

DEMOCRACY AND THE CONSTITUTION.

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A CONSTITUTION is not necessarily a written document. As in the case of the English constitution, it may consist of the customs of the country expressed in acts of parliament and in the decisions of the courts. In such case it is perpetually in process of revision by new enactments of parliament and by decisions of the courts which establish new precedents by rendering decisions in cases which present new features.

Life itself is constantly changing its ways, and when a majority of the community have adjusted themselves to the new ways there is a demand that laws shall be passed which will compel the more backward members of society to make the new adjustment for the public convenience and welfare. Cases come before the courts in which these new points are to be decided; they are decided on the basis of the prevailing custom, and thus the constitution is revised. Laws are passed in response to the demands of the progressive majority, and thus again the constitution is revised. In England this revision is final until superseded by further revision through the same process.

In America the situation is different. Life, to be sure, changes its ways here as elsewhere. From year to year the methods of human association are tried out by experience; and some of these ways are shown to be serviceable and therefore good, while others which were developed under earlier conditions are seen to be out of date, and perhaps to hamper more than they facilitate the community life. At the same time new situations arise as a result of the new processes by which the necessities of life are produced, and new methods of association and new principles of conduct are developed by these situations. They are first understood and adopted by the more progressive members of society, then gradually the average run of people fall in line and in time they are adopted by the majority. Laws are then demanded for the purpose of bringing the backward ones up with the average of their fellows.

These laws are passed by the legislative branch of the government here as in England, but in America this does not revise the constitution. Even when the courts decide cases on the basis of the new laws, and these decisions are in harmony with the public will and the public conscience, the constitution is not revised thereby.

For such a case can be carried to the supreme court, and it then decides whether the law is in conformity with the constitution, which was written by our great-grandfathers in the days before the community life was altered. If the law conforms to that ancient form of government it stands; otherwise it is void, and in any case the constitution remains the same as it was before. As a matter of experience such cases are always appealed by some special interest, because some favor which it has received at the hands of government under the constitution is restricted or withdrawn by the new law. Thus the constitution acts as a bulwark in defense of the special interests and against the common good.

A decision that such a law is unconstitutional is usually followed by a clamor of protest; whereupon the people are informed that they are unreasonable. The law must conform to the constitution, and if they do not like the decision all they have to do is to change the constitution which they themselves have made and for which they are responsible. But a bare numerical majority of votes in the legislature is sufficient to enact the law; while a number of successive votes, the final one expressing a concurrence of three-fourths of the states, is required to change the constitution.

Even to revise a state constitution two-thirds of the legislature must first vote in favor of revision, and in some of the states this vote must be passed in two successive sessions, after which a majority vote of the people is required. While to revise the federal constitution it is required first, that two-thirds of the members of congress shall vote in favor of revision, after which the amendment is referred to the people. If three-fourths of the states then concur by a majority vote the amendment becomes a part of the constitution.

But note the difference between the concurrent majority and a simple numerical majority. The numerical majority would be ascertained by a simple counting of votes. The concurrent majority consists of a majority of votes in a majority of the states. For this purpose Delaware with its 148,735 (1900) population counts for as many as New York with its 7,273,605 souls. Under the rule of the concurrent three-fourths majority, the thirteen least populous states, which in the aggregate have a population of only, 8,000,000, by voting in the negative would be able to defeat an amendment, even though the remaining thirty-five states, whose population totals 92,000,000, should vote solidly for it. The majorities in those thirteen states might be ever so small, yet these few votes, totaling possibly only a few hundred, would rule the United States. We are

accustomed to thinking that the majority rules in America; yet so far is this from the truth, that one more than one-fourth of the states can rule one less than three-fourths under the constitution, and the discrepancy when populations instead of states are counted may be many times greater.

This is not an argument against states' rights; it can perhaps be demonstrated that the states ought to have very important rights of which they are deprived. The purpose of this argument is to show how far the constitution falls short of securing democratic control.

Our theory that the majority rules in America is not to be reconciled in any way with the plain fact that a small minority controls the majority. There is a wide discrepancy between the theory and the fact. Nor is this discrepancy merely an inadvertence perpetrated in an hour of preoccupation. The fact that the minority rules is not merely an unforeseen accident against which it was impossible to provide. The intention to place the ruling power in the hands of the minority, and the motives for doing it, are set forth with a clearness and precision which precludes every possibility of doubt, in the debates of the convention which formed the constitution. The debates were recorded by Judge Yates of New York, who was a member of the convention. The report is incomplete because Judge Yates left the convention in wrath, before its work was finished. The record was not published until after the death of the last member of the convention; and it shows that body and the constitution framed by it in a light surprisingly different from that in which our fond faith has viewed it for a century and a quarter.

But that is in part because our faith has been foolish as well as fond. We have been vain and not very intelligent theorists. We have read into that time the social and economic conditions of the present, along with the political and moral ideals of a later century; and no greater injustice is ever done by men, than when they judge the acts of the men of one era in the light of the conditions and by the standards of another era. To avoid injustice it will be necessary for us to get in mind a few of the facts and conditions of that time and to understand the language which must be used in this discussion in view of those facts.

