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Does New York State Need a New Constitution?

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The defeat at the last election of the proposed amendments to the constitution of this state by upwards of four hundred thousand majority, the largest majority ever cast against a candidate or a referendum proposition in the history of the state, is instructive as showing that the constitutional convention widely misjudged the demand for constitutional reform existing in the minds of the voters.

The amendments proposed were prepared with unusual care. They were elaborately discussed in the convention and in committee and by the press and public men. They went before the people with staunch, able and enthusiastic protagonists. The essential propositions were opposed in the same spirit and with equal ability, both on the floor of the convention and in the campaign that preceded the election. The overwhelming majority cast against them shows that there existed not merely a difference of opinion on the merits of the amendments submitted, but rather a ground swell, a general trend of dissatisfaction, want of confidence, want of conviction, coming from the rank and file of the voters. It was such a movement as usually shapes history, marks a crisis in political affairs and settles political issues.

Notwithstanding all this it must be admitted that there exists still a general feeling, pervading even the ranks of all those factors which opposed and voted against the proposed amendments, in favor of overhauling in some respects our fundamental law. This feeling will result undoubtedly in a demand for another constitutional convention next year, or in a demand for the submission, through the action of two successive legislatures, of specific propositions for the amendment of the constitution, to the electors in the future. It is, therefore, important that there should be a discussion, while people's minds are clear and before politics enters the field, of the need of constitutional amendment.

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The present constitution has been assailed vigorously, ably and even bitterly from all quarters, including in the ranks of its critics some of the ablest of our public men. It has been attacked in its fundamental principles and in its administrative details. Foremost among those who make this attack is the distinguished president of the recent constitutional convention, who in a carefully prepared and forcible speech delivered to the delegates of the recent constitutional convention, mercilessly assailed some of the most important features of our present constitution. He charged the evils of invisible government, which concededly exist, to the lack of concentrated authority in the administration of the state, and advocated as a remedy a redistribution of power that would subordinate the important departments in the state government to the governor by giving him power of appointment of the heads of those departments, and giving him control, through a budget system, of the finances of the different bureaus, institutions and departments of the state. This attack, it will be seen, is aimed at the very theory of government created substantially in 1777 by our first constitution and maintained by our present constitution, and that is its avowed purpose. It is intended by this propaganda to reorganize the government of the state and redistribute its powers with a view of concentrated authority in the office of governor. Such attack, from such a source, made with so much warmth and insistence, surely calls for patient and intelligent analysis, and is the greatest problem now before the people of the state.

The first step in the solution of this problem is an examination of our present constitution for the purpose of ascertaining its real defects from a practical and political standpoint. Is it the parent of invisible government or does invisible government exist because of its defects? Are the state's finances profligately or corruptly administered by what the constitution contains or by what it lacks in the present scheme of administration? Would the affairs of the state be more economically and efficiently managed as the result of the short ballot, thereby increasing the power of the governor and subordinating the departments to him? Do we need a budget system such as proposed by the recent constitutional convention? These questions, going to the fundamental principles of constitutional government, naturally lead us to inquire what is the trouble with the existing constitution in these respects. Where did it come from? Who fastened it upon us? In what secret conspiracy was it hatched out? What band of political bosses had the power to fasten this yoke upon the neck of the State of New York? Under what cloud

of ignorance were the people living? By the spell of whose sinister influence were they guided when by a majority of nearly one hundred thousand they adopted the constitution of 1894? Surely, if it be as bad as it is said to be, its parentage is found neither in patriotism nor in wisdom. Its makers could have been neither statesmen nor scholars, but must have been the tools of some sinister influence working against the interests of the people of the state.

It will not be claimed, I am sure, that any revolution has taken place in either the social, political or industrial life of the state making necessary a different form of government from that adopted in 1777, elaborated in 1821, strengthened and made more democratic in 1846 and slightly amended in detail but ratified in principle in 1894 and accepted on each of these occasions by the people. It will not be asserted that we have outgrown the principles of democracy established by those who organized the state government and perpetuated in every amendment to the constitution since proposed. These principles have stood the test of time up to the present. Will they stand the test of the present?

