RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTIUTION OF THE UNITED STATES

Compiled by Everett Somerville Brown | University of Michigan Press, 1938

INTRODUCTION

THE proposal by Congress that the question of the repeal of the Eighteenth Amendment should be submitted to conventions in the states, instead of to state legislatures, as in all previous instances, marked an important innovation in American Government. Americans are quite familiar with the convention idea, for it has played a large part in their political and social life. A convention drafted the Constitution itself, and conventions in the states, called for the express purpose, ratified it. Conventions have drafted state constitutions and have met to revise them. Every four years nominating conventions are called to name the presidential candidates of the respective political parties. Yet almost one hundred and fifty years elapsed between the calling of conventions in the states to ratify the Federal Constitution and the first use of the convention method in amending that document. Attempts to do so were made at various times, but to no avail.[1] The Corwin amendment of 1861, which provided that "no amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or to interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State," although submitted to the legislatures of the several states, was "ratified" by a constitutional convention in Illinois,[2] an action which probably would have been held null and void if tested in the Supreme Court.[3] There was much contemporaneous criticism of the action of Illinois on two grounds: that the proposed amendment had not been submitted to conventions and that the convention in Illinois had been called, not to pass upon an amendment to the Federal Constitution, but to revise the constitution of the state.[4] Since the proposed amendment was not ratified the direct issue was never raised.

Much of the criticism of the Eighteenth Amendment was based on the claim that its ratification had not properly reflected the opinion of the people of the country. The point was constantly emphasized that no change in the Constitution vitally affecting the habits or the morals of the individual citizens ought to be made without recourse to conventions called for that specific purpose. The platforms of the two major parties in the presidential campaign of 1932 recommended that a repeal amendment be submitted to conventions. The Republican plank on this subject read: "Such an

amendment should be promptly submitted to the States by Congress, to be acted upon by State conventions called for that sole purpose . . . and adequately safeguarded so as to be truly representative." The Democratic plank differed little from the Republican, so far as procedure is concerned. It was as follows: "We advocate the repeal of the Eighteenth Amendment. To effect such repeal we demand that Congress immediately propose a constitutional amendment to truly representative conventions in the States called to act solely on that subject."

[1] See Herman V. Ames, The Proposed Amendments to the Constitution of the United States, pp. 286-287; Proposed Amendments to the Constitution, 69th Congress, 1st Session, Sen. Doc, No. 93, and 70th Congress, 2d Session, House Doc, No. 551, p. 199. Also 71st Congress, 2d Session, Sen. Doc, No. 78, wherein is given a compilation of applications to the Senate by the legislatures of various states for the calling of a constitutional convention for the purpose of proposing amendments. The classic treatise on the general subject is John A. Jameson, Constitutional Conventions. See also Everett S. Brown, "The Procedure of Ratification," 185, Annals of the Academy of Political and Social Science, 1936, pp. 85-91.

[2] Ames, op. cit., pp. 196, 286; Documentary History of the Constitution, 518-519.

[3] Cf. Havjke v. Smith, 253 U. S. 221, 64 L. Ed. 871. United States v. Sprague et at., 282 U. S. 716, 75 L. Ed. 640.

[4] See the remarks of Senator Ashurst, Congressional Record, 72d Congress, 2d Session, 4151.

In accordance with this latter pledge Senate Joint Resolution 211 was introduced by Senator Blaine of Wisconsin on December 6, 1932. It proposed submitting the question of repeal of the Eighteenth Amendment to conventions in the states.[5] The report of the Committee on the Judiciary, to which the resolution had been referred, was printed in the *Congressional Record* on January 12. The resolution had been amended by the committee to provide for the submission of the proposal of repeal to legislatures of the states, instead of to conventions.[8] This proposed change in procedure immediately aroused the criticism of officers of associations which had fought for years to persuade members of Congress to submit a repeal amendment to conventions in the states. Charles S. Rackemann, president of the Constitutional

Liberty League, in a letter of January 9, 1933, to Senator Walsh of Massachusetts, wrote: "The proposal that the amendment should be referred to State legislatures comes as a complete surprise. We had supposed that the plan of referring this question, so important in its relations to the fundamental principles of the Constitution, to conventions of the people meeting in the several States had received practically unanimous support."[7] Jouett Shouse, president of the Association against the Prohibition Amendment, protested in similar vein. After referring to the platform pledges of the two major parties, he continued: "It would seem, therefore, wholly improbable that Congress in submitting the resolution would flaunt these specific platform promises and would refer it for action to legislatures instead of to conventions. . . . Moreover, it is obvious that the only method whereby popular expression on this proposition, which deals so intimately with the life and habits of the people, could be had is through the convention method of ratification."[8] Similarly, R. H. Anderson, coauthor of the repeal plank in the Democratic Party platform, pointed out that the proposed ratification by conventions was the "one phase of the prohibition question upon which sentiment was unanimous in both Republican and Democratic conventions," and declared: "In this way the question would be divorced from all others and an expression of popular sentiment obtained upon one of the most controversial issues which has ever faced this country."[9]

