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The Passing of the Constitution of 1877

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A distinguished alumnus of this venerable institution in a great address on the Federal Constitution once said: "Constitutions are not made—they grow." The truth of the epigram is apparent when we consider the unwritten British Constitution. But we have been accustomed to think of the written Constitution of the United States as the work solely of the Convention which assembled in the City of Philadelphia in the summer of 1789 with George Washington in the chair. This is a very superficial view. If we examine that great document we will see that the government which it set up was essentially English. The division of the powers of government into executive, legislative and judicial, the bicameral legislature, and those fundamental principles of individual liberty, those great guarantees of protection of the citizen from oppression at the hands of the government, were all worked out and firmly established,

> *"In that land of old and fair renown*
> *Where freedom broadens slowly down*
> *From precedent to precedent."*

Indeed the American Constitution is but the outgrowth of the English—another step in popular government and in political and religious liberty. The Constitution of the United States would be well nigh meaningless except as read in the light of the struggles beginning in the dawn of English history and continuing through the centuries both on British and American soil, which culminated in the final setting up of thirteen little sovereignties hugging the Atlantic seaboard in the western world.

Moreover, let us not make the mistake of supposing that the constitution ceased to grow when it was signed by the members of the convention and ratified by the states. True, there has not been much change in its outward appearance despite the nineteen amendments which have been adopted and added to it. But any thinking man will instantly recognize that the Constitution of 1930 is vastly different from the Constitution of 1789—as different as is the American nation of Herbert

Hoover from the union of states of George Washington. Fortunately the wise and far seeing statesmen who composed the Convention recognized that the constitution was to serve, not for a day nor for a century, but as long as America should live. So they dealt only with fundamental principles. They sketched simply the broad outlines of the government, in order that the constitution could grow to meet the needs of the nation, develop with the life of the people without wrenching or straining, or rending it apart. And it has continued to grow, slowly, gradually, most of the time almost imperceptibly, adapting an eighteenth century charter to the needs of a twentieth century state.

The constitution has grown by formal amendment adopted in the manner prescribed by the instrument itself. Written one hundred and forty years ago, it has been amended in all that long period only nine times, not counting of course the first ten amendments proposed by the first Congress and adopted practically at the same time as the original instrument. Most of these nine amendments made but small changes in the constitution affecting only some detail. Of much more importance has been its growth through judicial construction, especially in those great opinions of Marshall "which found the constitution a skeleton and clothed it with life and beauty." The constitution has grown also through custom and usage as the common law has grown. After all, the constitution, the fundamental law of a state, is not comprehended in the written instrument which we in America call its constitution. Magna Charta, the Bill of Rights, the Act of Settlement, are part of the British Constitution but not all of it. So in a large and true sense we may say the Constitution of 1789 and the nineteen amendments contain, or are, a part of the fundamental law of the United States but not all of it; for the constituiton is continually growing not only by amendment, but as surely "from precedent to precedent" after the manner of the British Constitution and the English common law. And it is necessary that it should continue to grow if it is to serve the needs of a growing and developing people.

The framers of the Georgia Constitution of 1877, great men though they were, seem to have overlooked the fact that a constitution is a living organism, a vital breathing thing, instinct with life, which must grow or shrivel and die and be cast aside an "outgrown shell by life's unresting sea." They did not intend that the Constitution which they framed should grow. The material which they used in its construction was

adamant, fixed, unyielding, immovable, with no element of elasticity. The constitution which they wrote and the government which they set up was that of a purely agricultural, desperately poor, nineteenth century state and they seem not to have contemplated any change of condition, any growth or development of that state.

To understand and appreciate the purpose and the motive which actuated the Convention of 1877 we must take into account the people of Georgia and the experience through which they had passed. A majority of them were of that hardy, independent, individualistic race who, facing persecution in Scotland, had crossed the Irish Channel and settled in the north of of Ireland; and when again the victims of renewed persecution, had come in a steady stream from Ulster to America, reaching these shores just in time to form the best and bravest units of Washington's army. When the war was over and America was free these Scotch Irishmen poured into Upper Georgia, the southern frontier, eagerly taking up each new Indian cession as soon as Poor Lo could be induced to leave it.

