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The Rising Tide of Prohibition Repeal

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"In a government by the people everything must yield sooner or later to the will of the majority."—*Henry Cabot Lodge, Introduction to the "Federalist."*

RECENTLY the press has teemed with accounts of the hearings before the Judiciary Committee of the House of Representatives on a great national issue. This is the first time in over ten years that public cognizance of that issue has been taken by a Congressional Committee in open session. Nevertheless during the decade of noble experimentation there has accumulated behind closed doors considerable material for the consideration of judiciary committees. An examination of the resolutions that have been so referred discloses some startling indications. In the light of the history of the existing amendments to the Constitution they reflect clearly a definite trend toward the early possibility of a popular adjudication of this issue in the form of the proposal for ratification of an amendment of our organic law.

The Eighteenth Amendment became a part of the Constitution upon the 16th day of January, 1919. In every year since that time save 1920 there have been introduced in Congress one or more amendments designed to effect either its repeal or a substantial modification of its purview. At the present time their total is forty-four. This is four more than were introduced in a similar period during the crusade to write national prohibition into our organic law. In point of fact it is a larger number than those offered from 1900 to 1917, when that amendment was finally proposed to the States for ratification. The straws are definitely in the wind.

Repeal Musings

The process by which our organic law may be formally amended has been neatly termed a safety-valve for the escape of public opinion. An examination of the history of the proposals of the existing amendments discloses three indicative conditions. These amendments have ordinarily been the result of wide-spread popular agitation over a considerable period of time. These upheavals have taken place at definite stages in our history. And finally the amendments introduced in Congress are an index to the course and intensity of the movement. The curve of the rising tide may in some degree be plotted.

Article V, wherein the amending process is outlined, is the shortest article save one in the Constitution. Within the confines of less than a hundred words is the solution of one of the most difficult problems that confronted the Federal Convention. That problem was to carve out a procedure which would secure to the document the degree of stability necessary to its existence and yet which would permit of its alteration when the unforeseeable exigencies of the future so demanded. The idea of the provision for the amendment of a once-written constitution is purely American. Its first appearance was in the Pennsylvania Frame of Government in 1683.

Two modes exist by which amendments may be formally proposed. With one everybody is familiar. Congress by a two-thirds vote of both Houses may propose an amendment. This is known as the "legislative" mode. Action thereunder rests in the discretion of Congress. The other method is termed the "convention" mode. It is initiated by the State legislatures. They may make applications to Congress to call a convention which shall propose amendments. When two-thirds of the State legislatures have so acted, Congress no longer has any discretion in the matter. A convention must be called.

The proposal is but half the process. The amendment becomes effective only upon ratification "by the Legislatures of

three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress." Thus the manner of ratification likewise lies in the discretion of Congress.

It is a curious thing that the States have not utilized the convention mode more frequently. It has been almost universally employed in the revision of State constitutions. The Federal Constitution itself came into being by a series of steps which is precisely analogous to that method. That applications for conventions were anticipated at the time is apparent from the language of Alexander Hamilton. In discussing Article V in the Federalist papers he said: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."

This opinion may well have been founded upon the action of several of the State conventions called for the purpose of ratification of the Constitution. The fact that that document contained no Bill of Rights underlay the strong opposition to its adoption. In the majority of the conventions the issue—shall the Constitution be ratified?—resolved itself into the further question as to whether it should be accepted with precedent or with subsequent amendments. Under the leadership of John Hancock, the Massachusetts convention had been the first to go on record with a ratification coupled with the proposal of specific amendments. The conventions in other States took similar action. The amendments thus proposed reached a total of one hundred and twenty-four. Moreover, the First Congress had been sitting less than a month when there were presented to it the resolutions of the legislatures of New York and Virginia, which made applications for a convention. Thereafter James Madison offered the resolutions which were ultimately embodied in the first ten amendments which are popularly known as the Bill of Rights.

A decision of the Supreme Court gave rise to the next amendment. In Chisholm *vs.* Georgia, that body held that a State might be sued by a citizen of another State. Two days after that decision was handed down an amendment which denied this exercise of the judicial power was introduced in the Senate. Similar amendments had been urged in the First Congress and during the Rhode Island Convention. After the decision resolutions embodying a demand for the change appeared from three of the States. The amendment as it stands was proposed by Congress in 1794 and ratified in 1798. Soon thereafter the Jefferson-Burr embroilment in the presidential election of 1800 gave cause for the Twelfth Amendment. Preceding its final proposal there are of record fifteen resolutions, seven of which were made in the halls of Congress and the remainder appear in resolutions of State legislatures presented to that body.

