7. Evolution of the Constitution

Wide World Photo

ALTHOUGH the general principles of the Constitution are more or less fixed, their interpretation and application are constantly changing. The Constitution may be the final authority with regard to the seating of power in the various branches of the federal government. That is a stable principle. However, the way that real power settles among the different interest groups that take part in government is not exactly determined. The true location of political power is set by a variety of factors such as military force, personal prestige, public opinion, economic influence, religious justification, ideals, and customs. Because these factors and their comparative weight are always changing, the arrangement of political power derived from them is likewise ever shifting. Hence the Constitution, which sets forth the rules defining the relationships among these political powers, must

undergo constant change; it is interpreted and applied in keeping with the altered power situations.

Since the American Constitution appears to be embraced in a single document, and also because it is rather difficult to amend, it is sometimes described as being fairly rigid. On that ground it is often contrasted, favorably or unfavorably—depending upon the critic's viewpoint—with the British Constitution, which, being "unwritten," is held to be more flexible. Actually, although the British Constitution does not appear in a single document, it does consist mainly of a few great documents whose principles the British government would not lightly discard. Moreover, the American Constitution is far more than a single document. It includes innumerable laws, administrative and judicial decisions, and customs and habits. The whole Constitution is as broad as the political life of the American people. Hence it is both as rigid and as flexible as that political life.

FORMAL AMENDMENT

The process of formal amendment

The process of formal amendment of the Constitution includes two principal steps: proposition and ratification. The Constitution provides two ways for accomplishing each of these steps (Art. V).

Proposition: An amendment may be proposed either by a two-thirds majority vote of those present and voting in each house of Congress, provided a quorum is present, or by a convention which Congress shall summon when so directed by the legislatures of two-thirds of the States. All present Amendments have been proposed by congressional vote; indeed, no amending convention has ever been summoned. On many occasions one or more of the State legislatures have petitioned for such a convention. However, it is difficult to know just how long such petitions remain active. Almost certainly if a considerable number of State legislatures should call for a convention, the public opinion that stimulated this action would also have brought the election of congressmen who themselves would undertake to propose the amendment. Congress in any event would be loath to surrender its initiative to a convention. Finally, there is no means for controlling the extent of power inherent in such a convention; as matters stand, it could draft an entirely new constitution to be submitted to the people. In essence this was the action of the Philadelphia Convention of 1787.

Ratification: An amendment may be ratified either by the legislatures of three-fourths of the States, or by conventions in three-fourths of the States. Congress is to decide which ratifying method shall be used. There are two matters which, if dealt with by amendment, would require even more than a three-fourths majority. The Constitution provides that the boundaries of a State may be changed only with the consent of the State or States involved (Art. IV, sec. 3, cl. 1), and that a State may be denied

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Convention to Ratify the 21st Amendment in the State of Utah, December 5, 1933. Utah was the thirty-sixth and conclusive State to approve the only amendment submitted to State conventions rather than State legislatures.

equal suffrage in the Senate only with its own consent (Art. V). Any amendment related to either of these matters would presumably need not only a three-fourths majority but also the ratifying vote of the State or States concerned. Figure 15 illustrates the possible combinations of proposition and ratification, and the frequency of their use.

The first twenty Amendments were all ratified by State legislatures. Congress provided, however, that the Twenty-first must be ratified by conventions. One explanation for the procedure adopted with respect to the Twenty-first Amendment is based on the intent of the Amendment, which was to repeal the Eighteenth Amendment and legalize the manufacture and sale of alcoholic beverages. Congress, it is assumed, feared lest State legislatures, dominated as they were, and are, by rural, "dry" groups, would reject the Amendment; and it chose to have the Amendment put before conventions, which could give larger representation to the urban, "wet" influence.

