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# Intrinsic Limitations on the Power of Constitutional Amendment

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# INTRINSIC LIMITATIONS ON THE POWER OF CONSTITUTIONAL AMENDMENT

JUST as the war has educated the public in geography, so the question of amending the organic law of the country has stimulated discussion concerning our own legal and political institutions. The amendments providing for the direct election of senators and for federal power to levy an income tax attracted little attention compared with the sudden interest in legal questions which the so-called prohibition amendment has aroused, for it touches upon a matter of very intimate personal concern to many people and one over which very heated controversies have raged. Matters involving, or which are made to involve, moral issues always stir the deepest emotions and leave a wake or the rancoring sense of injustice. This feeling, left by the Civil War, has only for a few years been wiped out in the South. It is now present in many classes and places, especially in the North and East, as a result of the ratification of the Eighteenth Amendment. Inquiry is lively as to the powers of Constitutional Amendment and their exercise.

The power of Constitutional Amendment would be a simple problem if it were limited to the Fifth Article. But that establishes only the machinery for amendment. The prohibition against depriving any State of equal representation in the Senate was a safeguard demanded by the small States who feared that the larger States, whom they had come to regard as their enemies, would use the amending power to crush them out and absorb them. By way of regulating the amendment of the organic law it has no importance.

Any limitation upon the amending power which would be upheld by the Supreme Court would, of course, not be one derived merely from some general theory of the nature of our government,—not one which, we might feel, *ought* to be found in the Constitution and which we would consequently seek to interpret into it. The only limitation which the Court would admit would have to follow very clearly from the wording of the instrument itself. The Court has been strict in adhering to the wording and obvious intention of private contracts where implied covenants were claimed. In *Hudson Canal Co.* v. *Pennsylvania Coal Co.*[1] Justice Clifford denying the claim of the plaintiffs to an implied covenant, said:

> "Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly ex-

[1] 8 Wall. 276.

pressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect."

It is unlikely that the Court would apply a less severe test to an implied limitation on the amending power. Our Constitution is rigid as it stands and the only element of elasticity which permits it to be adapted to new social and political conditions is the power of amendment. Now and again, reformers whose schemes have failed to get past the rather cumbersome amendment machinery have raised the cry that the Constitution is too difficult of amendment. It was precisely with a view to fencing the Constitution off from hasty and meddlesome hands that would tamper with it that its framers made the process of amendment longer and more involved than that of ordinary legislation. It would have seemed, in spite of the possibility of ratification by a minority, that any proposed amendment was sufficiently subjected to discussion and the play of various political forces to prevent any unwise measure from creeping into our organic law. The Supreme Court, responsible for the sound interpretation and correct application of that law, will be slow to admit any limitation of the amending power which might make the Constitution more difficult of adaptation to changing conditions.

Yet it would seem that the Constitution, to maintain its own character and identity, must preserve the essential form of the government it establishes. The government inaugurated in 1789 was dual in form. Because of the large measure of local autonomy the colonies had enjoyed before 1776 it was inevitable that, however they might organize to secure the advantages of common action and unified control as a nation, the various States would insist on retaining not their identity only, but a large sphere for independent action as well. They were too mutually jealous to do otherwise. The purposes of nationalism would be accomplished by granting the Federal government complete power over interstate and international relations. The States varied greatly in their intimate and local institutions and would not only resent Federal interference in them but were actuallly much better able to regulate them for themselves than a single central agency would be.

Inasmuch as the Federal government was one of enumerated powers, all powers not enumerated were by implication reserved to the States. But the people desired a more definite assurance of the liberty of the individual and the power of the State in its own affairs. The first ten amendments were the result of this desire. They

belong, historically and from their nature, with the original Constitution. They were proposed by the first Congress and unanimously ratified. Indeed several States ratified the Constitution only with the understanding that such amendments,—a Bill of Rights and a guarantee of the powers reserved to the States—should be immediately proposed. By the Ninth and Tenth Amendments all powers not specifically granted to the Federal government nor prohibited to the States by the Constitution were reserved "to the States or to the people."

Regarding this peculiar wording, I cannot do better than quote from Curtis:[2]

> "This means, as I apprehend, not the people of the United States, regarded as a mass, but the people of the several States. The 'people of the United States,' regarded as a nation, have no power of government—they have the power to make a *revolution*. The reservation is to the *States*, or to *their* people. The reason for using both terms 'the States' and 'the people' was that the States, as organized by their constitutions, might not lose all the powers which their 'people' have."