Let us briefly consider the work of the constitutional convention of 1894 as a convenient starting point in pursuing this inquiry. Who were the men who guided the deliberations of that convention and were responsible for its results? The man who presided over that convention stood foremost at the bar of the state of New York and the nation. A finished scholar, a profound lawyer, an eloquent speaker and a patriotic citizen, he seemed to infuse into the deliberations of that convention the intelligent enthusiasm of his own charming personality. This was Joseph H. Choate.

Next to him in rank and in influence in the convention was the man who perhaps stood next to him, at that time, in the bar of the state, concededly great as a lawyer and as a statesman, then in the full maturity of those extraordinary powers which since have shown brilliantly in high official positions in the nation. This was Elihu Root, who presided at the recent constitutional convention.

Were we to pursue our inquiry further into the personnel of that convention, which is beyond the limits of this article, we would find it made up of men foremost at the bar and in public life. Many of them have since been elevated to the highest courts in the state and to prominence in public life. It included politicians and scholars, doctrinaires and office-holders. No more distinguished or capable body of men ever represented the state in a constitutional convention. President Choate, in opening the proceedings, addressed the delegates upon the work before them in a speech of unusual force

and with that charming rhetoric and profound learning characteristic of his best efforts. He called attention to the fact that fifty years had passed since a constitutional convention had been held whose labors were ratified by the people. In that speech he said:

"There has been a general, uniform and ever advancing prosperity, comfort and well being of the people of the state. The convention is not called upon to treat the constitution with any rude or sacrilegious hand.

The people have become accustomed to its provisions and the convention will be false to its trust if it enters upon any attempt to tear asunder the structure which, for so many years, has satisfied, in the main, the wants of the people of the State of New York."

This is the spirit which guided the deliberations of the convention. The fundamental principles of the constitution were to be held sacred. It occurred to no one to challenge them or seek their overthrow or to impair that vitality which nearly a century and a quarter of development had contributed to our fundamental law. Invisible government had existed before, scandals had been as frequent before as now in the various departments of the state, extravagances in the management of public affairs were a constant campaign issue, yet it occurred to no one that the cause of all this was in the fundamental law.

The essential amendments outlined by President Choate were:

1. Reapportionment.
2. Government of cities.
3. Relief of the Court of Appeals.
4. Protection and purification of the ballot.
5. Changes in methods of legislation.
6. The protection of the civil service by anchoring it in the constitution; and a few other matters of more or less importance, none of them affecting or contemplating a change in our form of government.

All the principles of the constitution, the distribution of administrative power, the number of elected state officials,—all matters affecting our form of government were left as they were found.

The convention followed substantially the lines laid out in the speech of President Choate. The important amendments related to:

1. Bribery at elections.
2. Registration of voters.
3. Manner of voting.
4. Bipartisan election boards.
5. Apportionment of members of the legislature.

6. Protection of the civil service by extending competitive examinations wherever practicable and giving preference to veterans.

7. The reorganization of our judicial system and limitation of appeals to the Court of Appeals.

8. Forest preserves.

9. Canal improvement.

10. Regulation of municipal affairs.

11. Establishment of the state board of charities, commission in lunacy and the prison commission.

There was no discussion of the short ballot, no suggestion from any source that the power of appointment of the governor should be increased by taking away from the people the right to elect stat officials, nor was there any suggestion of a budget system that would give the power to the governor to control the administration of every department, bureau and institution of the state. The convention had before it, somewhat fresher in its mind than it is in ours today, the development of our constitution along the lines of popular participation in public affairs.

The constitution of 1777, inheriting the colonial idea of appointment, provided for the election of a governor and lieutenant-governor, the appointment of state treasurer by the legislature, and the appointment of all other state officers, the judicial and military officers, the mayors of cities, sheriffs, coroners, district attorneys, county judges, etc.

