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Dangers in Disregarding Fundamental Conceptions when Amending the Federal Constitution*

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On receipt of the invitation to deliver the Irvine lecture for 1925 at Cornell, I selected for my theme, "The Dangers Incident to a Disregard of Fundamental Conceptions when Amending the Federal Constitution." Discussion of the LaFollette proposal to work a radical change in our system of judicial review and consideration of the Child Labor Amendment have so recently held the public attention that perhaps some of you may think, now that these suggestions appear to have met with defeat, we might well turn our thoughts to matters of an entirely different nature. But there never has been, and never will be, any subject of more vital importance for constant consideration by those who aspire to leadership in American thought than that of the Constitution; to preserve its blessings for future generations, we of to-day must be eternally vigilant in keeping alive a real comprehension of its basic principles and in safeguarding it from disintegrating amendments. That there is danger in this respect, is shown by the nature of particular amendments recently proposed in Congress,—many of which indicate a tendency to disregard the general scheme of the Constitution itself,—and by the ever-increasing number of such proposals.

The people must be educated to understand not only the broad conceptions on which our fundamental law rests, but also the practical value of guarding against any unnecessary disturbance of the balance of those ideas,—so carefully worked out and reduced to principles by the founders of our national government. These are

*An address before the Cornell University College of Law, May 22, 1925, on the Frank Irvine Foundation, established by the Conkling Inn of Phi Delta Phi. President Coolidge, in his Memorial day address, 1925, delivered eight days after this address, dealt with the subject of centralization of power in much the same way as it is here treated.

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the important thoughts which I wish to develop, though, in doing so, other points will be touched on, such as the harmful results, psychological and practical, which are likely to follow in the wake of over-centralization of power at Washington and from the pursuit of present-day efforts to cure all evils, political, social and economic, through the enactment of laws,—especially through the medium of constitutional amendments.

The Constitution of the United States is a comparatively short document, which a person of average intelligence can read understandingly in less than half an hour; and this is so, principally, because it is not a set of inconsistent general principles but a harmonious whole, dealing with matters regarded as essential to the vital functioning of a federal government, or as fundamental safeguards of human liberties.¹ For more than one hundred and thirty years this chart of government has served the American people well, and if there is anything to which we owe the flexibility and permanency of our institutions it is to the fact that "so little in it is settled dogmatically, so much is left for experiment"² under a carefully thought-out federal system of powers, checks and balances. In other words, the Constitution leaves room for growth according to the developments of the age which it is to serve, without the necessity for constantly altering its provisions or adding new ones. Unfortunately, these considerations seem to be rather generally disregarded at the present time; which makes it our duty to examine critically all suggested amendments and to discountenance any which unnecessarily depart from the true principles on which our national government rests, or which tend to disturb the general scheme of the Constitution.

The delegates to the Convention of 1787 strove for months to erect a central power that should not encroach on the sovereignty of the states or on the rights of individuals, any more than was essential to its effectiveness and enduring strength; and had a plan been proposed which disregarded these primary ideas, we may safely assert it would not have been ratified. Of necessity, therefore, the framers recognized that the existence as well as the soundness of the polity they were seeking to establish must depend on a wise adjustment of powers between the central government and those of the states,³

¹See the remarks of Mr. Fabian Franklin, *N. Y. Times*, December 16, 1917.

²McMaster in Shaler's *United States*, II, p. 500.

³Madison, *The Federalist* XLV, p. 19*.

⁴"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to

and on adequate safeguards against encroachments by either of them upon the individual liberties of the citizen.⁴ The Constitution embodied these fundamental concepts and aimed thereby to protect "not only the states against the central power, not only each branch of the federal government against the other branches, but the people against themselves; that is, the people as a whole against the impulses of a transient majority."⁵ Any departure from the basic principles on which our scheme of government rests undermines the whole structure to some extent, and when the departure consists of changes in the federal character of the plan as originally adopted the ultimate harm may be too considerable for immediate appreciation.

In its inception the federal principle served a twofold purpose; it reconciled the existence of a central power with jealous state governments⁶ and provided the means by which distinctly national matters could be effectively administered, purely domestic concerns being left in the control of the component states.⁷ Observance of the federal idea was vital during the first years of our national existence, but it is equally essential to-day. Indeed, with out vast expansion of territory and population, and the always increasing difficulty of keeping so many people reasonably contented with the manner in which they are governed, it seems that the maintenance of the powers of the states in their relation to the individual citizen and a wise distribution of governmental functions, in order to secure their proper enforcement,⁸ are even more important to-day than in the days of the founders.

the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Hamilton, *The Federalist* XVII, p. 7*.

"... those things, in short, which are proper to be provided for by local legislation can never be desirable cares of a general jurisdiction . . . because the attempt to exercise [those powers] would be as troublesome as it would be nugatory, and the possession of them for that reason would contribute nothing to the dignity, to the importance, or to the splendor of the national government."