Technicalities of the Amending Process: Numerous technicalities have arisen in conjunction with the amending process. For example, a State may vote *against* ratifying a projected amendment, then later reverse itself and ratify the amendment. (The Supreme Court established this principle in 1939 in the case of *Coleman* versus *Miller*. This principle is consonant with the doctrine that no one session of a legislature may bind the action of any succeeding session. Moreover, should a legislature want to reverse itself in this manner, it would show that the electorate which chose it had probably reversed its opinion about ratification. It would be difficult to forbid a legislature to respond to a change of opinion among its con-

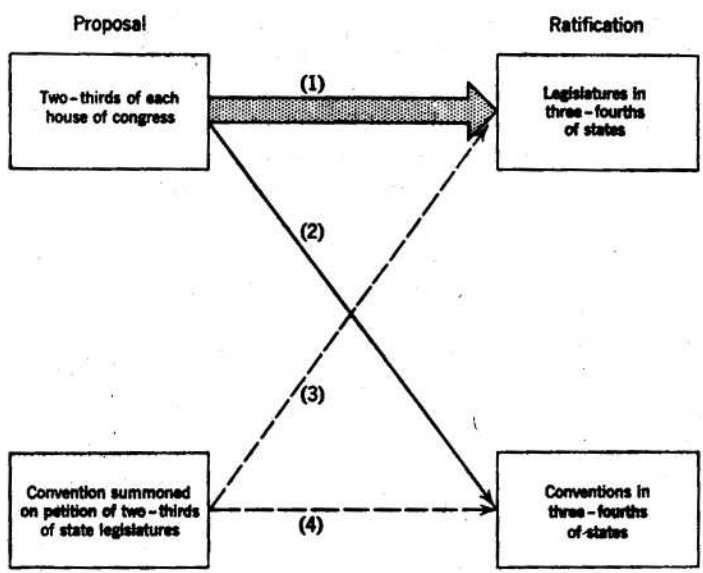

Figure 15. Four Methods of Formal Amendment of the Constitution. The thickness of the arrows signifies the frequency with which a method has been used. Note that two methods have not been used at all, one method only once, and the fourth on twenty-one occasions.

stituents. However, a State may not withdraw its ratification once it has ratified an amendment. This was decided by Secretary of State Seward and Congress in 1868 when Ohio and New Jersey sought to withdraw their ratifications of the Fourteenth Amendment. The complications which would flow from such a power would be enormous. Certainly this power could not be used once an amendment had the approval of enough States to ratify it; but even at an earlier stage, the whole process would be thrown into confusion by the retraction of a positive approval.

It has never been established how long a proposed amendment is active after Congress has submitted it to the States. Conceivably the amendment to regulate child labor, which was proposed by Congress in 1924, is still subject to ratification. To avert problems that might develop over this question, Congress provided a seven-year limit in the text of the Eighteenth, Twentieth, Twenty-first, and Twenty-second Amendments. The probabilities are that the Supreme Court would maintain that any proposed amendment is active unless the Congress has specifically withdrawn the amendment from circulation.

The President has no formal role in the proposing or ratifying of an amendment. In 1798 the validity of the Eleventh Amendment was disputed on the ground that it had not been signed by the President. However, the Supreme Court refused to hear the case (*Hollingsworth et al.* versus *Virginia*); and Associate Justice Samuel Chase commented that the constitutional provision relative to presidential approval of congressional acts did not apply to an amendment since it was not ordinary legislation. Had the Court sustained the position that the President should sign an amendment, it would have cast a shadow over the validity of the Bill of Rights. But if the President has no formal role in the amending process, he is restrained by little more than political considerations from using his influence, especially with Congress, for or against an amendment. The latest example of such presidential action was the adamant position that President Eisenhower adopted against the proposed Bricker amendment, and that he communicated to Congress.

Nature of the Amendments

Considering the amount of change that has taken place in the American government since 1787, it is rather surprising that there have been very few Amendments. It might be held that there have been only twelve, since of the entire twenty-two the first ten, or Bill of Rights, were adopted so quickly after the ratification of the Constitution that they might almost be considered integral with the original Constitution. These twenty-two Amendments have had considerable influence upon the American government. In general, they have had one or more of the following purposes: (1) to limit the power of the federal government; (2) to limit the power of the State governments; (3) to increase the power of the federal government; or (4) to change the structure or machinery of the government.