This dual form of government which the exigencies of the situation necessitated was the best suited for the country in its later development as well as in 1789. The Fathers wrought better than they knew. If they could have gazed a century and a quarter into the future and seen the nation stretch to the Pacific, grow from thirteen States to forty-eight and become the melting-pot for the world, they could not have devised a scheme better adapted to the needs of the country. Because of the wide differences in geographical and social conditions it is desirable that the States should retain over all the common law and the regulations of daily life included in the term "police power" the fullest control that is compatible with the welfare of the whole nation.

The question of States sovereignty, in so far as that is taken to mean the supremacy of the States over the central government, was settled by the Civil War. But questions as to the nature of sovereignty and whether it is divisible have no bearing upon the problem under discussion, for the Constitution clearly means to leave the States the largest measure of local autonomy. "Every power delegated to the Federal Government relates either to the international or the inter-State relations of the United States. Every pow-

[2] CURTIS, "CONSTITUTIONAL HISTORY OF THE UNITED STATES," Vol. II, p. 160, footnote.

er prohibited to the States affects the same relations, and them only."[3] This statement, made in the heat of a Congressional debate, appears at first to be of doubtful accuracy. Powers were granted Congress and prohibitions were laid upon the States for the purposes of establishing a nation in place of a loose confederation and of providing efficient machinery for the national organization. Examples are the power to pass uniform bankruptcy laws and the clause forbidding States to pass a law impairing the obligation of contracts. One of the chief causes of trouble under the Articles of Confederation had been the confused condition of the currency culminating in the paper money craze of 1786. There were State laws providing for the payment of debts in installments or in property, in some cases, at less than its full value. Money in different stages of depreciation and a variety of laws looking to the relief of debtors put contracts made within a State on the plane of a very uncertain gamble and contracts made between parties in different States were, if anything, a greater risk.[4] The new Constitution would have been doomed from the start if it had not taken steps to restore order in the commercial and financial world and establish credit on a sound basis throughout the States. Not only was this necessary to the success of the new government in America, but it was essential to the securing of favorable recognition from other nations. Evidently then, even these clauses which do not deal with international or interstate relations as such found their place in the Constitution because of their bearing upon those relations.

In general, the division of power which makes the dual character of our government has been admitted and approved. During the controversy over the right of secession, even the strongest opponents of the State sovereignty doctrine took care to make clear that they desired in no way to interfere with the principle of local control in purely local matters. The Republican party national convention at Chicago in 1860 passed the following resolution:

> "That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend."[5]

The question of slavery for the support of which the State sovereignty doctrine was brought to its greatest development could not

[3] Congressional Globe—38th Congress, 1st session, p. 2993.
[4] See BANCROFT, "HISTORY OF THE UNITED STATES," Vol. VI, Chap. VI.
[5] Congressional Globe—38th Congress, 1st session, p. 2985.

be dealt with wholly under the caption of "police power." As long as slavery existed it belonged to the police power for the slave was a thing before the law just as an animal is a thing. But the question of the right of a State to deny to a human being possessed of all his faculties the right of the status of a person was a political question, —a question of the organization of society under the government and before the law. The Thirteenth Amendment was not an invasion of the police power but a proper matter of organic law. The anomaly was that the police power should enter the question at all, —that human beings should ever have stood before the law as property.

Whatever may be thought the location of sovereignty in our government, its dual form remains a fact, resulting from the Ninth and Tenth Amendments, for the existence of the States depends upon their retaining the powers secured to them by those amendments. Of the importance of these powers, which embrace and, in a general way, coincide with the police power, Hare says:

> "The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant. . . . .The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community."[6]

This doctrine has found judicial sanction in a number of important cases. In the case of *New York and New England Railroad Co.* v. *Bristol,*[7] the Supreme Court said:

> "It is likewise thoroughly established in this Court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the im-

[6] HARE, "AMERICAN CONSTITUTIONAL LAW," Vol. II, p. 766.

[7] 151 U. S. 556. See also *Beer Co.* v. *Mass.*, 97 U. S. 25, and *Stone* v. *Miss.*, 101 U. S. 814, etc.

> plied liability to governmental regulation in particulars essential to the preservation of the community from injury."

In the case of an attempt to collect a Federal tax on the official income of a State judge,[8] the Court said:

> "Such being the separate and independent condition of the States in one complex system, as recognized by the Constitution, and the existence of which is so indispensable that without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax."