⁴Hamilton, *Ibid.*

"There is an inherent and intrinsic weakness in all federal constitutions, and . . . too much pains cannot be taken in their organization to give them all the force which is compatible with the principles of liberty."

⁵Viscount Bryce, *The American Commonwealth*, I, 406.

⁶Elliot's Debates, Vol. V, p. 168-9, 217, 219, 269.

⁷Madison, *The Federalist*, XLVI, p. 19*.

"... By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant; and with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments. On the side of these, therefore, the popular bias may well be expected most strongly to incline."

⁸"The question is not as it had been in the beginning, whether a particular

Those living under a written constitution may, it is true, obtain the distribution of powers and functions they desire, for, after all is said, the instrument is theirs, to mold as they will; but political wisdom dictates to a people having a thoughtfully constructed federal system, which has worked with phenomenal success, that they shall at all times view with caution proposals which have, or may have, a tendency to disturb its equilibrium.

From 1789 to date there have been more than twenty-four hundred distinct resolutions proposing approximately thirty-five hundred amendments to the Constitution.⁹ A growing inclination to alter the fundamental law is evidenced by the fact that while, in the fifty-six years from 1804 to 1860, there were some four hundred resolutions,¹⁰ showing an average of about seven a year, in the period of the last thirty-six years (1889-1925), eleven hundred resolutions, covering over sixteen hundred amendments, have been proposed;¹¹ or an average of more than thirty resolutions a year. In the 67th Congress there were 103 resolutions,¹² and in the last, or 68th Congress, at least eighty-seven. The fact that only one of the latter passed is of no moment, since, owing to peculiar political conditions, it was impossible to bring most of them to a vote; the proposal of so many amendments at the two recent sessions is the significant fact. It reflects an inclination to meddle with the Constitution without the comprehensive consideration which the gravity of such undertakings requires; for, as a brief review will demonstrate, many of the resolutions would introduce into the fundamental law matters which have no proper place there, while others show an utter disregard of the plan of the Constitution, and still others indicate a deplorable lack of appreciation of their probable ultimate effect on the public welfare, when viewed with the breadth and foresight demanded by such matters. It is this disregard of the character of the Constitution itself, and of the possible evil effects of certain amendments on it as a whole, which presents the real danger to be kept in mind; but, to make clear that such a danger exists, it seems wise to survey the

power is essential to the existence of the federal government, but which of our governments is best suited to exert that power to the greatest advantage of the public at large."—W. L. Frierson, "The Constitution as recently Amended and Construed," 1921 Colorado State Bar Assn. 303.

⁹I.e. to March 4, 1923. Herman V. Ames, "The Amending Provision of the Federal Constitution in Practice." Reprint from the Proceedings of the American Philosophical Society, Vol. LXIII, No. 1, 1924, at p. 63.

¹⁰H. V. Ames, "Proposed Amendments to the Constitution during the First Century of its History." Annual Reports of the Amer. Historical Assn. for 1896, Vol. II, p. 19.

¹¹H. V. Ames, Reprint from Proceedings of the American Philosophical Society, supra, p. 63.

¹²Congressional Digest, March 1923, 172.

field of recently proposed amendments, in a general way, and, perhaps, to examine some of them more particularly.

The eighty-seven resolutions brought before the last Congress contain sixty-three proposals and relate to some forty subjects. They may be grouped in four classes: (a) Those relating to the structure and machinery of government, such as the method of amending the Constitution, the election of the President, the organization and power of the Supreme Court, and the treaty-making power; (b) those modifying or enlarging the exercise of powers Congress already possesses, such as those relating to war and taxation; (c) those directly affecting personal rights; (d) those concerning the distribution of powers between the national and state governments. The proposals in the last-mentioned group represent, in practically every case, attempts to augment the powers of the central government, and to grant it either direct control or the right to assume control over matters connected in an intimate way with the lives of the people.

There were seven resolutions suggesting changes in the existing method of altering or adding to the Constitution, of which only one would materially affect the present system of proposing amendments, but all would change the procedure of ratification by state legislatures, and confer this power, either directly or indirectly, on the electors themselves. The Constitution belongs to the people¹³ and there are many who believe that there should be more direct control over changes in it than the existing method presents;¹⁴ but, if we are

¹³Lincoln's First Inaugural Address, March 4, 1861.

"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. I cannot be ignorant of the fact that many worthy and patriotic citizens are desirous of having the Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others not especially chosen for the purpose, and which might not be precisely such as they would wish either to accept or refuse."