The convention of 1821 provided for the election of governor and lieutenant-governor by the people, and the appointment by the legislature of the secretary of state, comptroller, treasurer, attorney-general and surveyor general. This continued until 1846 and was the cause of much dissatisfaction and criticism. There was an overwhelming demand at that time, in which charges of corruption, inefficiency and extravagance were made, that the people be allowed to elect all of the state officers. That demand was met by the constitutional convention of that year, and an amendment was passed with little objection, providing for the election by the people of the secretary of state, comptroller, treasurer, state engineer and surveyor, attorney-general and three canal commissioners. The people were also to elect four of the eight judges of the court of appeals, and to elect supreme court judges, county judges and other county officers theretofore appointed.

In 1833 an amendment proposed by the legislature was adopted by the people, providing for the election of the mayor of New York City.

In 1839 an amendment proposed by the legislature was adopted, providing for the election by the people of the mayors of all cities.

When the convention of 1894 met it found the history of the preceding years all leading in one direction, namely, in the direction of giving the people wider participation in public affairs. There was no demand for a change and it did not occur to that convention to create a demand or to do anything more than amend the constitution so as to meet current needs, which did not include any fundamental change.

Between the years 1894 and 1915 the demand on the part of the people for participation in public affairs had increased rather than abated. It gave birth to the initiative, the referendum and the recall. The people were demanding an extension of suffrage which involved a radical change in the fundamental principles of the constitution. These being without merit, being little more than temporary hysteria, passed away, but there was a demand that was substantial which ripened into a law which both parties, apparently with enthusiasm, certainly with unanimity, in the legislature enacted. That law was right at the threshold of the convention of 1915, the direct primary law, one of the most radical steps ever taken in the state in the direction of recognizing the wisdom of allowing the people direct participation in the election of local and state officers and the selection of political committees.

This is the history that the constitutional convention of 1915 overlooked. This is the trend that the convention either did not understand or sought to challenge. The work of the convention of 1894 and of all previous constitutional conventions was sought to be upset and an entirely new scheme of government adopted in which the governor's power was to be increased and the people's jurisdiction in the affairs of the state correspondingly diminished.

The people did not take these changes seriously. They felt that the constitution, fundamentally, was right, and they objected to, in the language of Mr. Choate in 1894, any attempt "to tear asunder the structure which for so many years has satisfied, in the main, the wants of the people of the state." They did not believe in increasing the power of the governor and in subordinating the other departments, both in the manner of appointments and of fundamental control, to the chief executive of the state. Were they right in this?

Three amendments were proposed, intended to affect a change in the distribution of executive power as it exists at the present time, and destroying the co-relation of the functions of government as

they exist under the present constitution and as they have existed substantially since the first constitution of 1877. They are:

1. The short ballot.
2. The budget system.
3. Permitting the governor to appoint without confirmation by the senate, certain important officers whose appointment now requires confirmation.

The propaganda of the short ballot is based upon the theory either that the governor will appoint better men than the people will elect, or that by giving the governor responsible administrative control of the departments affected, the administration of those departments will be more efficient and economical. The idea of making the governor responsible for the administration of the affairs of the state to as great an extent as possible is also behind the idea. The genuine short ballot advocates favor the election by the people of the governor and lieutenant-governor only, giving the governor power to appoint the comptroller, the attorney-general, the state engineer, the secretary of state and the treasurer, now elected and since 1846 elected by the people.

How did this question come to be projected with such force and persistency into the political discussions of the day, resulting in a bitter contest in the recent constitutional convention and in a compromise whereby the comptroller and attorney-general were still to be elected, and the state engineer, treasurer and secretary of state were to be appointed by the governor? Was it because history points out that there has been greater efficiency and economy in those departments already under the control of the governor? Have better men come into public life through appointment than by election? Have the people failed in the use of the ballot, in using proper discrimination in voting upon state officials?

What does history say about this? Many charges have been made, during the last few years, of extravagance, inefficiency and even graft in certain departments of the state, almost invariably against departments the heads of which are appointed by the governor. Governor Hughes was called into public life by the great service he rendered in unearthing frauds in the insurance department, the head of which has always been appointed by the governor, and one of the most conspicuous acts of his famous administration was trying to better that department. Other departments that have been in times gone by under accusations of inefficiency and extravagance are the highway department and the prison department, the heads of which are appointed by the governor.

