repudiated that doctrine and forced the States to accept its ruling. There has been only two United States cases arising under the 19th Amendment and these were argued January 23 and 24, 1922, respectively, and decided April 22 in one case, *Fairchild v. Hughes*.⁷ A New York citizen attempted to enjoin the Secretary of State from registering the Amendment on the ground that Tennessee and Virginia ratified by improper methods. But Justice Brandeis said that notice of ratification was conclusive so far as the Government was concerned. Also, that a New York citizen had no right to an injunction because it would not affect his State. In the other case, *Leser et al. v. Mercer Garnett et al.*⁸ two women in Baltimore registered to vote and election officers brought action to have their names stricken from the rolls. The Maryland Supreme Court sustained the contention of the officers, but Justice Brandeis held that the State Constitution was subservient and that an increase in electorate was no defense; that State limitation of Federal Act is void, and that the 15th Amendment with parallel phraseology has been constitutional for fifty years; that the Secretary of State must record States that ratify. So we find ourselves powerless and faced with a very bad condition to be tolerated or endured.

It is the opinion of the author that we will now pass through a long period of constitutional rest. There will be considerable activity for repealing the 18th, and some contention for repealing the 19th, but neither is likely to be repealed. The most we can hope for is reasonable laws and liberal construction placed on the meaning of the 18th.

R. SHAD BENNETT, '22.

7. 260 Supreme Court Advance Sheets, April, 1922.

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