In explanation of the amendment of the proposal by the Committee on the Judiciary, Senator Blaine said that at the moment there were over forty state legislatures in session. If the joint resolution should be acted upon by the then session of Congress it could go to these legislatures immediately for action; if the convention method should be agreed upon as the mode of ratification it was obvious, according to Senator Blaine, that ratification would be deferred about four years, or even more.[10] He also emphasized the fact that the convention method would be an expensive one, involving large campaign expenses, as well as the cost of election of delegates and the holding of the convention. Time and expense could be saved by submitting the question to legislatures. So far as public debate was concerned, Blaine contended that the matter had been thoroughly discussed throughout the country. Replying to the suggestion that the Federal Government might pay the cost of holding an election for the purpose of electing delegates to the conventions in the respective states, Blaine

said that it was the consensus of opinion of the Committee on the Judiciary that there was no constitutional authority for the Federal Government to set up machinery throughout the country for the conduct of such an election.[11]

[5] Congressional Record, -jzi Congress, 2d Session, 64-65. "Ibid., 1621.

'Ibid., 1622. 'Ibid., 1622. 'Ibid., 4001. [10]Ibid., 4005. "Ibid.. 4140.

Despite the opinion of the Committee and Blaine's argument in support of it, Senator Robinson of Arkansas, on February 15, 1933, offered an amendment to the resolution to change the method of ratification from state legislatures to conventions in the states.[12] In the debate which followed, much of the discussion was concerned with the power of Congress to provide by law for the election of delegates to the conventions in the states. Senator Walsh of Montana declared that such a suggestion was "contrary to the most fundamental principles upon which our dual system of government is founded."[13] In this contention he was supported by such prominent senators as Robinson of Arkansas, Borah, Ashurst, and Glass. Senator Robinson expressed the opinion that, even if the power of Congress were conceded, any attempt of Congress to exercise it would result in the defeat of ratification in a large number of states.[14] The Robinson amendment was then passed by a vote of 45 yeas to 15 nays,[15] and the proposed amendment in its final form by 63 to 23.[16]

There was little debate in the House on the method of ratification. The most pertinent remark on the subject was that of Representative Celler of New York, who stated that in his belief the word "convention" as used in Article V of the Constitution precluded and repelled the idea that the conventions in the states could be governed by congressional fiat. Each state must set up its own procedure. There might be forty-eight types of machinery, which was unfortunate, Mr. Celler said, but it could not be helped.[17] The joint resolution passed the House on February 20, 1933, by a vote of 289 to 121.[18]

The enrolled joint resolution was delivered on February 20, 1933, to the Secretary of State, Henry L. Stimson, who on the next day sent certified copies of it to the respective governors of the forty-eight states. During 1933 laws were passed in forty-three states (Georgia, Kansas, Louisiana, Mississippi, and North Dakota being the

exceptions) providing for action upon the proposed amendment. During that same year conventions were held in thirty-eight states, and all except one, South Carolina, ratified the amendment. In North Carolina the electorate voted for convention delegates, but also voted against holding a convention. Montana, Nebraska, Oklahoma, and South Dakota made provision for the selection of convention delegates in 1934, but Montana alone elected delegates and held a convention in that year. Ratification of the amendment was completed on December 5, 1933, and a certificate to that effect, as required by law, was signed at 6:37 P.M. by Acting Secretary of State, William Phillips.[19]

Perhaps the most outstanding feature of the repeal conventions is their lack of a truly deliberative character. The fundamental nature of a constitutional convention was placed squarely before the justices of the supreme judicial court of Maine in the request of the Senate of that state for an advisory opinion on the question: "Must a convention assembling in a state to pass upon an amendment to the Constitution of the United States and submitted by vote of the Congress to the action of conventions in the several states be a deliberative convention?" The justices replied: "A convention is a body or assembly representative of all the people of the state. The convention must be free to exercise the essential and characteristic function of rational deliberation. This question is, therefore, answered in the affirmative."[20]

[12] Congressional Record, 72d Congress, 2d Session, 4148-4149. [13] Ibid., 4148-4149.

[14] Ibid., 4154. [15] Ibid., 4169. [16] Ibid., 4231.

[17]Ibid., 45x5. [18]Ibid., 4516.

