CHAPTER XXXII

THE AMENDMENT OF THE CONSTITUTION

THE men who sat in the Convention of 1787 were not sanguine enough, like some of the legislating sages of antiquity, or like such imperial codifiers as the Emperor Justinian, to suppose that their work could stand unaltered for all time to come. They provided (Art. v.) that "Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode may be prescribed by Congress."

There are therefore two methods of framing and proposing amendments.

(A) Congress may itself, by a two-thirds vote in each house, prepare and propose amendments.

(B) The legislatures of two-thirds of the States may require Congress to summon a Constitutional Convention. Congress shall thereupon do so, having no option to refuse; and the Convention when called shall draft and submit amendments. No provision is made as to the election and composition of the Convention, matters which would therefore appear to be left to the discretion of Congress.

There are also two methods of enacting amendments framed and proposed in either of the foregoing ways. It is left to Congress to prescribe one or other method as Congress may think fit.

(X) The legislatures of three-fourths of the States may ratify any amendments submitted to them.

(Y) Conventions may be called in the several States, and three-fourths of these conventions may ratify.[1]

On all the occasions on which the amending power has been exercised, method A has been employed for proposing and method X for ratifying — *i.e.* no drafting conventions of the whole Union or ratifying conventions in the several States have ever been summoned. The preference of the action of Congress and the State legislatures may be ascribed to the fact that it has never been desired to remodel the whole Constitution, but only to make changes or additions on special points. Moreover, the procedure by National and State conventions might be slower, and would involve controversy over the method of electing those bodies. The consent of the President is not required to a constitutional amendment.[2] A two-thirds majority in Congress can override his veto of a Bill, and at least that majority is needed to bring a constitutional amendment before the people.

There is only one provision of the Constitution which cannot be changed by this process. It is that which secures to each and every State equal representation in one branch of the legislature. "No State without its consent shall be deprived of its equal suffrage in the Senate" (Art. v.). It will be observed that this provision does not require unanimity on the part of the States to a change diminishing or extinguishing State representation in the Senate, but merely gives any particular State proposed to be affected an absolute veto on the proposal. If a State were to consent to surrender its rights, and three-fourths of the whole number to concur, the resistance of the remaining fourth would not prevent the amendment from taking effect.

Following President Lincoln, Americans speak of the Union as indestructible; and the expression, "An indestructible Union of indestructible States," has been used by the Supreme court in a famous case.[3] But looking at the constitution simply as a legal document, one finds nothing in it to prevent the adop-

[1] No time is fixed within which the ratification must take place, a somewhat inconvenient omission.

[2] The point was decided by the Supreme court in 1794 in the case of *Hollingsworth* v. *State of Vermont* (3 Dall. 378); and the Senate came to the same conclusion in 1865. See Jameson on *Constitutional Conventions*, § 560.

[3] *Texas* v. *White*, see *ante*, p. 322.

tion of an amendment providing a method for dissolving the existing Federal tie, whereupon such method would be applied so as to form new unions, or permit each State to become an absolutely sovereign and independent commonwealth. The power of the people of the United States appears competent to effect this, should it ever be desired, in a perfectly legal way, just as the British Parliament is legally competent to re-divide Great Britain into the sixteen or eighteen independent kingdoms which existed within the island in the eighth century.

The amendments made by the above process (A + X) to the Constitution have been in all fifteen in number. These have been made on four occasions, and fall into four groups, two of which consist of one amendment each. The first group, including ten amendments made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it, rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroachments of Federal power.[1] The second and third groups, if a single amendment can be properly called a group (viz. amendments xi. and xii.) are corrections of minor defects which had disclosed themselves in the working of the Constitution.[2] The fourth group is the only one which marked a political crisis and registered a political victory. It comprises three amendments (xiii. xiv. xv.) which forbid slavery, define citizenship, secure the suffrage of citizens against attempts by States to discriminate to the injury of particular classes, and extend Federal protection to those citizens who may suffer from the operation of certain kinds of unjust State laws. These three amendments are the outcome of the War of Secession, and were needed in order to confirm and secure for the future its results. The requisite majority of States was obtained under conditions altogether abnormal, some of the lately conquered States ratifying while actually controlled by the northern armies, others as the price which they were obliged

[1] These ten amendments were proposed by the first Congress, having been framed by it out of 103 amendments suggested by various States, and were ratified by all the States but three. They took effect in December 1791.

