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THE DEVELOPMENT OF STATE CONSTITUTIONS.

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UNDER this heading I want to present a few considerations of a rather general character brought home to me casually during work involving some incidental study of State constitutions, chiefly in the old Northwest Territory.

I was at the outset rather pleasantly surprised to find these constitutions an interesting study. Ambassador Bryce, in his *American Commonwealth*, long ago (1888) observed (Chap. XXXVII., Vol. II., p. 434) that "the State constitutions furnish invaluable materials for history. Their interest is all the greater because the succession of constitutions and amendments to constitutions from 1776 till to-day enables the annals of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities. Their fullness and minuteness make them, so to speak, more pictorial than the Federal Constitution. They tell us more about the actual methods and conduct of the government than it does."

There is not only interest, there is room for humor, also, in the study of the State constitutions. Mr. Bryce finds our State constitutions surprising in places; he exhibits many provisions, especially in the bills of rights, as objects of curiosity, and occasionally jokes at them, as in the observation that "twenty-six States declare that 'all men have a natural, inherent and inalienable right to enjoy and defend life and liberty, and all of these except the melancholy Missouri, add, the natural right to pursue happiness.'" (Chap. XXXVII, Vol. II, p. 424.) He refers to

them as "documents whose clauses, while they attempt to solve the latest problems of democratic commonwealths, often recall the earliest efforts of our English forefathers to restrain the excesses of medieval tyranny." (Chap. XXXVIII, Vol. II, p 442).

Other things besides Mr. Bryce's amused complacency throw a cheerful ray across the path of the student of State constitutions. The innovations in at least nine new State constitutions cause Eastern writers to make the most mournful and pessimistic comparisons with the time-honored Massachusetts instrument. Professor Stimson, of Harvard University, in his very convenient compilation of "The Law of the Federal and State Constitutions of the United States" (1908), deplores the inaccessibility of State constitutions. "In Georgia it is not procurable. * * * Some States like New Hampshire and Ohio do not print them at all with their general laws. Oregon and other States entirely omit constitutional amendments, while hardly any State follows the example of Massachusetts in printing the constitution in its correct form every year. * * * While the usual compilation of the laws of New York and the official compilation of Georgia and several other States commit the last inanity of printing the State Constitution alphabetically under C, as if it were an ordinary law" (p. XXI.) His exasperation finally reaches the height of exclamation points. "Owing to the negligence or stupidity of the State authorities in not printing these [amendments] with the annual laws, this [a complete list of constitutional amendments] is a difficult matter to ascertain. In Oregon, indeed, where laws and constitutional amendments are adopted by popular initiative, the Secretary of State complains that they are 'full of bad spelling, punctuation, omissions and repeated words'!" (p. 123).

There are many things to tax one's patience in the study of the (approximately) 125 State constitutions in force at one time or another since 1776. For instance, the official and supposedly complete collection of State constitutions in F. N. Thorpe's *American Charters, Constitutions and Organic Laws* (otherwise entitled *Federal and State Constitutions*) published by the Government Printing Office, in the section devoted to Illinois omits

entirely the Constitution of 1848, and, though published in 1909, has amendments only down to 1900, thus omitting the amendments of 1904 and 1908.

Nevertheless, enough material is easily accessible and enough good work has been done to make it possible for any one to go into the subject as far as he wants to, and to get considerable enlightenment. The official seven-volume compilation of Federal and State constitutions edited by F. N. Thorpe, just referred to, though imperfectly and not well indexed, contains most of the official documents one needs, and can easily be supplemented so as to give one a collection complete to within the last two years. Then, beginning with Judge J. A. Jameson's *The Constitutional Convention*, a great work, though written to prove the untenable proposition that the State constitutional convention is legally under the direction and subject to the authority of the State Legislature, with Bryce's luminous study in chapters XXXVII-XXXVIII of his *American Commonwealth*, and Cooley's *Constitutional Limitations*, there are a number of books and articles which not only incorporate an enormous amount of work and so save the time of the investigator, but are well worth reading. Among these I can only make mention of: Borgeaud, *Adoption and Amendment of Constitutions*; Professor Dealey, *Our State Constitution* (supplement to the *Annals of the American Academy of Political and Social Science*, Massachusetts, 1907); Professor Garner's article upon *The Amendment of State Constitutions* in the *American Political Science Review*, February, 1907; Lobingier, *The People's Law*; Stimson, *Law of the Federal and State Constitutions of the United States*, 1908, and the *Year Book of Legislation* issued by the New York State Library. New York has been given an exhaustive treatise in the four-volume *Constitutional History of New York*, by Lincoln, which supplies most of the material for, if it does not often give the interpretation of the important constitutional developments in that State. The best recent piece of work with which I am familiar has been done by Walter Fairleigh Dodd, *The Revision and Amendment of State Constitutions*, 1910, an accurate, complete, convenient and convincing treatment of the subject. In