Limits on National Power: The first eight Amendments set limits such as guarantees of freedom of religion and the press, and the assurance of trial

by jury and the due process of law in federal courts. The Ninth Amendment answered those who argued that a list such as the first eight Amendments would suggest that *only* those rights were to be guaranteed; it declared that other rights may also be possessed by the people. The Tenth Amendment confines the powers of the national government to those enumerated in the Constitution. The Eleventh Amendment takes away from the federal courts all cases begun by a citizen of one State against another State. This additional guarantee of State sovereignty was demanded by those who feared lest the States might be brought before the bar of federal justice in numerous suits over debts they had not paid. The Thirteenth Amendment, which prohibits slavery, implicitly denies the federal government the power to protect slavery in the territories, and removes its indirect power to protect slavery in the States by enacting a fugitive slave law. The Amendment is also a limit on State powers as well, forbidding State governments to uphold slavery. The Twenty-first Amendment, by repealing the Eighteenth, bars the federal government from outlawing the manufacture and sale of alcoholic beverages.

Limits on State Power: The Thirteenth Amendment forbids the States to allow slavery. The Fourteenth Amendment contains several limitations on State power, designed to control legislation in the southern States after the Civil War. It guarantees all persons due process of law, that is, a fair and objective trial, in State courts, and forbids States to take away any person's vote save for participation in rebellion or other crime. Subsequently the due process clause of this Amendment was applied by courts to business corporations as well as to individuals so as to restrict the ability of the States to regulate business practices. The Fifteenth Amendment forbids the States to deny any person the suffrage on the ground of race or previous condition of servitude; this Amendment aimed at enfranchising the southern Negroes. The Nineteenth Amendment makes a similar prohibition with regard to sex; it was intended to guarantee woman suffrage.

Increases in Federal Power: In a sense each of the three Amendments curtailing State power actually increased the power of the federal government, since the federal courts became umpires in cases involving alleged infractions of the Amendments. The Sixteenth Amendment, which empowers the federal government to levy an income tax without regard to the population of the several States, vastly increased the federal taxing powers and tax resources. However, it must be stressed that in itself the Amendment did not add a new formal power to the federal government, because the government always had the power to levy an income tax. What the Amendment did was to change the method of collecting the tax, so that the tax could be easily and practicably levied. In consequence, it allowed the federal government to increase its functions greatly, for it now could afford to pay for more functions. The Eighteenth Amendment, prohibiting the sale and manufacture of alcoholic beverages, authorized the federal government to control the dietary habits of many people.

Changes in the Structure and Machinery of the Government: The Twelfth Amendment greatly altered the means of electing the President and Vice

President. Formerly each member of the Electoral College had cast two votes; the candidate securing the largest number, provided it was a majority, was declared President; the candidate winning the second largest number became Vice President. The Amendment provides that each Elector shall cast one vote for President and one for Vice President. It was adopted after the election of 1800, in which the same number of Electors had chosen both Jefferson and Burr, so that Burr, who had been thought of as Vice President, almost became President. As noted above, the Sixteenth Amendment formally changes the machinery for collecting a federal income tax. The Seventeenth Amendment provided for the popular election of the Senate. Inasmuch as Senators beforehand were elected by State legislatures, this Amendment lessened the power of the States. The Twentieth Amendment advanced the inauguration of the President from March until January after his election. It also advanced the first meeting of Congress from December thirteen months after an election to January immediately after the election, thereby eradicating the "lame duck" session (as was termed the meeting of Congress attended by "lame ducks" who had been voted out of office in November but held their seats until the next March). This Amendment was designed to bring the schedule of the government into step with present transportation speeds. The Twenty-second Amendment bans the election of any person to more than two terms as President. It was proposed and ratified after Franklin D. Roosevelt had been elected to the presidency four times; it made law of the maxim set by Washington and Jefferson that no man should be President for more than two terms. The graph in Figure 16 shows the various functions for which the Amendments were designed, or which they serve; note that some Amendments fill more than one function.