[2] The eleventh amendment negatived a construction which the Supreme court had put upon its own judicial powers (see above, p. 232); the twelfth corrected a fault in the method of choosing the President.

to pay for the re-admission to Congress of their senators and representatives.[1] The details belong to history: all we need here note is that these deep-reaching, but under the circumstances perhaps unavoidable, changes were carried through not by the free will of the peoples of three-fourths of the States, but under the pressure of a majority which had triumphed in a great war, and used its command of the National government and military strength of the Union to effect purposes deemed indispensable to the reconstruction of the Federal system.[2]

Many amendments to the Constitution have been at various times suggested to Congress by Presidents, or brought forward in Congress by members, but very few of these have ever obtained the requisite two-thirds vote of both Houses. In 1789, however, and again in 1807, amendments were passed by Congress and submitted to the States for which the requisite majority of three-fourths of the States was not obtained; and in February and March 1861 an amendment forbidding the Constitution to be ever so amended as to authorize Congress

[1] The thirteenth amendment was proposed by Congress in February 1865, ratified and declared in force December 1865; the fourteenth was proposed by Congress June 1866, ratified and declared in force July 1868; the fifteenth was proposed by Congress February 1869, ratified and declared in force March 1870. The fourteenth amendment had given the States a strong motive for enfranchising the negroes by cutting down the representation in Congress of any State which excluded male inhabitants (being citizens of the United States) from the suffrage; the fifteenth went further and forbade "race, colour, or previous condition of servitude," to be made a ground of exclusion. The grounds for this bold step were succinctly set forth by Senator Willey (of West Virginia) when he said that the suffrage was the only sure guarantee the negro could have in many parts of the country for the enjoyment of his civil rights; that it would be a safer shield than law, and that it was required by the demands of justice, the principles of human liberty, and the spirit of Christian civilization.

The effect of these three amendments was fully considered by the Supreme court (in 1872) in the so-called Slaughter-house Cases (16 Wall. 82), the effect of which is thus stated by Mr. Justice Miller: "With the exception of the specific provisions in the three amendments for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the power of the States for that purpose, with the additions to the power of the general government to enforce those provisions, no substantial change has been made in the relations of the State governments to the Federal government." — Address delivered before the University of Michigan, 1887.

[2] But though military coercion influenced the adoption of the thirteenth amendment, while political coercion bore a large part in securing the adoption of the others, it must be remembered that some changes in the Constitution were an absolutely necessary corollary to the war which had just ended.

to interfere with the "domestic institutions," including slavery, of any State, was passed in both Houses, but never submitted to the States, because war broke out immediately afterwards. It would doubtless, had peace been preserved, have failed to obtain the acceptance of three-fourths of the States, and its effect could only have been to require those who might thereafter propose to amend the Constitution so as to deal with slavery, to propose also the repeal of this particular amendment itself.[1]

The moral of these facts is not far to seek. Although it has long been the habit of the Americans to talk of their Constitution with almost superstitious reverence, there have often been times when leading statesmen, perhaps even political parties, would have materially altered it if they could have done so. There have, moreover, been some alterations suggested in it, which the impartial good sense of the wise would have approved, but which have never been submitted to the States, because it was known they could not be carried by the requisite majority.[2] If, therefore, comparatively little use

[1] The Greek republics of antiquity sometimes placed some particular law under a special sanction by denouncing the penalty of death on any one who should propose to repeal it. In such cases, the man who intended to repeal the law so sanctioned of course began by proposing the repeal of the law which imposed the penalty. So it would have been in this case: so it must always be. No sovereign body can limit its own powers. The British Parliament seems to have attempted to bind itself by providing in the Act of Union with Ireland (39 and 40 George III., c. 67) that the maintenance of the Protestant Episcopal Church as an Established Church in Ireland should be "deemed an essential and fundamental part of the Union." That Church was, however, disestablished in 1869 with as much ease as though this provision had never existed.

[2] In the Forty-ninth Congress (1884–86) no fewer than forty-seven propositions were introduced for the amendment of the Constitution, some of them of a sweeping, several of a rather complex, nature. (Some of these covered the same ground, so the total number of alterations proposed was less than forty-seven.) None seems to have been voted on by Congress; and only five or six even deserved serious consideration. One at least, that enabling the President to veto items in an appropriation bill, would have effected a great improvement. I find among them the following proposals: To prohibit the sale of alcoholic liquors, to forbid polygamy, to confer the suffrage on women, to vest the election of the President directly in the people, to elect representatives for three instead of two years, to choose senators by popular election, to empower Congress to limit the hours of labour, to empower Congress to pass uniform laws regarding marriage and divorce, to enable the people to elect certain Federal officers, to forbid Congress to pass any local private or special enactment, to forbid Congress to direct the payment of claims legally barred by lapse of time, to forbid the States to hire out the labour of prisoners.