In 1798 a constitution had been adopted which, with certain amendments, had served the needs of the rapidly growing commonwealth until 1861. During this period the youngest and weakest of the thirteen original states won and worthily wore the proud appellation of "The Empire State of the South." Her voice was potent in the nation. Then came the long, destructive, disastrous war. Much of the flower of Georgia's young manhood was cut down. Her economic system and most of her wealth were destroyed. A large part of the state was laid waste with fire and sword. And then reconstruction—the state governmtnt overthrown, a military satrap exercising supreme authority; a new and alien government set up composed of carpet baggers, scalawags and ignorant ex-slaves; the public treasury looted; private property confiscated by ruinous taxation; the credit of the state and many of the counties and cities destroyed by the endorsement of the bonds of railroads existing only on paper; the public revenues wrung from the oppressed and voiceless people squandered; at last the alien governor fled the state to escape prosecution while some of his associates were not so fortunate, and the people resumed control of their government. In less than a decade the state had adopted three constitutions. Under them this Iliad of woes had taken place. Of these things the members of the Convention of 1877 had been in part active participants and in part distressed witnesses and agonized sufferers. Georgia

had been freed from the curse of re-construction sooner than most of her sister states of the South. When the Convention of 1877 met, South Carolina and Louisiana were still under radical rule, their corrupt and vicious governments supported by Federal bayonets and negro militia. Most of the others had been but recently redeemed.

Such were the conditions and such the people who assembled in convention to ordain and establish a new constitution for the recently emancipated state of Georgia. It is not surprising that they should have mistrusted all government, that their efforts should have been directed toward so restricting and limiting the powers of executive and legislature as to prevent effecutally any recurrence of conditions lately existing. To insure against any abuse of power no power was conferred. It is doubtful if any state government has ever been so restricted, so hedged about with limitations, given so little liberty of action. General Toombs, the dominating figure of the Convention, boasted that they had "locked the door of the treasury and thrown away the key."

In England the great historic conflict had been between king and parliament over the power to tax. The same conflict in slightly different form had led to the Declaration of Independence by the American colonies. "Taxation without representation is tyranny," they said. The people of Georgia went further. They were unwilling to trust even their representatives, chosen by themselves every two years, with this great power of taxation except in the most limited way. They ordained that the power of taxation should be exercised for the following purposes only:

> "For the support of the State Government and the public institutions.
>
> For educational purposes, in instructing children in the elementary branches of an English education only.
>
> To pay the interest on the public debt.
>
> To pay the principal of the public debt.
>
> To suppress insurrection, to repel invasion, and defend the state in time of war.
>
> To supply the soldiers who lost a limb or limbs, in the military service of the Confederate States, with substantial artificial limbs during life."

No high schools, no colleges or technical schools, no highways, no public improvements, no public health or public welfare work, no pensions could be provided for or paid. Nothing better illustrates the limited power of the General Assembly than these

restrictions on the essential power of taxation. Not only were the purposes for which taxes could be levied confined to a narrow sphere but also the method of exercising the power was hedged about and closely guarded. All taxation was required to be uniform on the same class of subjects and ad valorem on all property subject to be taxed and no property, save a few unimportant excepted classes, could be exempted from taxation. The legislature was given no choice, no latitude, no freedom of action.

The number of senators and the counties composing the senatorial districts, the number of representatives, the per diem and mileage of the members, the expenses of the officers, the exact number of days it should continue in session, with minute regulations as to the enactment of laws amounting almost to rules of order, were all definitely described in the constitution.

A similar distrust of the executive is also plainlly apparent. Instead of vesting the executive power in the Governor and giving him authority to appoint the other officers, holding him responsible for their actions, such power as is conferred is divided among the Governor, the Secretary of State, the Comptroller General and the Treasurer, who with the Attorney-General are elected at the same time and for the same terms as the Governor. The salaries of all these officers and the expenses of their offices were definitely fixed in the constitution until changed by a recent amendment. The Governor is given no control over these officers or the departments over which they preside.