nearly every State, moreover, there are full records of the formation of the constitution in the shape of journals and debates of the constitutional conventions.

The general outline of the developments of written State constitutions from the revolution to the present generation, has been frequently traced and with tolerable unanimity. We are not a people of striking originality in our political life, and there is greater similarity between the constitutions adopted in different States at a given time than one would expect. The New England States have been slow to remake their constitutions. Three of them have lasted 115 years or over, and the average of the constitutions in effect just before New Hampshire adopted a new one in 1903 was nearly one hundred years. Other States have revised their constitutions more frequently, and, counting the New England States in, the average life of a State constitution has been about thirty-one years. These two facts, namely, that constitutions of different States tend toward a given model, and that there are frequent revisions, make it easy to distinguish certain periods, the first three of which are best described perhaps by Mr. Bryce (*American Commonwealth*, Chap. XXXVIII), though he omits some elements which have been decisive in many States, as the internal improvement episode in the Middle West. The first period covers the first thirty years of our independence, and constitutions formed during these years manifest a dread of and reaction from executive tyranny, together with a disposition to leave everything to the legislature. The legislature was supposed to represent not so much the whole people as the best people. The people themselves as a whole were not thought of as capable of much political action or wisdom. Everything for the most part centered in the legislature, the choice of governor, the control of the various departments of the government, even the making and changing of the constitution itself.

The second period extends from about 1805 to about 1846. States entering the Union during this time, or revising their government, drew up documents giving the people generally a larger part in the government. The suffrage was opened to all white male adults, nearly all offices were to be filled by popular election,

and terms of office were short, so as to pass the offices around more frequently and give what President Jackson called a "healthful action to the system" (Annual Message to Congress, 1829), and changes in the constitution were to be wrought chiefly if not solely through constitutional conventions elected by the people.

The third period began about 1845 or 1850, and was precipitated by the mistakes and incompetency of the legislatures, by the enormous development of log rolling and private legislation, and especially in this part of the country by the extravagant and dangerously large expenditure for internal improvements. In the old Northwest Territory, Ohio, Indiana and Illinois revised their constitutions, and the other States came into the Union with constitutions formed under this impulse. Important limitations, especially in financial matters, were put upon the power of the legislature, and a curb was placed upon private legislation. In general, great distrust of the legislature was shown. Generally the power and the length of term of the governor was increased. He was more than before regarded as the representative of the people—the fear of a strong executive was declining. The net result of this development was a relative conservatism. Change in State government became more difficult than before, and the policy of State governments became generally more conservative.

We have for some years been passing into a fourth period, in which is apparent a tendency toward more complete democracy. The lengthening of the constitution so as to make it a kind of direct popular legislation, the incorporation in new constitutions or grafting by amendment upon old ones of measures such as the initiative, referendum, recall and direct primary, are indications of the intention to bring the government more directly than before into the hands of the people.

In addition to this formal development of our State governments witnessed to by changes in their organic law, there has been steadily taking place the usual development of a more informal sort by judicial interpretation and by custom. As has been frequently remarked, the shorter life, the easier methods of

amendment and the greater detail of our State constitutions, have given less scope to judicial interpretation in our State than in our national history. The question of constitutionality in State courts is more frequently a matter of getting some clear meaning out of obscure or ambiguous phrases, of overturning laws through technical errors in their construction, in short, more artificial and less satisfactory than is the case with questions of Federal legislation and constitutionality. The repetition of this long and laborious process of construction is one of the strongest arguments against constitutional revision. Perhaps the most clearly established and universally developed principle of judicial action is this, that the State legislatures are bodies of residuary and not of merely delegated authority, or, to state it differently, that power not lodged elsewhere and not forbidden to the legislature may be exercised by that body. Yet even this character of some of the articles of some of the most recent constitutions, for instance, Oklahoma and the proposed constitution of New Mexico, seem to deny.