In the first session of the Fifty-first Congress twenty-eight such propositions were introduced, including proposals for the prohibition of lotteries, to suppress trusts and prohibit gambling in agricultural products, to modify the clause in the Federal Constitution regarding the obligation of contracts

has been made of the provisions for amendment, this has been due, not solely to the excellence of the original instrument, but also to the difficulties which surround the process of change. Alterations, though perhaps not large alterations, have been needed, to cure admitted faults or to supply dangerous omissions, but the process has been so difficult that it has never been successfully applied, except either to matters of minor consequence involving no party interests (Amendments xi. and xii.), or in the course of a revolutionary movement which had dislocated the Union itself (Amendments xiii. xiv. xv.).

Why then has the regular procedure for amendment proved in practice so hard to apply?

Partly, of course, owing to the inherent disputatiousness and perversity (what the Americans call "cussedness") of bodies of men. It is difficult to get two-thirds of two assemblies (the Houses of Congress) and three-fourths of forty-four commonwealths, each of which acts by two assemblies, for the State legislatures are all double-chambered, to agree to the same practical proposition. Except under the pressure of urgent troubles, such as were those which procured the acceptance of the Constitution itself in 1788, few persons or bodies will consent to forego objections of detail, perhaps in themselves reasonable, for the mere sake of agreeing to what others have accepted. They want to have what seems to themselves the very best, instead of a second best suggested by some one else. Now, bodies enjoying so much legal independence as do the legislatures of the States, far from being disposed to defer to Congress or to one another, are more jealous, more suspicious, more vain and opinionated, than so many individuals. Nothing but a violent party spirit, seeking either a common party object or individual gain to flow from party success, makes them work together.

If an amendment comes to the legislatures recommended by the general voice of their party, they will be quick to adopt it. But in that case it will encounter the hostility of the opposite party, and parties are in most of the Northern States pretty evenly balanced. It is seldom that a two-thirds

majority in either House of Congress can be secured on a party issue; and of course such majorities in both Houses, and a three-fourths majority of State legislatures on a party issue, are still less probable. Now, in a country pervaded by the spirit of party, most questions either are at starting, or soon become, controversial. A change in the Constitution, however useful its ultimate consequences, is likely to be for the moment deemed more advantageous to one party than to the other, and this is enough to make the other party oppose it. The mere fact that a proposal comes from one side, rouses the suspicion of the other. There is always that dilemma of which England has so often felt the evil consequences. If a measure of reform is pressing, it becomes matter of party contention, and excites passion. If it is not pressing, neither party, having other and nearer aims, cares to take it up and push it through. In America, a party amendment to the Constitution can very seldom be carried. A non-party amendment falls into the category of those things which, because they are everybody's business, are the business of nobody.

It is evident when one considers the nature of a Rigid or Supreme constitution, that some method of altering it so as to make it conform to altered facts and ideas is indispensable. A European critic may remark that the American method has failed to answer the expectations formed of it. The belief, he will say, of its authors was that while nothing less than a general agreement would justify alteration, that agreement would exist when omissions impeding its working were discovered. But this has not come to pass. There have been long and fierce controversies over the construction of several points in the Constitution, over the right of Congress to spend money on internal improvements, to charter a national bank, to impose a protective tariff, above all, over the treatment of slavery in the Territories. But the method of amendment was not applied to any of these questions, because no general agreement could be reached upon them, or indeed upon any but secondary matters. So the struggle over the interpretation of a document which it was found impossible to amend, passed from the law courts to the battle-field. Americans reply to such criticisms by observing that the power of amending the Constitution is one

which cannot prudently be employed to conclude current political controversies, that if it were so used no constitution could be either rigid or reasonably permanent, that some latitude of construction is desirable, and that in the above-mentioned cases amendments excluding absolutely one or other of the constructions contended for would either have tied down the legislature too tightly or have hastened a probably inevitable conflict.

Ought the process of change to be made easier? say by requiring only a bare majority in Congress, and a two-thirds majority of States? American statesmen think not. A swift and easy method would not only weaken the sense of security which the rigid Constitution now gives, but would increase the troubles of current politics by stimulating a majority in Congress to frequently submit amendments to the States. The habit of mending would turn into the habit of tinkering. There would be too little distinction between changes in the ordinary statute law, which require the agreement of majorities in the two Houses and the President, and changes in the more solemnly enacted fundamental law. And the rights of the States, upon which congressional legislation cannot now directly encroach, would be endangered. The French scheme, under which an absolute majority of the two Chambers, sitting together, can amend the Constitution; or even the Swiss scheme, under which a bare majority of the voting citizens, coupled with a majority of the Cantons, can ratify constitutional changes drafted by the Chambers, in pursuance of a previous popular vote for the revision of the Constitution,[1] is considered by the Americans dangerously lax. The idea reigns that solidity and security are the most vital attributes of a fundamental law.

From this there has followed another interesting result. Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend, or usage may modify, the express provisions of the apparently immovable and inflexible instrument.

[1] See the Swiss Federal Constitution, Arts. 118–121.