Notre Dame Law Review

Volume 9 | Issue 3 Article 4

3-1-1934

Effect of the Eighteenth Amendment upon the Amending Process

Max P. Rapacz

EFFECT OF THE EIGHTEENTH AMENDMENT UPON THE AMENDING PROCESS

While the Eighteenth Amendment may be a dead letter through the ratification of the Twenty-First (Repeal) Amendment, its effect upon the amending process is likely to be permanent. Until recent years it was quite the prevailing opinion that the task of amending the Constitution was too difficult. Neither Congress nor the Legislatures seemed to respond promptly to the demands of the people for an amendment. But the speed and manner in which the Repeal Amendment was adopted points to a change of attitude on the part of both Congress and the legislatures and suggests that the burden of passing upon future amendments may henceforth be shifted to the people.

The Repeal Amendment is the first to be ratified by state conventions and while a governor recently stated that it was "strange" that this was the first time the convention method of ratification was used, in reality it was but the culmination of a popular demand to take a more direct part in amending the Constitution which can be traced back for a couple of decades. For a long time neither Congress nor the legislatures heeded the demand and the United States Supreme Court likewise took a conservative stand against legislation allowing any expression of the popular will. The legislatures in ratifying past amendments frequently refused to respond to the majority opinion, either because they were browbeaten by powerful minorities or because they failed to gauge public opinion accurately. A Massachusetts legislature once ratified the Woman Suffrage Amendment only a few months after the people had voted it down.[1] And in Ohio the Eighteenth Amendment was rejected by a popular referendum after its ratification by the legislature.[2] Nevertheless, the

1 See 33 Harv. L. Rev. 223, 224.
2 See Yale L. Jour. 821.

ratification of the legislature prevailed over the popular will because the Supreme Court held that the referendum provisions of state constitutions cannot be applied to the ratification of amendments to the Federal Constitution.[3]

With the efforts of the people to express themselves being defeated at every turn under the system of legislative ratification, it is not "strange" that Congress proposed ratification of the Repeal Amendment through conventions elected by the people. It is but natural that this demand for a more direct participation in amending the Constitution should have crystalized into action in connection with the repeal of the Eighteenth Amendment is respect to which there have been so many accusations that it did not represent the popular will. This recent step taken by Congress permitting a more direct expression of popular opinions is also in accord with the usual method of amending state constitutions.

The Eighteenth Amendment in addition to bringing forth a long dormant method of ratification also focused attention upon the possible scope of future amendments. After its ratification it was urged upon the Supreme Court in the *Prohibition Cases*[4] that there was an implied limitation upon the scope of the amendments that could be proposed by Congress. It was contended by such eminent counsel as Elihu Root that the very nature of our Federal system precludes any serious changes in the constitutional distribution of powers between the state and the national governments, and that any amendment which tends directly to destroy the power of the several states in local self-government should be held void as contrary to the spirit and intent of the Constitution. The Supreme Court, however, rejected this implied limitations doctrine and upheld the Eighteenth Amendment and the Volstead Act. Irrespective of any views on the desirability of the Eighteenth Amendment the Court reached

---

3 Hawke v. Smith, 253 U. S. 221, 40 S. Ct. 485 (1920).

4 Rhode Island v. Palmer, 253 U. S. 350, 40 S. Ct. 486 (1920).

the only proper conclusion on the implied limitations doctrine. To have recognized it would have been unsound on principle and not consonant with a democratic system of government. It would have given the courts control over amendments as against the more representative Congress and the people.

It is the power of amendment which makes the Constitution adaptable to changing conditions and it will be the free and proper exercise of this power which will be the strongest factor in preserving it. One may reasonably assume that after the first success in amending the Constitution through popular demand and approval, the people will at least insist upon the right to pass on all future amendments of a controversial nature. Perhaps that is as it should be in view of our recent experiences with the amendment just repealed. But with this newly won privilege of the people to participate more directly in amending the fundamental law goes a grave responsibility. Though through the Repeal Amendment the states are *regaining* some powers which they once gave up, it is more likely that future amendments will involve a *delegation* of powers to the national government previously exercised by the states as was the case of the Eighteenth amendment.

What of the "New Deal"? Will it call for new amendments? If so, shall we allow them? Where shall we stop? Shall we permit our local police systems to be federalized for better protection against crime? Shall we permit federal control of our cities through grants which entail federal supervision? It may well be that federal control can be wisely extended in certain directions, but it is also obvious that through a gradual shifting of powers from the state and local governments to the Federal Government our time honored dual system of government may be completely obliterated. It seems that even the existence of the individual

states may not be beyond the amending power of the people. So, if the ratification of the Twenty-First Amendment proves to be but the beginning of an era in which the electorate are going to play a more important role in amending the Constitution, their experiences with the Eighteenth Amendment may yet serve as a valuable guide in determining which amendments should be approved and which should be rejected.

Max P. Rapacz.

DePaul University, College of Law.