Custom has been, perhaps, more active in developing a new character in our State governments than is generally supposed. Party organization, the lobby, the growth of commissions, the non-partisan or bi-partisan reform of State institutions such as prisons, reformatories and asylums, centralizing tendencies in the management of local institutions, the socializing of education, care of the public health, and numerous other easily recognized developments, have transformed the conditions in which our political life is lived.

It is easy to see now that democratic government in our States is not the simple thing it was at first thought to be. The reaction from the strong executive of colonial days to the omnipotent legislature, and the reaction back toward a strong executive, the complicated and unsystematic efforts in new constitutions to correct acknowledged abuses, show the need of something more than abstract theory to guide us.

There are those who think that the old threefold division of government into the legislative, executive and judicial departments can no longer be maintained. Certain it is that few if any

recent State constitutions can be systematically arranged on that basis. They contain the divisions of the executive, the legislative and the judicial, and then a multitude of other provisions. Professor Dealey speaks "not merely of the three historic departments of government, viz., the executive, the judicial and the legislative, but also of the differentiations from these, the administration, the electorate, and that nameless agency which in every State has the legal right to formulate the fundamental law, an agency which for want of a better name may be called the 'Legal Sovereign.'" (Our State Constitutions, p. 2.) By "administration" he means the boards and commissions, the departments of state, treasury, education, the auditor, controller and other departments by which most of the expert work of State government is done. By the "electorate" he means the voters, considered not as the "sovereign people," but as a government agency acting under the constitution and possessing the power of appointment to office by election, the judiciary power through service in juries, and in some States the power of legislation through the referendum and the initiative. By the "legal sovereign" he means practically the constitutional convention, that is, the voters in their act of determining the fundamental law by which all other acts of government are determined. This he thinks "is the great agency through which democracy finds expression."

Whether we agree with this rearrangement or not, we can easily see that the simple outlines of government supposed in the revolution to prevail, are no longer sufficient and no longer prevail. Legislative, executive and judicial departments overlap in some instances (as legislative reference department, commissions) and leave gaps in others (workingmen's compensation laws, etc.) There is room for a still greater development of commissions or commissioners to deal with business and private interests than has yet taken place, and, as Mr. Bryce points out in the last edition (1910) of the *American Commonwealth*, the success in England of bodies with quasi-judicial powers in dealing with quasi-public interests would warrant a larger application of this department of government in the United States. Railroad, public

utilities and other commissions such as have been introduced in New York, Massachusetts, Wisconsin, and, to some degree in most States, have apparently been an effective and convenient method of dealing with a heretofore complicated problem. I am not certain that our constitutions would not be simpler and more intelligible instruments if we abandoned the threefold division of government in them entirely and outlined our State government by the description of the organs of government and the functions of government as they are actually established, and did not try to bring them under the old categories.

The rise of new industrial and social conditions and new political devices not foreseen by the makers of our State constitutions has brought the amending power into greater prominence than formerly. For example, in New York, Indiana and many other States, any fair and effective workingmen's compensation act is almost excluded by the wording of the constitution, in some cases by an accidental phrase or two, and by the long standing judicial interpretation of the constitution.

There are many ways of amending constitutions in force in different States—on the initiative of the legislature by varying majorities in both branches, and the popular referendum in varying required majorities; or on initiative of a commission appointed for that purpose (New York) and referendum of the people; or by the initiative of the legislature and by action of a convention with or without a popular referendum; or even by action of successive legislatures with two-thirds majority in each house (Delaware).