Then for sixty years the Constitution remained without formal alteration. The history of the Reconstruction Amendments is well known. Suffice it to say in this regard that the precedent attempts both in the legislative and the convention mode number well into the hundreds. After these came another lapse of forty-three years.

It is from the experience that lies in back of the adoption of the last four amendments that there may be gathered the data that is indicative with reference to the agitation for the repeal of the great American Thou Shalt Not. They were adopted within the confines of the decade between 1910 and 1920. And with the exception of the Seventeenth the popular demand for the change dates back less than a generation from the present time. Moreover, they have all been subject to the ratification of three-fourths of forty-eight States and amid conditions akin to those which now exist. Neither of these factors pertain to a consideration of the earlier amendments.

Repeal Musings

Commentators upon the amending process have usually been impressed with the difficulties attendant upon the successful operation of this constitutional procedure. The computation of the numbers of the obstinate minority who may enslave their clamoring brethren is a frequent and unenlightening tabulation. In discussing the Reconstruction Amendments Professor Dicey has remarked that "nothing short of impending revolution" would be effective to bring about further amendment. Woodrow Wilson used similar language when he said 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 cumbrous machinery in Article V." Let it be noted that these remarks were made before the militant minorities in favor of national prohibition and women's suffrage had demonstrated how the legislative mode might be utilized for the expression of their desires.

Women's suffrage takes first place. The first resolution relative thereto was introduced in Congress in 1866 by Mr. Brooks of New York. Three years later two national organizations, the National Women's Suffrage Association and the American Women's Suffrage Association, came into being, and in that year, 1869, four resolutions were presented in Congress. A hiatus occurred between 1872 and 1878, but from that time until 1911 from one to four such propositions were introduced during each Congress. Then coincident with the spread of the movement in the States the numbers began to rise, reaching a total of twenty-four proposals during the Sixty-fifth Congress. The amendment was finally proposed by Congress in the first session of the next Congress on June 5, 1919. All told, a total of one hundred and eighteen attempts had been made.

Although the movement for local prohibitory legislation dates from the late forties, national prohibition in the

shape of a constitutional mandate was not urged until 1876. A Mr. Blair, of New Hampshire, sponsored the first idea for a noble experiment. The subsequent attempts were extremely sporadic until 1913, there having been offered up to that time but nineteen resolutions. Doubtless the work in the field kept such organizations as the Women's Christian Temperance Union and the Anti-Saloon League thoroughly occupied. It was Richmond Pearson Hobson, of Spanish-War and the sinking-of-the-*Merrimac* fame, who started the ball rolling with his resolution on December 4, 1911. Prior to that time there had been but one other resolution until one searches back of the turn of the century. Hobson kept his ball rolling. During the next Congress, the Sixty-third, fourteen such resolutions were introduced and he sponsored nine of them. The ensuing two terms of Congress show eleven and thirteen attempts before the Prohibition Amendment was finally proposed on December 17, 1917. A total of fifty-seven attempts had been made.

Preceding the final proposal of the Sixteenth Amendment the four terms of Congress, from the Fifty-eighth to the Sixty-first inclusive, saw three, three, seven, and six resolutions relative to income taxation respectively. With respect to the popular election of senators embodied in the Seventeenth Amendment, the analogous figures run from eight to thirteen and then thirteen to eighteen. Furthermore, in contradistinction to the Eighteenth Amendment, one or more resolutions proposing the other three changes were offered yearly with negligible exceptions from 1900 on. A comparison of these figures lends color to the assertion that the Prohibition Amendment resulted from a wave of hysteria abetted by able political management.

In the history of the agitation against what the French are pleased to call the "régime sec," the record discloses several indicative facts. The first of the forty-

four proposals was made by Mr. Hill of New York. His resolution, which involved direct repeal, was introduced on May 19, 1919. This was just over four month after ratification. Before the amendment became effective in 1920, two other resolutions appeared. These three make the total in the Sixty-sixth Congress. The next two terms of Congress saw the same number introduced in each. Then the figure leaps. There were twelve in the Sixty-ninth and fourteen in the Seventieth Congress. During the current Congress there have been nine resolutions brought forward. Assuredly, the tide is rising.