It is clear that the "high and responsible duties assigned to them in the Constitution" are chiefly those relating to the public health, safety and morals and to control of domestic institutions. Their importance in "the operations of their governments, for preserving their existence" is thus expressed by Justice Gray in his dissenting opinion in *Leisey* v. *Hardin*:[9]

> "Among the powers thus reserved to the several States is what is commonly called the police power—that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the State against disorder, disease, poverty and crime. . . . .This power being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable."

It will be noted that in these decisions the authority of the police power rests upon implication. The exercise of rights granted and the use of property "cannot be withdrawn from the *implied* liability to governmental regulation, etc." The means and instrumentalities of the State government "*should* be left free and unimpaired." Why? Because the establishment of the two governments with enumerated powers granted to one and residuary powers reserved

[8] *Collector* v. *Day*, 11 Wall. 113.
[9] 135 U. S. 100, 127-8.

to the other, *implies* that neither is to be permitted to absorb or impede the other. Again, "Any one, therefore, who accepts a lottery charter does so with the *implied* understanding that the people in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not."[10] And, "Among those matters which are *implied*, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government."[11]

All these cases against infraction of police power look, with the exception of *Collector* v. *Day*, to instances where a portion of it was alienated to private control; and *Collector* v. *Day* anticipated a friction between two divisions of government by which one might impede or destroy the other. The case of a Constitutional amendment which would transfer all or a part of the police power from the State to the Federal government would be a different matter. There would be no possibility of the police functions falling into abeyance. They would simply be exercised by the central government instead of the local. Neither would there be the question of friction between two branches of government, for there would be only one—the central.

That is the significance of these quotations,—they show the absolute necessity of State control of the police power if we are to maintain the form of government established in 1789. If that power were lost the State governments could not exist, would have no *raison d' être;* States would becomt mere electoral and administrative districts and our government would be entirely unified, not dual. An amendment which would rob the States of these powers reserved to them by the Ninth and Tenth Amendments would be revolutionary. This is not an extravagant statement. So eminent an authority as Curtis says:

> "If three-fourths of the states were to undertake to repeal them (the Ninth and Tenth Amendments), or to remove them from their place in the foundations of the Union, it would be equivalent to a revolution. There would remain nothing but the dominant force of three-fourths of the States, and this would soon end in a complete consolidation of the physical force of the nation, to be followed by a different system of government of a despotic character."[12]

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[10] *Stone* v. *Miss.*, 101 U. S. 814.
[11] *South Carolina* v. *U. S.*, 199 U. S. 451.
[12] CURTIS, "CONSTITUTIONAL HISTORY OF THE UNITED STATES," Vol. II, p. 160.

The Court, from the reservations of the Ninth and Tenth Amendments, implies the inalienability of the police power from the States even by their own will. But it goes farther than upholding actions of States which, but for the implied inalienability of the police power, would be considered to impair the obligation of contracts or to take property without due process of law,—it goes farther than freeing means and instrumentalities of State government from Federal taxation. In the case of *Compagnie Française* v. *Board of Health*[13] the Court upheld the Board of Health of the State of Louisiana for holding a vessel in quarantine although it had met the quarantine requirements under the treaties governing the case, by reading the treaty as having predicated the supremacy of the police power. "In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke, not paramount to them." A treaty, declared to be, together with the Constitution and laws made in pursuance thereof, the "supreme law of the land," is held by implication subject to the police power.

Some incidents of the police power not vital to the exercise of the power itself as, for example, those related to interstate commerce, have come under Federal control for the sake of the efficient exercise of the Federal power in that particular. Yet in all essential things the powers reserved by the Ninth and Tenth Amendments have been held by implication to be superior to whatever might conflict with them. They are supreme over treaties, over contracts between State and a person, over a State's own legislation and over Federal taxation. Are they also beyond the amending power? Is the existence of the States beyond the amending power? For that is what the question comes to.

There are many reasons for believing that the power of amendment is, like these other powers, subject to the superiority of those institutions upon which depends the existence of the States,—a superiority implied from the Ninth and Tenth Amendments and from the intent of the framers of the Constitution as shown by history and by their own words.

The rule of Constitutional interpretation applicable to this question is thus formulated by one of the most eminent authorities:

> "A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument."[14]

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[13] 186 U. S. 380.

[14] STORY ON THE CONSTITUTION, Sec. 1508.