It is even possible in some States to secure a sort of higher or second degree legislation by way of constitutional amendments. In cases where the constitution contains lengthy, detailed and complicated provisions which are really in the nature of legislation, ease of amendment is desirable and even necessary, if embarrassing situations are to be avoided. While there are objections to this sort of constitutions and to their flexibility, such as the complication of their judicial interpretation and the shifting of responsibility from the legislature, there is no inherent or demonstrated reason why this practice should not be admitted

into our governmental system. The tendency is certainly in this direction, as is seen in the greatly increased length of recent constitutions (Oklahoma, 175 pp.; Alabama, 69 pp., fine print; Louisiana, 144 pp.), and by the frequency of amendments. It has been figured that in the decade 1894-1904 there were 412 amendments to State constitutions formally and legally prepared, and 230 adopted. (Garner, *American Political Science Review*, pp. 245-6.) California is especially prolific in this respect, having adopted amendments 42 times between 1888 and 1908. (Stimson, p. 123.) This year in California, after the victory of the progressives caused an overturning in the State government, twenty-three amendments to the constitution have been submitted by the legislature to the people, providing among other things "for the initiative and referendum, the recall for all elective offices, including judges, and for woman's suffrage." (*The Nation*, May 11, 1911, Vol. XCII, pp. 459-460.)

Illinois and Indiana have constitutions among the most rigid in the United States. The requirement by the former is that a proposed amendment must be approved by "a majority of the electors voting" at the election, while in the latter a majority of the electors is required, and the judicial instruction has been that this means a majority of the people qualified to vote whether they vote or not (69 Ind. 505, 1880), though the court has also maintained that in the absence of registration the number voting shall be presumed to be the number qualified to vote (156 Ind. 104, 1901). These and other restrictions have made it extremely difficult to amend either constitution, so that in Illinois the agitation for direct primaries involved almost insuperable obstacles, and in Indiana of late years constitutional amendments have been apparently impossible. Indeed, the Indiana constitution has only been amended twice since its adoption in 1851, namely, in 1873 and in 1881. Governor Marshall has this year embarked in a revolutionary scheme of procuring the passage in the legislature, by the support of the Democratic members, of a bill submitting a new constitution to the people and providing means of counting the Democratic party vote as a vote for the constitution. The present constitution, while it provides a required process

for amendment, makes no provision for the calling of another constitutional convention, nor does it make any mention of the possibility of a new constitution. Governor Marshall and members of the legislature have argued that his leaves the door open for the legislature to submit a new constitution to the people. As far as Indiana is concerned, however, there would be just as much precedent for the governor himself submitting a new constitution to the people without the intervention of the legislature. All precedents call for a constitutional convention. If, on the other hand, the new constitution be, as is claimed by the opposition, not in fact a new constitution but a series of amendments to the old, the whole procedure is plainly unconstitutional.

It seems, however, only a matter of comparatively few years until many of the States of the Middle West which have not recently revised or substantially amended their constitutions will have to call constitutional conventions. These conventions have in the past undoubtedly represented the highest intelligence and the best character of the people, and have been in many respects the most successful element of our political systems. Yet it is doubtful whether the immediate future will be an opportune time for the formation of new constitutions. There is such a rapid change of political condition that constitutions would have to be made on the jump, and frequently the jump would be in the dark. The permanent effect of many recent devices, such as the direct primary, is not yet clear. The initiative and referendum, with much to commend them, have many vicious possibilities, and the recall may not be productive of a higher quality of officeholder. The short ballot is, perhaps, the one agitation now becoming acute which has the greatest promise and the least weight of objection against it, but even this probably can and should be tried out in city governments a little while longer before its effects can be absolutely counted on. In short, just as in the construction of dwelling houses so many new improvements are developing, such as the open-air sleeping porch, the sun parlor, electrical housekeeping and laundry appliances, that the perfect house of yesterday is unsatisfactory to-day, and prospective builders gain by waiting a while, so in the construction

of State constitutions the time for wise and permanent revision does not seem to be at hand.

Meanwhile experience is being accumulated and definite scientific information is becoming available. In our legislative reference libraries as well as in universities and text-books, a science of comparative legislation is rapidly taking form. We are becoming better able every year to judge accurately of conditions and to know the exact workings of political institutions. It ought not to be long before our law and constitution making bodies will have the advantage which the English Parliament enjoys of having expert commissions to study the effect of proposed legislation and expert political scientists to properly draft statutes.