To begin with, special interests had always been the basis of representation in the English House of Commons. It was the corporate entities of the shires and the towns which were represented in parliament, not the people thereof. The only political function

of the common man was exercised in the local government, from the earliest summoning of a parliament. The tun (town or township) was the only place where an individual counted as such. The theory that "all men are created equal," and the proposition that all government ought to rest "on the consent of the governed," were then the latest fad in political ideas. Every one was enthusiastically convinced in regard to them, so much so that none dared openly deny them; but no one had as yet realized their implications. The conduct of the American people themselves is the strongest proof of this. Political philosophical ideas had been worked out with great care, but there had been no experience in the application of them, and the people themselves seem not to have been able to imagine how to apply them, beyond the point of the local self-government of the town, in which they had been applied time out of mind.

Beyond this point it was absolutely necessary for government to go. Force of habit and the economic interests of the dominant class suggested that it should go on in the same beaten path and by the same steps which it had followed in England. But that path ran counter to the new political maxims, and the people were quick to see the conflict of theoretical ideas. After the Declaration of Independence, the practical question of carrying on the public business had to be met, and there were no new methods ready made. The vested interests of the country had been acquired under the terms of the old regime and the forms of the old regime were required to keep them intact. These forms were part and parcel of the old political ideas; but these ideas were tabu. It was, at least, very unpopular to defend them openly, yet the vested interests must be protected.

We are just beginning to acknowledge that the purposes of political institutions are economic, not romantic. Therefore we cannot reasonably denounce the founders of the government because they fabricated a practical and not a theoretical constitution. Yet because the practical requirements of a government which should protect the vested interests were inextricably bound up with the old theories it was impossible to discuss them openly and honestly. The people had no methods formulated to comport with their new ideas; they had not the faintest notion of what such methods should have been and did not even perceive that such new methods were required in order to put their new principles into practice, yet they would no longer tolerate the old ideas. The result was that practical discussions were carried on in secret, and open discussions

were upon questions of political philosophy. Methods and philosophy made liars of each other, yet faithful efforts were made to reconcile the two. Many ingenuous and many disingenuous things were said in the effort to clothe practical debate in the language of idealism. The debates of the federal convention abound in language of the new-fashioned sort which clothes ideas of antique model in garb so thin and so misfitting that the exhibit not infrequently falls to the level of the ludicrous.

The fact that all open discussion of political questions had to be carried on in the terms of the new philosophy marked an epoch in political evolution. The fact that means had not been devised for putting the maxims into practice created a predicament. Government business had to proceed without delay. Those who had vested interests took steps to safeguard them under the forms of government. So long as they could discuss these forms in the terms of the new political philosophy they did so openly; when that was no longer possible they retired behind closed doors, but the discussions went on. By these discussions a written constitution was finally hammered out, and that constitution first of all protected the vested interests of the country. But in doing so every concession was made to the popular political ideas that could be made without injury to the interests at stake. The promulgation of the constitution was then followed by a systematic education of the people, the purpose of which was to make them forget their disappointment and to make them believe that their ideals were really embodied somewhere in the constitution. From that day to this the politicians have by common consent promulgated the fallacy that this is a real democracy ruled by the majority of the people.

* It is probable that neither at that time, nor at any time since, has the real magnitude and competence of the task performed by the founders of this government been appreciated by the American people. We have no comprehension of it, and we have not burdened ourselves greatly with an effort to understand it. But at the same time we have been perfectly besotted with an ignorant and superstitious contentment with it, as if each and every one of us were to be credited with having some share in the performance of a sort of supernatural feat. Hence, until within the present decade, the attitude of all loyal Americans toward the constitution was one of unquestioning adulation: the fathers were a company of Olympian Joves—not one lesser deity among them. To question the constitution would have been treason, to inquire into its formation a sacrilege. Formerly we thought that there was no flaw whatever in the

American system; but now we are approaching maturity, the time of self-questioning has arrived and a reaction is setting in which threatens to shatter our complacency and wreck our vanity. Now it almost seems at times as if there is very little about the constitution which can be admired or recommended. It has fostered corruption, graft, exploitation. It is not a democracy at all, but a crafty and disingenuous reproduction of the monarchical system even more tyrannical and less enlightened than the original. We clamored for a democracy, and they gave us something else and told us it was the thing which we demanded. We have unmasked the imposition now; we are in the strenuous temper of crusaders; we are righting wrongs. Evil deeds cannot be condoned even though the sinner has certain noble and distinguished qualities. We cannot maintain an attitude of tolerance.

True, but a just understanding is better than tolerance. And while we refuse longer to grovel before the constitution, while we dissect it dispassionately as if it belonged to our neighbors instead of to us, let us make and file away for constant future reference a note of the following facts.

When the American government was formed it was a new kind of thing under the sun. For the first time in the world a national government proclaimed the theory that "all just government rests on the consent of the governed," although it made the "consent" ineffective by the "concurrent majority." For the first time a national government affirmed that "all men are created equal," though it made them unequal by a long series of checks and balances.

The nation was created out of a mass of helpless and ineffective fragments during a stormy period of world-politics, and it came safely through the storm. The framers of the constitution were not gods, they did not produce a perfect work full finished; but they laid the foundation of a nation which has lived, which has lived to awaken to an understanding of its true condition, to analyze it, discern its mistakes, and set about the correction of them. And this is the proof that the work done in that secret convention was a great work, with all the faults which it possessed from the standpoint of absolute democracy, and when criticised by the standards of present political and social ideals.