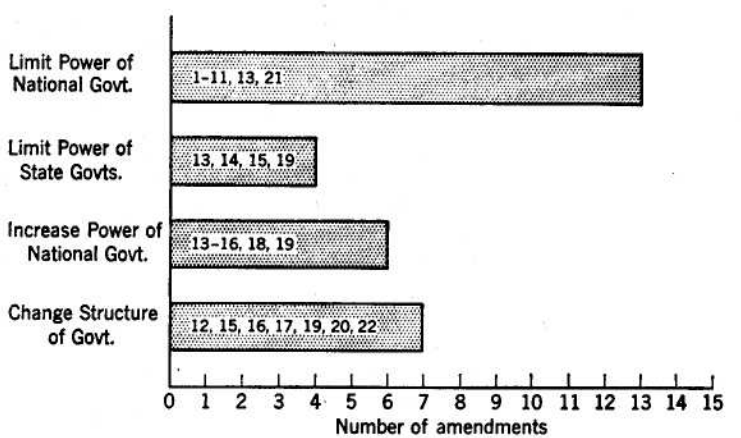

Figure 16. Functions of the Amendments. This bar chart shows how many, and which, of the Amendments to the Constitution have been designed to limit or increase the powers of the state and federal governments. Observe that some of the Amendments perform more than one function, and that the Thirteenth Amendment both limits and increases the power of the National government as well as limits the power of the States.

Some proposed amendments

According to one authority, between 1789 and 1953 there were 4,484 proposals for amendments to the Constitution laid before Congress.[1] It is noteworthy, however, that very few have attained the required two-thirds majority in the House and Senate. Fewer than ten proposed amendments that Congress has supported since 1800 have failed of ratification by the States. This is not difficult to understand; when two-thirds of the Congress approves an idea, the idea is sure to have considerable popular and legislative support across the nation as a whole. At present only one proposed amendment is in the ratification stage: that empowering Congress to legislate concerning child labor, which has been ratified by the legislatures of twenty-eight States. It appears unlikely to secure a favorable vote from the eight more States needed to add it to the Constitution. Actually the federal government today, thanks to Supreme Court decisions, has the power to regulate child labor that is connected with interstate commerce. It exercises this power through provisions of the Fair Labor Standards Act of 1938 and its amendments. Here was an occasion in which the Constitution evolved not through formal amendments but by means of a court decision (see below, page 103). Currently other proposals that have some support are: (1) a definite mention of the principle that treaties which conflict with, or go beyond, the Constitution are not permissible; (2) a guarantee of equal rights to women; (3) the abolition of the Electoral College, or at least some alteration in the method of electing the President; (4) a ban on the payment of a poll tax as a qualification for voting in federal elections; (5) removal of exemption from federal taxation now enjoyed by State and local bonds; (6) authorization for federal marriage and divorce legislation; (7) empowering State governors to appoint Representatives in the event of vacancies; (8) empowering the President to veto items in general appropriation bills; (9) limiting the income tax to no more than twenty-five per cent of personal income; (10) increasing the term of Representatives from two years to four; (11) extending the vote in federal elections to those eighteen years of age and older; and (12) a revision of the process of amending the federal Constitution, making it easier or more difficult, depending upon the position assumed by the supporter of the amendment.