Unless the power of amendment, then, is to be held paramount to every other power in the Constitution, it is incapable of withdrawing any power the Constitution grants. The essenial form and character of the government, being determined by the location and distribution of power, cannot be changed,—only the exercise of governmental functions can be regulated. Mr. Pendleton, seeking to apply this doctrine to the Thirteenth Amendment, expressed it in a striking and somewhat extreme manner:

> "Is it competent under the Constitution for three-fourths of the States to change the government into a hereditary monarchy, to abolish the Senate and House of Representatives and convert this Government into an autocracy? It certainly is not. The States cannot under pretense of amending the Constitution, subvert the structure, spirit and theory of this government."[15]

The same rule of interpretation is expressed by Mr. Tucker in a slightly different form:

> "Is not the ordinary rule of construction, that where a general grant of power which may embrace all subjects, is subsequently limited in the same instrument by a specific prohibition, the latter prevails."[16]

Article V is such a general grant. Taken by itself it clearly embraces all subjects except the equal representation in the Senate. The error of those who would deny any other limitation whatever to the amending power is that they regard Article V alone instead of taking the Constitution as a whole, including the first ten amendments which must be considered a part of the Constitution itself. If the Ninth and Tenth Amendments are to be given any significance at all, they must be considered as limitations on the amending power as specific as any other grant of power in the same instrument upon which the essential form of our government depends. I think their relation to that form has been made sufficiently clear.

That they were considered by their framers and generally at the time of their adoption to place the residuary powers forever beyond reach of the Federal government is shown by the history of the Constitution and of the adoption of these amendments. Indeed at least a portion of the framers of the Constitution considered that Article V carried its own limitations which should protect the government

[15] Congressional Globe, 38th Congress, 1st session, pp. 2992-3.
[16] TUCKER, "LIMITATIONS ON THE TREATY-MAKING POWER," p. 424.

from the radical changes. In the First Congress, Roger Sherman said:

> "All that is granted us by the Fifth Article is, that whenever we shall think it necessary we may propose amendments to the Constitution; not that we may propose to repeal the old, and substitute a new one."[17]

Stress is laid upon this word "necessary" as it appears in Article V by a contemporary writer:

> "The use of the word 'necessary' shows that it is not the intent of that article to invest Congress with *unlimited* discretion as to the nature of the amendments it may propose to the States for adoption. . . Congress can only propose amendments when they deem it *necessary*. 'Necessary for what?' The only legal answer that can be given is, 'Amendments necessary for the better carrying out of the express provisions of the original constitution,' and not such as would be invasions of the usages, customs and common law of the peoples of the several States."[18]

But it is not likely that the Supreme Court would undertake to place any limits upon the power of Congress to propose amendments. As in its interpretation of the "necessary and proper" clause it refuses to review any act of Congress which might reasonably be considered "necessary and proper," which is within the bounds of legislative discretion in other words, so in construing the Fifth Article it would be unwilling to say Congress had proposed an amendment which it did not "deem necessary." The discretion is left entirely with Congress.

Moreover, the action of Congress in proposing an amendment is not legislative. Jameson says:

> "When the legislative action consists simply in affirming, by a resolution intended only as a step preparatory to further and other action of that or of some other body, the expediency of amending the Constitution, or in merely proposing such amendments as it deems desirable, such action cannot properly be called legislative."[19]

It is analogous to the President's messages to Congress and cannot be legally restrained any more than the right of the President to present such ideas to Congress as he desires.

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[17] Annals of Congress, Vol. I, p. 742.

[18] Frederick G. Bromberg. CENTRAL LAW JOURNAL, Vol. 88. No. 13.

[19] JAMESON, "CONSTITUTIONAL CONVENTION," p. 505.

The legal control over amendments to the Constitution must be over the right of the States to ratify. The Court has already held in many instances, as we have seen, that a State is incompetent to legislate or grant away any of the powers reserved to it. Then it would seem to follow that a State is legally incompetent to ratify an amendment accomplishing such a transfer of powers, for ratification is a legislative act. Of course, no legal limitation can deny the right of revolution which is always without and beyond the law. But were a number of States, even the three-fourths required to ratify an amendment, to attempt a change in the organic law which was clearly beyond the legal power of amendment and therefore revolutionary, it would bind only those States which joined in this revolution. This fact is of special importance when we remember that representatives of a minority of the people representing an even smaller portion of the wealth and interests of the nation are numerically sufficient to secure ratification of an amendment. These possibilities together with the attempts of the Democratic party to secure the ratification of the equal suffrage amendment in time for the women to vote in the next presidential election, led the New York Times recently into an amusing bit of sarcasm:

> "How would it do to amend Article V of the Constitution so that amendments shall be proposed whenever two-thirds of both National Committees deem it necessary, and shall be valid when ratified by the State Committees of three-fourths of the States?"[20]

To set no bounds to the scope of amendment machinery possessed of such possibilities as ours is unwise policy. As well for the sake of that domestic tranquility and security in the blessing of liberty which it is the object of the Constitution to promote as for the legal aspects of the amending power, the limit to it should be placed at consistency with the scheme and purpose of the original constitution. Mr. Tucker suggests that the relations of the amending power and the reserved powers of the States may be summed up as follows:

> "That where a seemingly exclusive and paramount power in the Federal Government needs a local power of the State which may be necessary to the complete and symmetrical development of such Federal Power, if such State power be not an essential but only an appropriate power in the auton-

[20] New York Times, August 26, 1919.

> omy of the State, the States by amendment to the Constitution might grant such powers to the Federal Government for such purposes. Thus the supremacy of a Federal power on a subject committed to its exclusive keeping would be recognized, while the State would be deprived of no essential attribute. But where a power of a State, included either in its reserved powers or its police power, is one without which no State can exist, which is essential and necessary to the protection of the health, the safety, or the morals of the people, such power cannot be surrendered by the State or absorbed by the Federal Government, because to do so would be to annihilate the State."[21]

Whether the Eighteenth Amendment involves any essential of the police power is beyond the scope of this paper which seeks only to determine the principles which should decide the legality of amendments. It is suggested that the desire not to deprive the States of their powers led to the insertion of the anomalous "concurrent powers" clause. But wherever the two powers meet, the Federal takes precedence. Even should it prove to be possible for the two to work in co-operation, a portion of State police power has been given to the Federal authority. Otherwise the amendment has no meaning for the States already had the power to regulate and prohibit the liquor trade. If the portion of power taken from the States is essential to the police power, the amendment must be considered unconstitutional.

Whether or not we consider that power so essential, we can give unhesitating disapproval to an amendment, not which transfers the police power from State to Federal control, nor by which the right to exercise one function only of the police power is given to the Federal government, but by which a legislative use of one function of that power is embodied in the Federal Constitution. In 1864 Mr. Edgerton thought he had applied the *reductio ad absurdum* to the resolution of Congresss submitting the Thirteenth Amendment to the people for ratification when he said:

> "It might as well propose that freedom of religious opinion should be abolished, and one form of religious worship only prevail in all the States, or that marriage should not take place except between certain classes and at certain ages and otherwise define marital rights, or be extended to regu-

[21] TUCKER, "LIMITATIONS ON THE TREATY-MAKING POWER," p. 324.

late the relations of parent and child, or the canons of property, or the elective franchise."[22]

He must rest very uneasily in his grave, if he knows that an amendment has actually been proposed and ratified prohibiting the manufacture and sale of alcoholic liquors for beverage purposes.

"The Constitution of the United States," says Mr. Fabian Franklin, "is, and ought to be, an instrument dealing only with those fundamentals that are regarded either as essential to the vital functions of government in a Federal republic or as fundamental safeguards of human rights."[23]

Under this Constitution, thirteen inconsiderable quarreling communities became a nation and the nation grew to a world power of the first magnitude. As interpreted by the Supreme Court, the Constitution proved capable of weathering the most severe crises and of being adapted to an almost totally different social and industrial age than that in which it was created. It is worthy of the deepest veneration and, by Americans who stop to consider, it is accorded the respect due it.

But the air is full as never before of political theories, some with elements of truth but more the frothings of crack-brained radicals. In more countries than at any time since 1848 are there new governments, new constitutions, new regimes. The political unrest and upheaval is like nothing since the beginning of the last century. Revolution and counter-revolution are the order of the day. And America, as the world melting-pot, gets scraps of all the revolutions, all the political monstrosities and the radical illusions sprung from long oppression.

To protect our republican institutions and maintain American standards and ideals we must guard the Constitution from hands that would strike at its foundations. The limitations against the amending powers must be enforced. But the sanction must be found in an intelligent public opinion which reveres the Constitution, for it is that upon which, like the republican forms of government it organizes, the Constitution depends.

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[22] Congressional Globe, 38th Congress, 1st session, p. 2986.

[23] New York Times, December 16, 1917.