Those who have been familiar at closer range with the administration of affairs at Albany have been able to discover the cause of all this. There has existed, without question, with a few conspicuous exceptions, in those departments under the domination of the governor, a subserviency to the wish of the governor, a fear of independent action, and dependence upon the fortunes of politics, all of which have tended to destroy fearless, capable and vigorous administration. An elective officer and his appointees know in advance when their terms of office expire. Appointed officers and their appointees do not know this. They hope, often, to continue in office even under an adverse administration, and frequently resort to political manoeuvering, to appeals to bosses, and sometimes change their politics that they may continue to hold their jobs. This is history. These are facts. The result has been demoralization of the administration of these departments, and this without any particular criticism of the governor or any fault on his part.

The budget system proposed imposed the duty upon the heads of departments, bureaus and institutions of the state, of furnishing the governor with their estimates of the expenses during the ensuing year. This is simply for the information of the governor. The heads of the departments have no further authority in respect thereto. The governor may change these estimates to suit himself. He then submits them to the legislature which may reduce, but not increase, any of the governor's estimates. It will be seen, at once, that this is a power of life and death over the departments, bureaus and institutions affected. In other words, it makes the governor, and the governor alone, responsible for the finances for the administration of the government of the state. This gives the governor, should he choose to exercise it, the power to control the patronage as well as the administrative policy of all of the branches of the state government included within the budget system. The idea advanced is to make him responsible for finances. How would the governor exercise this great power? Does any one believe that he would or could give it his personal attention? No one who understands the already overburdened executive department would believe this for a moment. The whole matter and responsibility would be referred to a bureau and to clerks. We, therefore, would have irresponsible control by clerks and subordinates, in place of control by officers elected by the people and other heads, not elected, but all of whom are compelled to take an oath of office to serve the people faithfully and well to the best of their abilities. This amendment belittles the importance of the subject, is absolutely wrong in theory and would

prove cumbersome and inefficient in practice. It has been said that it would correct the evils of the present system, in other words, that it would prevent extravagance and dishonesty. The cases of extravagance and dishonesty that are intended to be remedied are those that have been called to the people's attention occasionally in the past, and relate almost entirely to contracts for public improvements and to dealing with contractors and others who are outside of the state service. No one who knows the facts would claim that the governor could exercise any more careful supervision of these matters than can be exercised by the heads of the departments under which they occur. He could not know whether a highway or a prison contract was executed according to its terms. The budget system could not remedy and in its scope was not capable of remedying this evil so far as the appropriations for departments and other expenditures are concerned. It cannot be charged that these appropriations are in a chaotic condition or that money goes astray. It is the duty of the comptroller's office, under the present system, to see that departmental expenses are charged to the proper appropriations and no money can be drawn out of the state treasury except pursuant to an appropriation and for the identical purpose for which it was appropriated. The comptroller's office, as it exists today, is an admirable organization, efficient and capable in all repects to look after the finances of the different departments and bureaus of the state and this work is honestly and efficiently done.

The third amendment that we are dealing with took away from the senate the power of confirmation of some of the important officers now requiring confirmation. The reason given was that the senate often holds the governor up in respect to his appointments and he is compelled to dicker patronage or to enter into compromises in order to get his nominees confirmed. If history has shown that the governor has made his great power subservient to the senate or to bosses, if it be true that he has dickered in order to get his nominees confirmed, will anybody argue that the governor should have more power to barter away or to dicker with? It is never necessary for the governor to dicker with the legislature. This may sometimes be given out as an apology for poor appointments and perhaps is, but a governor who would surrender his great authority has thereby shown himself unfit to fill the office of governor, and no amendment of the constitution could remedy this misfortune.