[19] See Ratification of the Tiaenty-first Amendment to the Constitution of the United States, Publication No. 573, Department of State (i934)- Also, Everett S. Brown, "The Ratification of the Twenty-first Amendment," American Political Science Review, XXIX (Dec, 1935), '005 1017.

A contrary view was expressed by the justices of the supreme court of Alabama. Replying to the question of whether the binding of delegates to abide by the result of the state referendum, as provided in the Alabama law, prevented the proposed convention from being a convention as intended by Article 5 of the Constitution of the

United States, the justices advised in the negative. They held that a convention was more truly representative when expressing the known will of the people, and they were "unable to see in the federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed."[21]

The lack of deliberation in the conventions followed as a matter of course from the nature of the elections at which delegates were chosen. As a rule, the choice of the voters was between delegates pledged for or against repeal, although in some states provision was made for unpledged delegates. Aside from the South Carolina convention, which was composed of delegates opposed to repeal, who voted against the ratification of the proposed amendment, the delegates favoring repeal were overwhelmingly in the majority. In only six of the thirty-eight states which ratified the Twenty-first Amendment were votes registered in the conventions against repeal, and in five of these the vote was almost negligible: Oregon, 5; Montana, 4; Washington, 4; New Jersey, 2; and Michigan, 1. Indiana was the exception. There the vote stood 246 to 83, and, moreover, in the Indiana convention a definite attempt was made by the opponents of repeal to elect their slate of officers to preside over the convention. Speeches were delivered in opposition to repeal. Indiana more than any other state adhered to the idea of a deliberative convention, although even in Indiana the law required from each delegate a pledge that he would, if elected, vote in accordance with the declaration made in his petition of candidacy.[22] At the opposite extreme was Arizona, where the law providing for election of delegates to the convention declared that a delegate failing to carry out a previous pledge to vote for or against ratification would be "guilty of a misdemeanor, his vote not considered, and his office deemed vacant."[23] In Arkansas, in addition to the election of delegates to the convention, a popular referendum was held on the question of repeal. The law providing for the convention required the Secretary of State to tabulate the result of this referendum and to certify it to the chairman of the convention. The convention, in turn, was required to cast its vote for whichever side of the question had received a majority of the total number of votes cast in the entire state and immediately to adjourn.[24] In the Arkansas convention the amendment was adopted by a vote of 42 to 15, following which the unanimous vote of the convention was cast for repeal.[25] Even where there

was no definite pledge the delegates were expected to follow the election returns. Their position was clearly stated by Delegate W. W. Montgomery, Jr., of Pennsylvania, in the following words:

[20] Maine Legislative Record, 1933, pp. 598, 804; ><>7 Atlantic Reporter, 178, 180.

[21] 148 Southern Reporter, 107—in. See comments on these cases in 47 Harvard Law Rev., 130; 18 Minnesota Law Rev., 70-71; 37 Law Notes, 121-122. The comments in the latter two articles differ as widely as the opinions of the justices in the two cases cited.

[22] Indiana Acts of the 78th Session, 1933, p. 853.

[23] Laws of Arizona, 1933, p. 407.

[24] Arkansas Acts of the 49th Assembly, 1933, pp. 457-469.

[25] Arkansas Gazette, August 2, 1933.

"Men and women of this Convention, we are here under a solemn oath to do our duty. We are free agents to exercise our discretion; we are not pledged to any action. We must use our own conscience and our own judgment, as the Constitution of the United States requires that we shall do, in taking this most important action which we today are called upon to take; but in forming our judgment, irrespective of our former or present personal ideas, it seems to me proper to bear in mind that we, all of us, who are elected as delegates to this convention, asked and received the votes of the vast majority of the voters of Pennsylvania upon our representation that we favored the repeal of the Eighteenth Amendment, and that while we are free and are in duty bound to vote on this question as our conscience and our judgment dictate, we would I think be false if we fail to recognize as a very important influence in forming our conclusion, that position we took and upon which we individually invited the votes of the people, who elected us and sent us here."

President Goolrick of the Virginia convention summed the matter up tersely: "Conventions ordinarily are deliberative bodies but no deliberation is necessary where the people have spoken in plain and decisive manner on a public question, fully understood by every intelligent voter."

Because of the lack of deliberation the sessions of the conventions were correspondingly brief. New Hampshire required only seventeen minutes for her favorable action on repeal, and in no instance did the sessions of a convention extend beyond the space of a single day. Organization routine and roll calls consumed considerable time, but in this respect there were wide variations in practice. While some conventions were quite punctilious concerning the selection of committees, others regarded them as utterly unnecessary and a waste of time. So, too, did the conventions differ with respect to speeches. In some conventions there was little oratory; in others, brief extemporaneous talks were made; while still others were made the occasion of lengthy prepared addresses, principally on the history of the repeal movement.