These various proposals lend themselves to a general classification. Direct repeal takes the lead with a total of fourteen resolutions. Then come ten involving referendum on either the entire question or the legalization of beers and wines. There have been six the effect of which would be to make State legislation supreme; five define alcoholic content, or, what is tantamount to the same thing in view of the figures prescribed, legalize wines and beers; four purport to regulate rather than prohibit, both with and without local option; and three look to the establishment of a dispensary system. The purpose of the remaining two has eluded investigation. Certainly, here is plenty of material for judiciary committees to ponder.

These proposals have all been made pursuant to the legislative mode. What of that direct action on the part of the States which proved so effective in the establishment of the Bill of Rights? The legislature of Wisconsin alone has acted. Last year its application for a constitutional convention was laid before the Senate twice and before the House once. It was received without comment and then achieved the dubious publicity of the columns of *The Congressional Record*.

In interesting contrast is the action of the First Congress when the first of such applications came before it in 1789. It

was presented with a resolution that it be referred to the Committee of the Whole. A debate ensued on the question of the propriety of referring such a matter to any committee. Madison arose and made the point that so to do "would seem to imply that the House had a right to deliberate upon the subject," which he conceived did not exist in any event. He then pointed out that it was beyond the power of Congress to decline complying once applications had been received from two-thirds of the State legislatures. Guided by these remarks, the House ordered that the application be entered at large on the journals and the original be deposited in the archives of Congress and carefully preserved.

An application similar to these arose out of a popular referendum held in Nevada in 1926. It is extremely doubtful if this manner of proceeding fits into the four corners of the requirements of Article V according to a decision of the Supreme Court. In Hawke *vs.* Smith, which was decided in 1920, it was held that an amendment to the Constitution could not be validly ratified by the use of the referendum. In view of this decision it is difficult to regard the Nevada application as anything more than a mere expression of popular opinion. The friends of the cause might well give heed to this angle of the problem which is presented by the convention mode. At the time that the Seventeenth Amendment was finally proposed by the Sixty-second Congress there were before that body applications for a constitutional convention from the legislatures of twenty-nine States, all of which had been presented pursuant to the express terms of Article V. Applications from three more States would have removed the issue from the halls of Congress into the hands of a Constitutional Convention. The effect of this Damocletian sword must have been powerful.

It is not to be denied that attempts have been made to repeal other amend-

ments. However, apart from the Twelfth Amendment, which would inevitably be altered by almost any proposed scheme as to presidential elections, the efforts have been either sporadic or distinctly sectional. The repeal of that portion of the Fourteenth Amendment which calls for decreased representation in Congress when suffrage rights are denied has been sought by Southern members of Congress. Likewise their resolutions have been aimed at the Fifteenth Amendment. The majority of these attempts were made by one senator and two representatives, all of whom represented Southern States. This is in direct contrast to the current agitation. The forty-four resolutions have been sponsored by three senators and twenty-one members of the House of Representatives. The States represented by these gentlemen range from Massachusetts to Missouri and from Michigan to Maryland. They are ten in number. If there be included those in which the voice of the opposition has been effectively voiced by the method of referenda, the total rises to fourteen.

Believe it or not, as suits your sentiment, the record contains definite indications of an early conclusion. The time is approaching when this issue of *nunc est bibendum* will, in the homely phraseology of the trial lawyer, go to the country in the form of a proposed amendment to the Constitution of the United States. And when and if this comes to pass the most certain method of ascertaining the will of the majority of the people on such a question is provided for in Article V. And that is to say by ratification by conventions in the several States. This has been proposed by two of the resolutions now pending in Congress. An undefiled reaction would be the result for the very simple reason that the delegates to such conventions would be elected directly by the people in the various States with reference to a single and explicit issue.

Repeal Musings

Resolutions introduced in Congress relative to the following amendments since December 4, 1899:

CONGRESS	16	17	18	19	REPEAL OF 18TH
Fifty-sixth	12	10	0	2	
Fifty-seventh	5	9	0	3	
Fifty-eighth	3	5	0	2	
Fifty-ninth	3	8	0	1	
Sixtieth	7	13	1	2	
Sixty-first	6	13	0	3	
Sixty-second		18	1	7	
Sixty-third		14		9	
Sixty-fourth		11		11	
Sixty-fifth		13		24	
Sixty-sixth				13	3
Sixty-seventh					3
Sixty-eighth					3
Sixty-ninth					12
Seventieth					14
Seventy-first—Current Congress to March 15, 1930					9

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