These three important amendments, destroying the present distribution of power and responsibility and curtailing the people's participation in the election of important officials, are in direct

opposition to the trend of political thought in this state in recent years. What would become of the direct primary law were these propositions to pass? The benefits of this law are practically nullified by the short ballot. There is little use of allowing the people to control primaries, particularly with a view of permitting them to participate in the election of officials, and then removing from the electorate all of the important officers of the state but two. It is not, therefore, surprising that the people, with their usual commonsense, repudiated overwhelmingly these propositions. They are justly and intelligently against any innovation in our form of government, and they regarded these propositions as unsound and dangerous as the initiative, the referendum and the recall, which went to the political scrap heap when challenged by popular common sense. They have frequently been told, in prefervid eloquence, that everything is all wrong, that public men are crooks as a rule, that the affairs of the state are dishonestly administered, but, when they look for the evidence of all this, it is not to be found, and these appeals when the issue comes are usually treated as they deserve to be treated.

The question, therefore, at the head of this article, must be answered in the negative. New York State does not need a new constitution. It does not follow that certain amendments to the present constitution are not necessary, but these amendments do not go to the basic principle of government or materially affect the present plan for the distribution of power.

The first amendment I would suggest is the elimination from the constitution of the provision requiring that there shall be submitted to the voters of the state every twenty years the question, "Shall there be a convention to revise the constitution and amend the same?", now found in section 2, article XIV of the present constitution. The right to amend suggests the duty to amend. The convention that is gathered with power to amend likes to make its work conspicuous and far reaching, and begins to work from the ground up. This is likely to result in an attack upon those provisions that should be regarded as finally settled, or in the submission to the people of a mass of complicated provisions which the people cannot possibly understand so as to intelligently vote upon them.

Other provisions of the constitution needing attention are: (a) the power of removal of state officers. This should be in the courts and not in the senate or in the governor. The subject should be removed from the atmosphere of partisan politics and dealt with distinctly and solely as a legal question; (b) the extension of the protection of the civil service so as to prevent removal from office

of a number of important deputies and clerks in each of the departments, bureaus and institutions of the state, in order that the administration of the state may not suffer materially by political change, such deputies and clerks to be removable only by the courts; (c) the reorganization of state commissions, making them single-headed so far as possible, so that there may be a one man responsibility instead of having the responsibility divided among a number of men; (d) the court of appeals should be given the power to regulate practice and to reorganize our judicial system from time to time, especially with reference to relieving the court of appeals from the congestion of its calendar; (e) abolishing the offices of state treasurer and secretary of state, which are no longer necessary as separate state offices, and making them departments in the office of the comptroller; (f) permitting students to vote, under proper restrictions, for state officers and upon propositions affecting the whole state, at the institutions which they are attending.

None of these affect our present scheme of government. They may be voted upon by submission, under the provisions of section 1, article XIV, of the constitution, which authorizes the senate and assembly by two successive legislatures to propose amendments to the people. This method is simple and sufficiently expeditious for all practical purposes. The people may act intelligently on a few propositions submitted to them separately when they cannot possibly grasp a series of amendments or a whole scheme of constitutional government. Many important amendments to the constitution have been made in this way and experience has taught that it is a safe and sensible way of amending our fundamental law.

The remedy for all the evils that actually exist in the state government is in the election and appointment of honest and competent men. It has been said that ours is a government of laws and not of men, but the actual administration of the government is a matter of men more than of laws. Able and honest public officials will, in the administration of public affairs, minimize, if not completely overcome, inadequate or bad laws, while incapable or dishonest public officials will nullify the effect of good laws. No public official, from the governor down, need plead, as an excuse for failure to administer the affairs of the state in a proper manner, that the constitution or the laws of the state is responsible. There is no foundation for such excuse. New York should be proud of her constitution and of her system of laws. Fundamentally they are both sound and correct. We should, therefore, proceed to deal with the future upon the theory that the past has taught us something that we can-

not destroy and should not forget. We should take for settled certain things in our scheme of government that have been approved of so many times by the people and have met every test so successfully that it would be folly to change.

Those who, while analyzing the present, have not forgotten the past, while yielding to the desire for progress, do not ignore the teachings of experience, will quite unanimously agree that the distribution of powers, as established in our first constitution and as developed from time to time by such constitutional amendments as experience has justified, is one of the fixed and sacred principles in our political history.