While the constitution in high sounding phrase proclaims that "the executive power is vested in the Governor" and requires that "he shall take care that the laws are faithfully executed," the only power committed to him is to grant reprieves and pardons and commute penalties; to issue writs of election for the filling of vacancies in the legislature; to give the General Assembly information and recommend to their consideration such measures as he deems expedient; to convoke the General Assembly in extra-ordinary session; to fill vacancies by appointment until successors can be elected; to approve or disapprove all bills passed which in the event of his disapproval may be re-enacted by a two-thirds vote; and to appoint his own secretaries not exceeding two in number—truly an imposing array of great powers to be vested in the chosen head of the state elected for only two years and made ineligible to reelection after the second term.

Instead of providing that there should be a Supreme Court

and such inferior courts as the General Assembly should from time to time establish, a complete judicial system with all details set forth was provided, with the salaries of the judges fixed.

There are seven paragraphs of the constitution relating to venue of actions, two governing procedure in cases of divorce, and nine relating to homesteads. Indeed the whole instrument is little more than a collection of statutory regulations rather than constitutional provisions, designed to hold in check and limit the exercise of the powers of government.

But "constitutions are not made—they grow." And so it has come to pass that in spite of restrictions and limitations the Constitution of Georgia has continued to grow, more slowly, far less symmetrically, but steadily, surely. The direction of its growth has been influenced by the inelastic provisions of the instrument. Many of these provisions prevented growth altogether in certain particulars and therefore had to be removed by direct and specific amendment. So, in the fifty-three years since the adoption of the constitution the General Assembly has proposed no less than one hundred and twenty-three amendments to it, of which one hundred and one have been adopted by the people, five have been rejected, four were not submitted as later proposals covering the same subject made them unnecessary, and thirteen are to be voted on at the general election in November.

Nothing could be more indicative of the inelasticity of the constitution and its lack of adaptability to present conditions than these ever increasing amendments. But instead of removing detailed regulations and arbitrary limitations and rendering the instrument more elastic, these amendments, with few exceptions, have provided additional minute statutory requirements and still further fettered the constitution and the government, calling repeatedly for amendments to amendments. Many of these amendments have inserted in the constitution purely local laws applicable to a single county or city, some of them to become effective if and when ratified by the people of the county or municipality at an election the machinery for which is elaborately provided in the amendment. The effect of this is to have a state-wide referendum on the amendment of the constitution so as to authorize a county or municipal referendum on a purely local question. A single paragraph of the article on the judiciaryy has been amended nine times so as to increase the salaries of the judges which, like the salaries of almost all officers of the state, the Convention had

undertaken to fix at all times at figures which would not be a living wage under present conditions. Most of these amendments were necessary to authorize the authorities of a particular county to supplement the salary, paid by the state, of the judge of the circuit in which the county was attached. Richmond County, by one amendment having been authorized to supplement the salary of the judge of the Augusta Circuit up to seven thousand dollars, is now asking for an additional amendment so as to make the salary ten thousand dollars and the whole state will vote on the question at the next election.

Were the fundamental law of a great state not being destroyed it would seem ridiculous for the General Assembly to propose and the sovereign people to ratify an amendment to the constitution permitting Milltown, under its more aristocratic name of Lakeland, to own and operate a railroad so as to connect the town with a mainline railway, or authorizing Stephens County to issue (if the people so vote) $60,000.00 of bonds to build a hospital, or Washington County to make temporary loans, or Fulton County to pension its employees, or Valdosta to issue bonds to build a college as a memorial to Woodrow Wilson (which though given the authority it did not do), or Crisp County to build a dam on the Flint River, or Chatham a road to Tybee, or Brunswick a municipal dock. These are only a few of the many purely local provisions incorporated in the fundamental law or now proposed to be, each with a wealth of detail which one might reasonably expect in a local statute but which is glaringly out of place in a constitution.

These amendments are sometimes contradictory, sometimes so confusing and ambiguous as to be almost meaningless. As Mr. Justice Hines recently said: "Such amendments have converted the constitution into a legal conundrum that no court can solve." "The constitution," said the distinguished and veteran member of the Supreme Court, "has been so mutilated by amendments that its purposes have been largely nullified." The learned justice has not overstated the case. Dr. Sam W. Small, the only surviving participant in the Convention of 1877, which he stenographically reported, has summed up the case against the constitution in a single sentence. "Most of its provisions," he says, "are obsolete, effete, wholly out of date, and the one hundred and one patches that have been sewed on to it in the past forty years are principallly the piece-quilting of constitutional amateurs and bunglers." Indeed it would not be very wide of the mark to assert that Georgia no longer

has a constitution. The restrictions and limitations worked out with such painstaking care by the framers and believed to be so efficacious, are now considered only as provisions for a referendum. The truth is, we amend the constitution with less thought, consideration or effort than it takes to pass ordinary legislation in states which have adopted the popular referendum as a part of their constitutional systems. When these amendments are of local application they pass the legislature as a matter of course and with no consideration whatever, by courtesy to the representative or senator from the county or district to be affected, being treated precisely as other local bills. They are ratified in the same perfunctory manner. The whole process is both a tragedy and a farce.