Criticism of the amending process

Some critics have charged that it is too easy to amend the Constitution. By elaborate mathematical calculations they have shown that cooperation among the Representatives and Senators of the thirty-two least heavily populated States might propose an amendment desired by fewer than half the people of the United States. They have also shown how it would be possible for State legislators from thinly settled constituencies to ratify an amendment despite a national popular majority opposing it. Other critics have

[1] Brown, Everett S., *Proposed Amendments to the Constitution of the United States* (Ann Arbor: George Wahr, 1953), p. 1.

asserted that the amending process is too difficult, showing how legislatures in thirteen States could thwart ratification although an enormous popular majority might be supporting it. Both arguments may have force in some future cases, but they have not come into play thus far.

More important to the question of how rigid is the Constitution is the fact that formal amendment is not the sole means of changing it. Tremendous change has been effected by new ideas and practices not described in the Constitution and by divers informal means of amendment. To say this in the language adopted at the start of this chapter, the American Constitution (the basic organization of the government) contains the Constitution itself, with its Amendments; developments in directions foreseen by the Constitution; and a number of alterations in what was expected or planned by the authors of the Constitution.

INFORMAL GROWTH AND AMENDMENT

Legislation

Legislation enacted by Congress and by State legislatures has added emphasis to certain features of the Constitution. For instance, in 1788 the Constitution afforded but a skeleton for the federal government, which must be fleshed by congressional and State legislative enactments. For the federal judiciary the Constitution supplied only the Supreme Court; it empowered Congress to "from time to time ordain and establish" other courts (Art. III, sec. 1). Congress might have delegated all inferior federal jurisdiction to the State courts; instead, beginning with the Judiciary Act of 1789, it laid the basis for a system of federal district courts of first instance. The Constitution says little about the executive Departments; it merely authorizes the President to "require the opinion . . . of the principal officer in each of the executive Departments. . . ." (Art. II, sec. 2, cl. 1.) The First Congress created several Departments and provided for the appointment of their principal officers by the President with the advice and consent of the Senate.

With respect to State legislatures, they were obliged at the outset to determine the qualifications of the electors of the House of Representatives, which were to be "the qualifications requisite for electors of the most numerous branch of the State legislature" (Art. I, sec. 2, cl. 1). State legislatures participated in the election of George Washington, because the Constitution asserts that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors. . . ." (Art. II, sec. 1, cl. 2.) To take another example of the States' participation in molding the Constitution, they developed the election laws under which federal officers are chosen, including the forty-eight elaborate systems for nominating candidates for federal office.

Executive and administrative actions

Legislation is but one step in governing; it must be followed by execution and administration of the laws. By his interpretation and subsequent

application of a law, often drawn from his partisan political convictions, an executive or administrative officer can bring about major revisions in the sense of the Constitution. As chief of an administrative body of more than two million civil servants, the President can and does affect the meaning of the Constitution through the directives he issues to his subordinates. In a lesser fashion, Department heads and other administrative policy-making officials influence constitutional development. For example, the impeachment of President Johnson revolved about the President's interpretation of his constitutional power to remove officers he had appointed, without the permission of the Senate—as required by the Tenure of Office Act. According to Johnson's views, therefore, the Tenure of Office Act was unconstitutional—a belief which the Supreme Court supported some years later when it ruled the law in violation of the Constitution.

Similarly, the President may alter the emphasis of a law through his interpretation of the law and his subsequent procedure in executing and enforcing the law. The implementation of the Sherman Antitrust Act of 1890 offers one illustration of how different Presidents give different operational meaning to an act of Congress. Following passage of the Sherman Act, Presidents Benjamin Harrison, Cleveland, and McKinley rarely invoked it, since they believed that the federal government should not try to regulate business practices. But their successors, Theodore Roosevelt and Taft, together applied the Act more than one hundred times; for they held that the federal government should police interstate commerce.

The President influences constitutional evolution also through the legislative powers vested in him by the Constitution. Presidents from Washington to John Quincy Adams rarely used the veto power; it was their contention that it was designed solely to prevent unconstitutional legislation. President Jackson, on the contrary, employed the veto against laws running counter to his political philosophy. His immediate successors did not follow his example; but Jackson had set the precedent for the huge number of vetoes cast by Cleveland, F. D. Roosevelt, Truman, and the many vetoes of other Presidents. This "positive" veto has helped to increase the President's legislative power.