¹⁴"In this connection it is of interest to note that whereas a few years ago some form of popular participation in the process of amending the Constitution was advocated with a view of more easily securing amendments, to-day, on the other hand, the submission of proposed amendments to popular vote is urged by those who frankly avow that they expect it will render ratification more difficult. This is indicative of the distinct change of view that has taken place in the past ten years in consequence of the recent repeated demonstration of the effectiveness of the present amending provision of the Constitution."—Herman V. Ames, "The Amending Provision of the Federal Constitution in Practice," *supra*, p. 74.

to hope for real consideration by the people of suggested amendments, it should be arranged that only a limited number of them can be offered for ratification at the same election. Not one of the joint resolutions presented to the last Congress contains any such provision.

As might be expected, dissatisfaction with the 18th Amendment is reflected in some of the resolutions, one of which requires that a special general election be held to vote on the prohibition of beer, wine, and other malt or vinous liquors, and that, if their manufacture, sale and transportation for beverage purposes be approved, prohibition shall cease. This in effect would wipe out the 18th Amendment by a majority vote of the people, instead of by a new amendment adopted in the usual way; that is to say, we are to have one method of changing the Constitution in this particular instance but are to continue the old method in all other cases,—a novel proposition, which dismisses from view the fundamental idea that a constitution is supposed to contain general rules equally applicable, in every instance, to all situations within their respective purviews.

The election and terms of the President, the Vice-President, or members of Congress, form the subject of nineteen of the resolutions. These proposals suggest changes in the structure and operation of the machinery of government, which, in some instances, represent improvements to the existing system, and in others, undesirable departures from it; but they are not fraught with the dangers that attend those resolutions which deal with the division of powers between the national and state governments, or those which deal with fundamental rights.

The federal judiciary does not escape the amendment-seeker. It is proposed by a certain senator that the judges be elected by the citizens of their judicial districts, and that only those chosen for the lower federal courts shall be eligible to places on the Supreme bench. Although this resolution expressly states that Supreme Court justices shall be appointed to serve during good behavior, there is appended a joker which reads, "unless Congress shall otherwise provide for their election and tenure of office." If the Supreme Court is to maintain its high reputation for independence, wisdom and learning, the avenues of approach to it should remain open to the best legal minds of the nation, and it is difficult to see what particular advantage would be gained to the court or to the country by limiting those eligible to appointment.

While on the subject of the judiciary, though the proposal that Congress be made the ultimate body to determine the constitutionality of its own enactments has in effect been negatived, temporarily

perhaps, by a solemn referendum of the people, it may be well to say a word or two on that interesting topic from a standpoint which was not particularly discussed during the recent national campaign. That is this: An omnipotent Congress is irreconcilable with the system of checks and balances on which our written Constitution rests. The advocates of the suggested change to such a Congress no doubt think of the legal supremacy of the House of Commons in England, and desire to see that system established here; probably assuming that, if the English Parliament is omnipotent, there is no reason why the American Congress should not be equally all-powerful. The English system of parliamentary government, however, owing its existence to no written constitution or theory of limited powers, necessarily requires ministerial responsibility, and as many appeals to the country on defeated measures as may be required to insure that the people's desires shall be reflected in the House of Commons at all times.¹⁵ So truly has this principle been observed in England that, albeit the ministry command the confidence of the House of Commons, the King may dissolve Parliament, and order an appeal to the country, whenever it may fairly be assumed that the legislature has ceased to reflect the dominant wishes of the nation.¹⁶ Parliament, therefore, is not assured of any fixed tenure, and the majority party must retire either when defeated on a particular measure, or when, in the opinion of the King, its wishes no longer reflect those of the electorate;¹⁷ whereas, under our Constitution, an omnipotent majority in Congress would be subject to no such check. Suppose the

¹⁵Strictly, of course, the true *political* sovereign is the electorate, but being a body which from its nature can hardly legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature, the conduct of the legislature is regulated by understandings (conventions) whose object is to save the conformity of Parliament to the will of the nation. The conventions of the Constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, of the nation. See ch. xiv, "Nature of Conventions of Constitution," in Dicey's "Law of the Constitution," 8th ed. 1920.

¹⁶Dicey, *Ibid.* p. 429.

A dissolution is in its essence an appeal from the legal to the political sovereign. Parliament has been dissolved twice by the Crown, the celebrated cases being those of 1784 and 1834. In each instance the King dismissed a ministry which commanded the confidence of the House of Commons, and there was an appeal to the country. In the first case, George III's belief was justified; in the second case, William's belief turned out to be erroneous.

¹⁷Dicey, *Ibid.* 432-3.

"The precedents of 1784 and 1834 are decisive; they determine the principle on which the prerogative of dissolution ought to be exercised."