In the speeches which were delivered certain points were commonly emphasized. One was the novelty and historical significance of the event. Governor Wilbur L. Cross of Connecticut, for example, in addressing the delegates in that state, said: "You may have been told that this is an historic occasion. Never before has this State ratified a proposed Amendment to the Constitution of the United States by means of a Convention." Similarly, attention was repeatedly called to the fact that for the first time an amendment was being repealed. Speaker after speaker in the various conventions stressed the theme of our federal form of government and deplored the granting to the National Government by the Eighteenth Amendment of a police power which ought never to have been taken from the states. For example, Henry Marshall, vice president of the Indiana convention, declared: "So it is that we go forward, an impressive parade of the sovereign states, to bring about the orderly and inevitable repeal of a prohibition law which does not fit into the American scheme of ordered liberty; which is not in accord with the fundamentals of human rights as enunciated by the fathers. . . ." In like vein, Delegate Strieker in the Ohio convention decried "the error of writing into the Constitution a police regulation originally reserved to the states and placing same under federal control, without regard to the wishes, habits and temperament of the people of the several states, and imposing upon a large majority of the people the tyranny of a small minority with all its attendant evils." Considerable space in the speeches was devoted to the problem confronting the states incident to their responsibility for the control of the liquor traffic. Opposition to the return of the open saloon was uniformly voiced.

Many of the conventions opened their sessions with prayer. The high note of Americanism was sounded by the Reverend Mr. Noll of the Indiana convention when he thanked God "for America, Our Flag and form of American Government, with the feeling that we should rather live in our beloved land in the most isolated district in a log house on a hillside, burn a tallow candle and draw our drinking water with an old fashioned well sweep than to live with every convenience in the most densely populated districts with all modern conveniences in any other nation on the earth."

Only a few of the conventions followed the example of Indiana in preparing a special set of rules to govern procedure. Florida did so, but also stipulated that Robert's Rules of Order should govern parliamentary practice where applicable and not inconsistent with the standing rules. Robert's Rules of Order were used in the conventions in a number of states. Others adopted the rules of their legislative bodies. Impatience with parliamentary rules of procedure and a desire to push the resolution of ratification with as little delay as possible were evident in some of the conventions. In Massachusetts Delegate Charles F. Ely moved the suspension of the rules. When President Young pointed out that as yet there were no rules, Mr. Ely moved the adoption of the rules of the House of Representatives, which was done.

Here and there delegates showed an ignorance of the niceties of parliamentary procedure. In the Washington convention when Delegate Robert Alexander moved that the convention adjourn *sine die,* Delegate W. W. Conner moved a substitute, explaining it as follows: "A great many of the States of the Union holding conventions, instead of adjourning *sine die,* have adjourned without day and that fixes it so if there is anything that might happen or that might be incorrect in our records, the chairman could call us back into session, therefore, I move you as a substitute that this convention do now adjourn without day. The only difference is when we adjourn *sine die* we absolutely cannot come back and the other is if we adjourn without day and we find anything wrong with our record the president can again call us into session." Whereupon Delegate Alexander withdrew his motion in favor of the substitute, which was then carried unanimously and the Washington convention adjourned *without day* instead of *sine die!*

When one considers that these conventions met in the year following a presidential election it is noteworthy how little political partisanship crept into their proceedings. It is true that here and there vocal tributes were paid to President Roosevelt and in

one instance, in the Alabama convention, the delegates went so far as to adopt a resolution approving and endorsing the plans for relief of the administration in Washington and extending to President Roosevelt their best wishes for continued success. Yet on the whole the movement for repeal cut across party lines, as is reflected by the remark of James W. Wadsworth to Alfred E. Smith in the New York convention: "Think of you and me on the same ticket!"

A modern note was introduced by the broadcasting over the radio of the proceedings of several of the conventions, and in the New York convention popular stars of the radio world were called upon to sing the Star Spangled Banner.

In the action of these conventions was written another chapter in the history of the Constitution. They accomplished the purpose for which they were called and truly registered the will of the American people on a great national issue. Their detailed journals record the result of a popular referendum and will serve as a guide to future action in similar cases. But they also raise the important issue: Did these conventions justify the time and the expense incurred by them? Would it not be preferable to amend Article V of the Constitution and to permit the voters in the respective states to register their decision directly at the polls? A good argument for the latter alternative can be found in the journals of the repeal conventions.[26]

[26] *On this point see Charles S. Lobinger, "Some Obsolete Features of Our Federal Constitution," 72d Congress, 2d Session, Sen. Doc, No. 100, pp. 26-28.*