Judicial decisions

Judicial decisions have effected many significant changes in the Constitution. The Constitution ordains that the federal judicial power "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority. . . ." (Art. III, sec. 2, cl. 1). Hence any law, once executed, is subject to being challenged and brought to court for interpretation in connection with a case at law. Each judgment so rendered will comprise a step in constitutional development.

The courts draw additional force from the power of judicial review of the constitutionality of federal and State laws. This power enables courts to declare whether a federal or State law conflicts with the Constitution; in so doing, of course, the courts must establish first the meaning of the Con-

stitution for this particular matter. Federal judicial review is itself a product of constitutional interpretation, firmly settled by 1803 in the case of Marbury *versus* Madison. That is, in order to begin the career of judicial review, the Supreme Court had first to declare in a case that it had the power of judicial review. By means of such review, the federal Supreme Court has brought about major alterations in the Constitution.

For instance, the Constitution is not clear as to the relationship between manufacturing and commerce. It gives Congress the power to regulate interstate commerce, but says nothing of manufacturing. Until 1937 the federal courts consistently ruled that manufacturing is only incidental to commerce; on that ground they struck down as unconstitutional federal laws governing manufacturing. But in 1937, the Supreme Court held that manufacturing is closely enough related to interstate commerce to permit congressional supervision, and upheld the National Labor Relations (Wagner) Act (*National Labor Relations Board* versus *Jones and Laughlin Steel Corp.*). From this decision Congress drew vast powers over the national economy, working a fundamental change in the Constitution. Through its power of judicial review the Supreme Court may be described as a permanent constitutional convention.

Custom and habit

American society has experienced great changes since the adoption of the Constitution, giving birth to new political forces and altering the alignments among the original forces. International and interstate trade have strengthened the mercantile groups. Manufacturing and finance, which were of comparatively modest stature in 1787, in the twentieth century exercise great power. Moreover, new interests have won substantial influence in certain regions of the country. New England, a mercantile area in 1787, has become a great workshop. The Midwest and Far West, once primarily agricultural, have become—especially in the States of Ohio, Michigan, Illinois, and California—highly urbanized. In the South, industry is acquiring political strength equal to that of farming. Finally, universal suffrage has authorized over half the population to take a direct part in the governing process, whereas at the time the Constitution was ratified no more than one person in ten could participate in government.

Many of these social and economic changes, with the corresponding shifts in political power they have occasioned, have occurred so rapidly, or have created so many complications, that no new formal political institutions have been erected to deal with them. There has been a considerable lag between the emergence of economic and social institutions on the one hand, and governing bodies on the other. Hence the people involved in these new forces and alignments have frequently improvised extraconstitutional political forms to manage them. Continued reliance upon these forms has won public acceptance for them. The mass of the people have gotten the habit of using them, and have incorporated them into the body of public custom.

There are many instances of this mode of constitutional change. The

Some men look at constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched. they ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well: I belonged to it, and labored with it. it deserved well of its country. it was very like the present, but without the experience of the present: and 20. years of experience in government is worth a century of book reading; and this they would say themselves, were they to arise from the dead. I am certainly not an advocate for frequent & untried changes in laws and constitutions. I think moderate imperfections had better be borne with: because, when once known, we accommodate our affairs to them, and find practical means of correcting their ill effects. but I know also that laws and institutions must go hand in hand with the progress of the human mind. as that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners & opinions change with the change of circumstances, institutions must advance also, & keep pace...

I tolerate with the utmost latitude the right of others to differ from me in opinion without imputing to them criminality. I know too well the weakness & uncertainty of human reason to wonder at it's different results. both of our political parties, at least the honest part of them, agree conscientiously in the same object.