There might reasonably be doubt whether the King would ever again dissolve the House of Commons as George III and William IV had done. Certainly such action on the part of the King would now be taken only where the disagreement between the wishes of the House and those of the electorate was fundamental, and likely to prove injurious to the former.

proposal were adopted that Congress, by the simple expedient of repassing an act, could make it constitutional notwithstanding the Supreme Court's prior judgment to the contrary; then, if a statute which had been declared unconstitutional, and which did not in fact reflect the dominant wishes of the people, were so passed a second time, the Congress could not be dissolved until the term had expired for which it was elected, and, in the period intervening between the time when it had ceased to represent the will of the people and the expiration of its legal tenure, there would be no check by the people on legislation that might be enacted. In short, under the proposed amendment, the dual plan of our government and the constitutional rights of the individual could conceivably be disregarded with impunity; our system would become hybrid in character, representing neither the parliamentary system nor, in effect, government based on written organic law.

When the amendment makers depart from the field of the judiciary and enter that of foreign relations, they would increase the difficulties of treaty-making by a resolution which provides that the consent of a majority of both houses of Congress be hereafter required; but as against this, another resolution proposes that the President be empowered to make treaties with the consent of a majority, instead of two-thirds, of the Senate.

Our experience in the recent war has given rise to several interesting proposals. On the one hand it is sought to restrict the war power of Congress by forbidding its exercise, except in case of invasion or insurrection, until a national referendum has been taken; to this is added,—no doubt with the thought of obviating the perhaps fatal disadvantages to which, under some circumstances, such a system of delay might subject us,—the further suggestion that the President and Senate be authorized to make treaties whereby the signatory powers would jointly agree not to declare or levy war until the proposition is submitted to and approved by their electors. Does any well-informed person believe that, when war fever sways the people these agreements would be observed; or that countries in general would enter into such compacts? On the other hand, several amendments are proposed which would empower or direct Congress, in the event of war, to conscript all citizens as well as all money, industries and property necessary to the prosecution of the conflict. Then, it is radically suggested to provide by constitutional amendment that one who, in time of war, defrauds or cheats the federal government in respect to war materials shall be guilty of treason. Imagine the Constitution ordaining that a person shall be guilty of

the high crime of treason if a jury should find, in the words of the resolution, that he sold the government "short weight," or an "inferior article"! Another effort to enlarge the word "treason", as now defined in the organic law, is made by a resolution which would include in it all attempts, by word or deed, to bring about the establishment of any new form of government, except through proper constitutional amendments. Here is a thought which, perhaps, is worth consideration; though there is no immediate need for such protection.

A proposal which seems popular with amendment-seekers is one empowering the federal government to tax the income from securities issued by the states; and at least one of the resolutions would tax such securities whether issued before or after the adoption of the authorizing amendment, whenever the income derived exceeds \$12,500 per annum. With the constant fluctuation of money in mind, think of putting a fixed sum like that into the Constitution! Another amendment would entirely prohibit the issuance of tax-exempt securities; and still another provides that the federal government shall return to the respective states the moneys collected from taxes on their securities, thus constituting the United States a collector of taxes for the benefit of the local governments. After volunteering thus to help the states, we find a resolution which proposes to impair their sovereignty by forbidding any civil division of government to use its property or credit (unless by remission of taxes) in aid of any sectarian or ecclesiastical society or institution.

Of the group of amendments which directly relate to the rights of persons, one stipulates that "men and women shall have equal rights throughout the United States and every place subject to its jurisdiction"; another prohibits polygamy; a third makes children of foreign parentage born in the United States ineligible to citizenship unless both parents are eligible. The first of these, granting equal rights to men and women, is a typical example of the loose thought running through many of the proposed amendments. How do we know what practical effects such a change would have on the undeveloped people of our foreign possessions? or, turning to this country, Are men to enjoy the right of dower in their deceased wives' estates, or women the right of curtesy in their dead husbands' estates? In Pennsylvania, a married woman has the privilege of exemption from liability on contracts of suretyship, or when she becomes an accommodation endorser, and in other instances; is the husband to enjoy similar privileges?

Most of the suggested changes in the Constitution are designed to

transfer certain powers from the states to the central government, apparently proceeding upon the premise that the states are either incapable or reluctant properly to manage affairs theretofore left in their charge. The greatest support along this line at the last Congress was given to the so-called Child Labor amendment, which, as you know, passed both houses and was submitted to the states. In all there were 26 resolutions seeking to transfer to or vest in the federal government the right to control the regulation of labor of this character. The large majority of these, like the one finally submitted to the states, sought to place the age limit at eighteen, although sixteen and twenty-one were also mentioned. Seven of the resolutions, not satisfied with the power to control the labor of minors, included in their scope the right to regulate the employment of women.

It looks as though the Child Labor amendment were defeated,¹⁸ and many believe its fate represents the turning of the tide against the whole idea of centralizing power in the federal government; but I incline to think that the extremes to which the draftsmen went in conferring power is the cause of the amendment's rejection. In other words, if, instead of granting power not only to regulate but to "prohibit" the labor of all persons up to eighteen years of age, as the present amendment does, the resolution had been phrased so as to grant Congress the power to prohibit the employment of minors under fourteen years and to regulate their labor up to sixteen years, it would have had a much better chance of adoption. This, in brief, is the plan proposed by the Commissioners on Uniform State Legislation,¹⁹ and it probably represents the limit to which the majority of the people would be willing to go, whether control is to be exercised by the states or by the nation.

