Kentucky Law Journal

Volume 11 | Issue 2

Article 4

1923

The Proposed Referendum Amendment

C. B. Seymour

THE PROPOSED REFERENDUM AMENDMENT

By C. B. SEYMOUR*

There is a growing fondness for direct legislation by the voters, and a growing distrust of representative government. There is also a growing restiveness at the exercise of the power of the courts to declare statutes unconstitutional, and a growing fear that the courts may thwart the will of the people. As a remedy for the apprehended evils, it has been suggested that whenever a Federal statute shall be declared unconstitutional, a referendum of the question to the voters should be had. Another proposed remedy suggested is a provision that if a Federal statute shall be declared unconstitutional, there should be a provision that in case of the re-enactment of the statute by Congress, it shall be a valid law.

The advocates of these remedies desire constitutional amendments providing these remedies.

The members of the bar generally deprecate such amendments as hurtful and injurious and destructive of the wise system of government under which we live; but there seem to have been few articles (or none) published tending to show that it is impossible for the Federal courts, (no matter what their wishes may be) to thwart the will of the nation. The purpose of this article is to show that without any change in the Constitution, the courts are powerless to thwart the fixed determination of the people.

Ever since *Luther* v. *Borden,* 7 Howard 1, it has been recognized that there are questions political in their nature, and not judicial. They must be determined by Congress and the President—not by the courts. Whether or not the matter is political or judicial, has thus far been decided by the courts, not by Congress; but should Congress (with the President) decide that a matter is political, not judicial, Congress (with the President) has control of the entire force of the nation, including the public purse, and can enforce its will notwithstanding any determination of the courts to the contrary.

That statutes might be enacted which would give the courts authority to pass on questions which are in their nature politi-

*Attorney at law, Louisville, Ky.

cal, will be conceded by all, but Congress, which has power to enact, has a like power to repeal.

The possession of a power is a widely different thing from the exercise of that power. Article IV, section 4, of the Constitution of the United States provides that the United States shall guarantee to every State in this Union a Republican form of government. Daniel Webster is said to have called this provision the sleeping lion of the Constitution. It is a soverign power. The exercise of it has not been conferred by statutes on the courts; should the courts against the will of Congress and without statutory authority attempt to exercise this power, Congress could and would disregard the action of the courts and enforce its own will. While there is no probability that the courts would make such an attempt, there is no need of a constitutional amendment to hold them in check as to this.

Congress is not fettered by being compelled to transact the public business within a few days. If the Constitution limited a regular session of Congress to sixty days, a court sitting much longer might run over Congress; but Congress has the power to continue in session and carry on its work up to the beginning of another session.

By Article III, Section 1, of the Federal Constitution, the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. Hence any court inferior to the Supreme Court may be repealed out of existence. When Thomas Jefferson succeeded John Adams as President of the United States, it was deemed desirable to do away with the district courts, and to substitute new courts—circuit courts. This was done. While Chief Justice Marshall was inclined to treat as unconstitutional and void, the act of April 29th, 1802, by which this was done, other justices of the Supreme Court took the opposite view. The change stood; and now for one hundred and twenty years there has been no doubt of the power of Congress to do away with any Federal Court other than the Supreme Court.

By Article III, Section 2, of the Federal Constitution the appellate jurisdiction of the Supreme Court is subject to such exceptions as the Congress may make, so that any portion of that jurisdiction may be repealed.

A notable instance of the exercise of this repealing power is found in the Federal Statute enacted March 27, 1868. In ex parte McCardle, 6 Wall. 318, the Supreme Court ruled that it had jurisdiction of an appeal in habeas corpus proceedings. There was a fair probability that the exercise of this power might open up the question of the validity of much of the reconstruction legislation; but the statute mentioned shut off the question, and was applied to the very case—McCardle's case—in which the existence of the appellate jurisdiction had been determined by the Supreme Court.

Two recent decisions of the Supreme Court have attracted attention and have caused some restiveness. An examination of those decisions will show that the law laid down by them could be repealed by statute. *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, held that the provisions of the Clayton Act of 1912 forbidding the issuing of injunctions and restraining orders in certain classes of cases, applies only between parties to a dispute concerning terms or conditions of employment. The action of a U. S. Circuit Court in issuing an injunction as to the recent railroad strike at the instance of the United States, carries out the doctrine of this decision. But it is apparent that the decision is based on the construction of a certain statute; and that it does not question the power of Congress to enact a statute so worded as to forbid the injunction in cases like the case in which it was rendered or in cases like the railroad strike case.

The case of the *United Mine Workers* v. *Coronado Coal Co.,* (decided in June, 1922) holds that an unincorporated labor union may be sued, and its funds applied to satisfy a judgment against it. A like decision was rendered by the House of Lords in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants,* (1901), A. C. 426—the House of Lords never overrules its own decisions; but Parliament by a statute—the 4th section of the Trade Disputes Act 1906—5 Edw. VII ch. 47—repealed the law so declared. Congress has clearly the right to repeal the law of the American case, if Congress sees fit so to do.

There are four instances in which the Supreme Court has declared a law that was contrary to the will of the nation. In all these cases the will of the nation has prevailed; and no such constitutional provision as the one now suggested was necessary.

The first of these cases—*Chisholm* v. *Georgia,* 2 Dallas, 419—held that a State might be sued in a civil action in the Supreme Court by a citizen of another State. The eleventh amendment to the Constitution was promptly adopted which excluded cognizance of such suits from the judicial power of the United States.

The second of these cases—*Scott* v. *Sanford,* 19 How. 393—the famous Dred Scott case—had a much more serious sequel. The point decided was that a negro is not a citizen; many other propositions were set forth in the opinions in the case. The case was decided in March, 1857; on July 23, 1868, the fourteenth amendment was ratified which declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside." This amendment repealed the law stated in *Scott* v. *Stafford.* A civil war intervened between the decision of the Supreme Court and the ratification of the amendment. It is certain that an armed conflict would not have been averted by a referendum.

The third case above referred to is *Hepburn* v. *Griswold,* 8 Wall. 603, which held the Legal Tender Acts unconstitutional as to contracts made before their enactment. Congress by statute increased the number of judges of the Supreme Court. In the Legal Tender cases, 12 Wall. 457, *Hepburn* v. *Griswold* was overruled; the new judges voted in favor of overruling *Hepburn* v. *Griswold, Knox* v. *Lee, Parker* v. *Davis,* 12 Wall. 457.

The fourth case above referred to is *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, relating to the income tax. The sixteenth amendment repealed restrictions supposed to exist on the power of Congress to levy income taxes.

Since the adoption of the eighteenth amendment it is settled that it does not require a vote of two-thirds of the members of each House of Congress to propose an amendment; two-thirds of a quoroum of each House may suffice.

It thus appears that without any change in our form of government, Congress and the President—who represent the will of the nation—have full power to prevent a thwarting of that will by the courts; for—

1. Congress has power to repeal out of existence any Federal court except the Supreme Court;

2. Congress has power to repeal any portion of the appellate jurisdiction of the Supreme Court;

3. Congress has power to increase the number of judges of the Supreme Court; if it should do so, the President would have power to nominate for the new judgeships men known to favor the overruling of an objectionable decision, whether made in the exercise of original or appellate jurisdiction;

4. The difficulties in the way of the adoption of specific amendments to the Federal Constitution are by no means insuperable.

It is not the purpose of this article to show that either the proposed referendum amendment or the proposed amendment that a re-enactment shall be final as to constitutionality, would be hurtful or injurious or destructive of the wise system of government under which we live. The scope of this article is to show that both the proposed amendments are needless and useless.