Another most condemnable practice of the supreme court to be corrected is that of cooking up a decision in Chambers, & delivering it by one of their members as the opinion of the court, without the possibility of our knowing how many, who, and for what reasons each member concurred. this compleatly defeats the possibility of impeachment by smothering evidence. a regard for character in each being now the only hold we can have of them, we should hold fast to it. they would, were they to give their opinions seriatim and publicly, - make a vow to justify themselves to the world by explaining the reasons which led to their opinion.

Const. Washington will be the example of voluntary withdrawal after 8 years. I shall follow it: and a few more precedents will oppose the obstacle of habit to any one after a while who shall endeavor to extend it, perhaps may beget a disposition to establish it by an amendment of the constitution.

Constitution provides that a member of the House must be a resident of the State from which he is elected (Art. I, sec. 2, cl. 2); custom and habit have dictated that, with rare exceptions, he must also be a resident of the district he represents. The Constitution authorizes the choice of a Speaker by the House (Art. I, sec. 2, cl. 5); custom has made him a member of the majority party, and consequently a figure of great strength (as distinct from the Speaker of the British House of Commons, who is nonpartisan and relatively unimportant). The Constitution established an indirect means for electing the President (Art. II, sec. 1, cl. 3); habit instructs the members of the Electoral College to act as directed by the plurality vote in their State. Among extraconstitutional bodies, political parties and pressure groups have become indispensable to the functioning of the federal government; yet the Constitution does not mention them. The British Constitution is often held to be the creature of custom; the American Constitution, like any other constitution that is mature, is hardly less the result of custom.

Public opinion

Ultimately every constitution must settle with public opinion. The group originally drafting the constitution must attune it to important public wants; at the same time the group must endeavor to mold opinion favorably toward the constitution. Figure 17 presents several excerpts from the letters of Thomas Jefferson; through hundreds of such letters, Jefferson established his leading role in the definition of the spirit of the Constitution and of American government. A constitution that does not mesh with the opinions of strong sections of public opinion cannot succeed. The modern world, which has placed great faith in written constitutions, has seen the failure of large numbers of them, notably in eastern and southern Europe and in Latin America; for these constitutions were not consonant with the opinions of the publics that they were designed to organize and rule. In the same way, constitutional change and interpretations must be supported by public opinion.

The way in which the federal government initiated first the adoption, then the rejection, of the prohibition of the manufacture and sale of alcoholic beverages affords an unusual illustration of the effect of public opinion upon the Constitution. During the so-called prohibition era, millions of people violated the law consciously and often. The transformation in public opinion compelled Congress to propose an amndment repealing the Prohibition Amendment; and this, the Twenty-first Amendment, was ratified in record time. A constitutional change, whatever its form, is usually first manifest in public opinion.

Figure 17. Some Important American Doctrines of Politics and the Constitution, as Stated by Jefferson. These facsimiles, excerpted from four of his handwritten letters, show the type of sharp and vibrant argument that influenced his own and all succeeding American generations.

QUESTIONS AND PROBLEMS

1. Can any threats to the continuation or peaceful change of the Constitution, similar to that posed by the Civil War, be foreseen at this time? What might they be?

2. Are you satisfied that the Constitution provides adequate means for formal amendment? Explain why or why not. If not, can you suggest a supplemental or amended method that would better suit your preference?

3. Which Amendment of the twenty-two do you regard as most important in its consequences? Explain your answer. Do you think it is logically or ethically necessary that other persons agree with your choice? Explain why so or why not.

4. Which of the twelve current proposals to amend the Constitution that are mentioned seems to you to be the most important and desirable? Why?

5. Which of the informal "amendments" to the Constitution do you regard as having been the most important in its consequences? Why do you select that particular transformation?

6. Of the Congress, the Supreme Court, and the presidency, which in your opinion is most likely to bring the greatest change to the Constitution in the next twenty-five years? Explain your answer.

7. Is it more important, in your opinion, that a constitution be acceptable to the leaders, or to the public, or to some combination of elements, in order to be enduring and applicable? Explain your answer.