Uniform marriage and divorce laws are the objects sought by six proposed amendments. Some of these would include, in the grant

¹⁸A state legislature which either has not acted on a particular amendment submitted to it for ratification, or has definitely rejected it, may reconsider its action and ratify later without resubmission of the amendment to the states by Congress. Where the proposed amendment contains, as in the case of the 18th, a time limit within which three-fourths of the states must ratify, reconsideration by non-acting or non-ratifying states must take place within this prescribed time limit. Where, however, there is no time limit in the amendment itself, the states, which have not acted upon or which have definitely rejected the proposed amendment, must reconsider within a reasonable time. The question as to what is a reasonable time is one which the Supreme Court would decide: *Dillon v. Glass*, 256 U. S. 368, 374-5. Consequently, the state legislatures which have failed to act on the Child Labor Amendment, or which have rejected it, may still ratify within a reasonable time. See, generally, Jameson, "Constitutional Conventions," section 576 et seq.; Ames, "Proposed Amendments to the Constitution during the First Century of its History," p. 300; Cooley, "Principles of Constitutional Law," pp. 211-12; W. F. Dodd, 30 *Yale Law Journal* 345.

¹⁹*Law Notes*, Vol. XXVIII, No. 11, p. 205.

of power to Congress, the right to control the legitimation as well as the care and custody of children when affected by divorce. In this case, as with child labor, the object sought to be advanced is quite proper, indeed laudable; the error consists in attempting to attain it by constitutional amendment. No one familiar with existing conditions can doubt the advisability of child labor regulation or of a more uniform marriage and divorce law, but the accomplishment of these objects does not demand a transfer to the federal government of power over domestic relations; and, so far as uniformity is desirable, it has not yet been demonstrated that the problems involved are incapable of solution by the method of uniform state laws.

From the summary given of the proposed amendments, it may be seen that, if any considerable number of them are to be taken seriously, we are moving away from the original scheme of the Constitution under which we have thriven so exceedingly well, toward a different and doubtful plan of government.

Without further attempting to point out arguments which suggest themselves against many of the proposals, it is clear that most of them make for over-centralization of power at Washington, and reflect a tendency to include in the Constitution matters other than those of a fundamental character. At the cost of repetition, it may be well to say again that the Constitution was framed with a deliberate purpose to interfere as little with the sovereign rights of the several states and the affairs of the people as is consistent with the formation of an effective central government; another purpose, equally deliberate and controlling, was to declare and protect the fundamental rights and privileges of the individual, but only such of them as are fundamental,—all others were to be cared for by ordinary legislation.

The word "fundamental," is here employed to cover such rights and privileges as all persons who believe in a social compact for free government may be supposed to agree upon; those which are so self-evident that they must necessarily be acknowledged, under any form of free government, or which, if not entirely self-evident, have been demonstrated by long experience. But even when dealing with rights and privileges of this character, before incorporating them into the federal Constitution, we should, in each instance, as did the founders of the country, make certain that the interest to be afforded such rigid protection involves a matter for general, rather than local, recognition; and, in determining this, all doubts ought to be resolved in favor of home rule and against national control. If, however, the matter be one of strict national concern, then, before providing for

it in the organic law, we should make sure that the right or privilege involved is relatively universal in its appeal and permanent in character. By "permanent" is here meant, of such a character that, so far as foresight can fathom, a major portion of the people will not be likely to want to treat it in a different way at any future time; and wisdom dictates that, in dealing with rights and privileges of this kind, constitutional provisions be cast in broad general language which, while guarding the central idea involved, will leave a certain latitude to the legislature in the field of enforcement.

When advocating adherence to the original lines of the Constitution, it need hardly be said that the first ten amendments, or the Bill of Rights, may be treated as a part of the initial conception, for they present generally accepted principles, such as those already referred to, which the delegates to the convention thought to be so universally acknowledged that it was unnecessary to include them in the original draft of the organic law. The eventual incorporation of these principles was planned, however, to satisfy those who demanded that course,²⁰ and, also, to make their enforcement doubly sure.

Treating the first ten amendments as though part of the original scheme of government, there have been only nine²¹ formal additions to the fundamental law since the beginning of our history, and four of these were adopted in the last ten years. This meagerness of amendment is largely²² accounted for by the fact, already noted, that the Constitution, being drawn to deal with only the most general elements of government, has proved so elastic as to adapt itself to new circumstances and contingencies as they have arisen. With the possible exception of the 18th, or Prohibition amendment, the Constitution, speaking generally, has heretofore left what may be called non-fundamental rights and controversial²³ matters to be dealt with

²⁰Elliot's Debates, Vol. II.

²¹The 11th Amendment protects the states from prosecution of suits against them in the federal courts. The 12th changed the method of choosing the President and Vice-President by the Electoral College. The 13th writes into the Constitution the abolition of slavery. The 14th guarantees the due process and equal protection of the law; it likewise settles several other questions of universal interest which arose out of the Civil War. The 15th is also a war amendment, for the purpose of protecting the right to vote. The 16th was adopted to permit the collection of income taxes; the 17th to change the manner of electing senators; the 18th to provide for national prohibition; and the 19th to enfranchise women.

²²Some amendments were suggested as cures for temporary evils, others were trivial or impracticable, still others failed owing to the constitutional obstacles of Article V. See Ames', "Proposed Amendments to the Constitution during the First Century of its History," p. 301, cited supra.

This latter reason, however, is less real in view of the comparative ease with which the last three amendments have been added to the Constitution. Events have demonstrated that the procedure as outlined in Article V is not so rigid and cumbersome as many heretofore would have had us believe.

²³The words "non-fundamental rights," are meant to cover rights which grew

either by Congress or by the several state legislatures, from time to time, as occasion and subject-matter involved might require; but the amendments before the last Congress, other than those proposing improvements in the administrative machinery of the national government, indicate that we are about to disregard these early principles. The danger is that we will burden Washington with a mass of powers,—growing out of undigested ideas, relating to controversial matters not fundamental in character, and about which no real consensus of opinion exists,—that, in most instances, properly belong to the several states, where they can be more effectively, because more sympathetically, handled than by what, of necessity, must always seem a comparatively distant national government.²⁴

The notion, rather generally entertained, that the nation can deal with the affairs of the people more capably than can the states, and that the federal government is able to discharge to the advantage of the people as a whole every duty they may see fit to place on it, is a fallacy which, if not speedily corrected, may prove disastrous; for a government which seems, to any degree, unable to enforce the laws of the country, particularly those incorporated into its fundamental code, and which is incapable of discharging efficiently every important duty it assumes, soon *forfeits respect*, and when that happens, the danger point is reached. Indeed, if we continue “in the wake of ambitious social programs calling more and more for interference with every relation of life,” dissatisfaction with law will become universal. As Dean Pound lucidly states:²⁵ “The causes of non-enforcement of law for the most part grow out of over-ambitious plans to regulate every phase of human action by law; they are involved in the continual resort to law to supply the deficiencies of other agencies of social control; they spring from attempts to govern by means of law things which in their nature do not admit of objective treatment and external coercion.”

If we are to enact wisely, whether in the state or the national legislature, we cannot forget that sound laws must have their roots

out of those domestic, industrial or commercial relations that necessarily change with alterations in the conditions of society; the phrase “controversial matters” is used to cover affairs concerning the permanent regulation of which it cannot justifiably be claimed that a consensus of opinion, or settled conviction exists in the minds of the people.

²⁴Hamilton, *The Federalist*, XVII, p. 7*.

²⁵“The operations of the national government, . . . relating to more general interests, . . . will be less apt to come home to the feelings of the people, and in proportion less likely to inspire a habitual sense of obligation and an active sentiment of attachment.”

Also, *Remarks of Colonel Mason, Elliot's Debates*, Vol. V, p. 170.

²⁶“The Limits of Effective Legal Action,”—Reprint of Penna. State Bar Association, 1916, p. 2.

in the customs and convictions of the people for whom the legislation is intended, and not in mere sentiment created by political or social propaganda; nor may we forget that the assumption by Congress of functions formerly administered by the states does not ensure their adequate enforcement. To quote from a recent writer: "Endangering the efficiency of the federal government by assigning to it tasks which inherently lend themselves to state and local supervision is a high price to pay for the realization of a reform. The national government, after all, is a human institution with its imperfections and limitations. It is easier to influence Congress than to convince forty-eight state legislatures to enact social legislation; a reform, however, is not necessarily attained when a congressional enactment is passed,—it is never attained until it has the support of public opinion in the areas where it is to be applied. For this reason, reformers should seriously consider whether federal action or state action is the better method of realizing a particular reform."²⁶

Unquestionably there are conditions in some parts of our country which it would be desirable to see prevailing throughout the Union, but this is no reason why supposedly backward and unwilling states should be forced by federal law to conform with uniform standards which their people do not desire. From an ideal standpoint, uniformity may or may not be advisable, but many reasons suggest why it cannot always be successfully established; none of which is more convincing than the fact that radically dissimilar conditions and ideas prevail, and probably will always prevail, in the different sections of this immense country. It is idle to suppose that these differences, fundamental in many instances, can be transcended and harmonized by a federal statute,²⁷ or even by the magic of a constitutional amendment. If certain states are inefficient or backward in their treatment of particular conditions, political wisdom would seem to dictate that they be persuaded to improve their own situations, attacking the problems involved with methods adapted to their cure²⁸ in accordance with local wishes, and that such reforms be not attempted through national coercion.

When thinking of problems presented by the Child Labor and other suggested amendments of similar character, it is well to keep in mind that (entirely aside from the harm such amendments may work as involving departures from the basic plan of the Constitution) re-

²⁶"Federal Centralization," Walter Thompson, p. 327.

²⁷Laski, "Problem of Sovereignty," p. 279, quoted in "Federal Centralization," cited *supra*, p. 357.

²⁸Dean Bat, "Hazards of Centralization," 1920-21, Texas Bar Association, p. 181.

forms, of the kind they seek to promote, require extensive official machinery for their proper administration; almost too extensive for a country the size of ours, if administration is to center at any one point. Then, again, we cannot overlook the fact that concurrent administration by the federal and state governments, so far as we have tried it, seems to lead rather to the attitude of mind, on the part of those executives who are supposed to act, that "everybody's business is nobody's business," and hence to laxity of law enforcement all along the line, with glaring spasmodic exceptions here and there. This is far from a desirable or healthy condition of public affairs.

In the desire for quick results and ease of accomplishment, the advocates of particular measures too often forget that merely writing law into the Constitution does not necessarily cure the evil aimed at. The existence of a fault in our national life does not always require that it should be made the subject of a constitutional amendment. The true tests would seem to be, not only whether the thing complained of is of such a nature that a remedy for its cure can properly be included in the fundamental law, but also, whether that course presents the best available method of eliminating the evil. At present, every time there is a desire for the realization of a new political, social or economic ideal, its proponents would have the Constitution amended accordingly,—in the belief, apparently, that this course, by some inherent and secret magic, will automatically ensure enforcement, whether or not a general sentiment for the enactment into law has developed in the various states of the Union. We seem to be following a superstition that the national power can operate to banish evil from the earth if only it can be induced to declare the supposed causes illegal; and, as a consequence, we repose unlimited confidence in the beneficent power of constitutional amendments, either prohibiting evils or authorizing Congress to deal with them. The late Professor Dicey, writing of the supremacy of the British Parliament, quotes from De Lolme a grotesque expression to the effect that "it is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman."²⁹ In this country the conviction seems to be growing that even this human shortcoming of the English system can readily be remedied by a constitutional amendment vesting in our own Congress the powers of a creator; but those who so believe are doomed to repeated disappointments.

²⁹Dicey, "Law of the Constitution," 8th ed. p. 41.

It seems obvious that most reforms which affect the intimate affairs of the people can be best worked out through the separate states, where those in control know the people and their capacity for absorbing social or political changes. Then, again, heretofore the states have afforded, and, if their powers are kept intact, will continue to afford, opportunities for experiment in the solution of governmental questions whereby each may profit through the failure or success of the others. It would be a serious mistake to renounce this laboratory process of development which has proved such a satisfactory aid in the past. In proportion as we withdraw possible subjects of experiment from the states, we lose to that extent "the opportunity which makes it possible for them to deal with contested and immature standards until a stabilized opinion is formed; such a process works for progress built on sound foundations, and is one of the strongest and most practical vindications of our system of division of powers."³⁰

But, aside from all other considerations, it is a wise policy to permit each state to regulate matters entering into the everyday life of its people, because there is always danger that when a vast population, most of it distant from the seat of government, becomes rather evenly divided in opinion concerning the character of, or necessity for, such regulation, the minority will be too large, and, in these days of organization, too compact, to submit to the will of the majority with that good grace which is essential to the maintenance of order. When the policy of the past is followed, however, and matters of the kind under discussion are left to the several states, the population of the country is broken into forty-eight different parts, in each of which the people may determine the problems involved for themselves in accordance with their own temperament, climatic conditions, traditions, and economic development.

Madison said in the *Federalist*,³¹ and the observation applies with equal force to-day, "If [the states] were abolished, the general government would be compelled by the principle of self-preservation to reinstate them in their proper jurisdiction." I do not, of course, intend to suggest that the present move toward intensified centralization foreshadows the abolition of state governments, but, rather, that, with the assumption of each new function by Congress, the orbits of proper jurisdiction are altered to some extent, generally involving loss of interest on the part of the states in the problems of administration, and, if the process be continued, it will be difficult,

³⁰"Federal Centralization," Walter Thompson, p. 363.

³¹The *Federalist*, XIV.

if not impossible, to re-establish in the states that sense of responsibility and that capacity for government which has enabled us to exist as a nation.

Thus far our rapid expansion has been possible chiefly because there was developed in the people, through citizenship in self-governing states, a strong political capacity and sturdy self-dependence. If such qualities are to be preserved for future use, it seems essential that we maintain the reality and effectiveness of our state governments, and not break them down by actual deprivation of powers through federal constitutional amendments, or by a process of subsidization through the doling out to the several states of moneys collected by the central government's exercise of the taxing power in fields which ought to be left to the states themselves; a danger not, however, within the scope of this paper.

As suggested a moment ago, in a vast country like ours, a highly centralized system of government is apt, owing to its impersonal and remote character, to cause a loss of interest in functions which the average citizen has little part in administering; and when its burdens happen to bear heavily on the people, they will be prone to look upon their government with resentment, viewing it almost as a foreign power, rather than as their own creation,—first losing faith in its institutions and then respect for it as a whole.

Prior to the present period, the limited field of activities entered upon by the federal power enabled it so to function that its efforts deserved and commanded respect; it was dealing with the individual less directly than were the states, and therefore subjected itself to less criticism. Of late, however, there has been a steady growth of federal control, and while, owing to certain unifying forces at work in our national life,³² much of this centralization has been inevitable, yet the movement to make Washington the repository of further powers is due in no small measure to those who, with misdirected zeal, magnify the efficiency of the federal government, and endeavor, with energetic ignorance, to entrust it with functions which it cannot well discharge. If our future policy is to be concentration of governmental activities at Washington, accompanied by a host of minor officials and employees, swarming from there and scattering throughout the country to execute detailed regulations of innumerable kinds, affecting the daily life of the inhabitants, we shall soon find resentment springing up in every quarter; and, in this connection, it must be conceded that when any considerable number of ordinarily worthy people grow to think of their government as a remote, prying and

³²"Federal Centralization," *supra*, pp. 307-11.

persecuting power, there is real danger in its path, whereas a democratic government,—no matter how distant its habitat,—whose agents or representatives are regarded with esteem by its citizens generally, need fear no dissatisfied elements.

History surely teaches that the only way to have sound government, that will hold the faith of the people, is to preserve and develop the local and intermediate units which support the central system. Administration, to be effective, must be divided among many agencies, for it is only by a proper distribution of functions, descending in gradation from the general to the particular, that the mass of human affairs may be best managed for the safety and prosperity of all.³³ In the past, that which has destroyed liberty and the political rights of man has been the generalizing of administration, and the concentration of all responsibilities into one governing body.

I do not agree with those who think the Constitution in danger because of a lack of interest on the part of those whom it is intended to serve, or that the trend toward centralization can be accounted for purely by the desire of those advocating special measures to find the easiest path to tread in working their ideas into the law; on the contrary, I incline to the belief that it is not the alleged indifference of the people, but rather the great impulse of the industrial movement in which we are now engaged that is pushing us steadily toward centralization in all departments of life, both business and governmental. Though we cannot stop this movement, and should not desire to, we can, and should, control and regulate it, rather than let it control us; and when it comes to dealing with the Constitution, while avoiding an attitude of hostility to all amendments—a condition of mind fatal to progress,—we can, and must, insist upon observance of the basic principles on which our government rests, unless we wish to chance its gradual dissolution. We should also insist upon the fact that most governmental activities which affect the every-day life of the people can be best administered by the several states, and that, where uniformity of regulation in regard to such matters is desirable, an earnest effort to obtain coöperative law-making on a general pattern shall first be made and proved practically impossible of accomplishment before resort is had to the expedient of a constitutional amendment conferring the power in question on the central government.

My final thought is this: Over-centralization of governmental

³³Thomas Jefferson in a letter to Mr. Cabell in 1816; "Federal Encroachments," 1920 N. Y. State Bar Association, p. 408. See also the remarks of Mr. Wilson, Elliot's Debates, Vol. V, p. 212.

authority presents many pitfalls for the future, regardless of the source of power, but powers conferred on Congress by amendment, particularly when they concern controversial matters, have peculiar disadvantages of their own; for, under our system, a small minority of states can prevent the elimination of an amendment from the Constitution, even though a majority might desire its repeal. Yet, to retain such amendments in the fundamental law, after they have ceased to represent popular convictions, creates disrespect for the Constitution itself,—the foundation of a system of government which, even after 130 years of endurance, we must remember is still in the experimental stage. The danger is we may forget that our Constitution represents a system, and, by a mass of disintegrating amendments, turn it into a thing of shreds and patches, without respect at home or honor abroad, that will fall apart through a lack of that harmony which is essential to the stability of any popular form of government.

While the ever-increasing number of proposed amendments suggests many objections of a practical character, to some of which I have called attention, yet, after all is said, the chief menace lies in the evil effect that too numerous and ill-conceived changes may have on the integrity of our federal constitutional system; this, it has been my endeavor to show, is not a mere phantom but a threatened danger of real proportions, worthy of earnest and constant consideration by those who believe in and want to preserve our original plan of government. It can be saved from destruction by the force of understanding and conviction which exists in the ranks of our great profession, but this must be organized for effective use, and that responsibility rests upon you, the present and future lawyers of America.