The constitution as an instrument of government is no longer seriously considered. The simple governmental structure which it set up, designed to perform only essential governmental functions, has been expanded until it now consists of twenty-nine departments, nine commissions, and twenty-one boards. There is no real difference between the departments provided for in the constitution and those created by statute. The latter are every whit as important, as powerful, as highly regarded as the former, some of them more so, commanding larger salaries, having more patronage, and performing more important functions. The sole difference is that the constitutional offices can be abolished only by referendum, while the others may be abolished by an act of the legislature which does not require submission to the people. Since only five out of the one hundred and six proposed amendments which have been submitted have been rejected, the difference is really unimportant.

Not only has the machinery of the government so outgrown the narrow limits of the constitution as to be unrecognizable, but the spirit and purpose of the constitution have also been completely transformed. A constitution and a government predicated on Jefferson's theory that "the least governed are the best governed" have become predominantlly social and paternal. Under the constitution neither the state nor the counties could tax for educational purposes save for "instructing children in the elementary branches of an English education only." Now the bridle is off. Half of our state taxes are appropriated to schools and well nigh every county (and there are enough of them to satisfy the most fastidious) boasts an accredited high school supported by taxation. From aid to Confederate soldiers confined to furnishing them artificial limbs, we have progressed until every soldier who served in the Confederate army or the

militia of any Confederate state, no matter how brief that service may have been, and the widow of any such soldier, though she may have married as late as 1880 are entitled to pensions and the state maintains a home for such Confederate soldiers as care to live in it. Under the constitution no provision was made for highways, but since the Highway Board was created it has spent more than $79,000,000 in building the state system and is now spending each year more than five times as much as the total revenues of the state in 1900. The regulation of, and supervision over, public utilities, banks and securities; public health, quarantine and public welfare; conservation of forests, of game and fish, of mineral resources; most of the extensive activities of the Department of Agriculture; the Department of Commerce and Labor; the eleemosynary and corrective institutions; the numerous branches of the University system—all these and many more have come into being since the constitution. The key which General Toombs threw away has been found and the treasury unlocked. Alas! it is now empty.

We are tending more and more toward a pure democracy and away from the representative government of the fathers. Under the constitution there were only four state officers, besides the governor, who were elected by the people. Now their "name is legion for they are many." The justices of the Supreme Court and the judges of the Superior Courts under the constitution were to be chosen by the legislature; but since the amendment of 1906 they, as well as the judges of the Court of Appeals, created since the constitution two amendments being required for the purpose, must trail the judicial ermine through the muck and mire of politics and submit their claims for preferment to the people whose causes they are to decide. The election of the solicitor-generals has passed also from the General Assembly to the people. Even the schools are in politics. The Commissioner of Education who, under the constitution, was to be appointed by the governor, is now elected by popular vote, as are the county superintendents. This is true also of the Commissioner of Agriculture and of the members of the Railroad Commission, now called the Public Service Commission.

The same tendency is manifested in the ever increasing referendums not only in amending the constitution already alluded to, but in much of the great mass of local legislation produced at each session of the General Assembly and not a few general laws as well.

There is also a tendency to decrease the size of the voting

units and to regard those elected to the legislature not as representatives but as mere mouth-pieces of the small groups who elect them. The constitution declared: "No new counties shall be created." There were then one hundred and thrity-seven. By amendment the number was fixed at one hundred and forty-five, eight additional counties being created. Since that amendment others have been added from time to time until we have reached the amazing total of one hundred and sixty-one, more than any state save Texas, and three times as many as the average whether measured by territory or population. The amendments by which these later counties have been created are the most remarkable pieces of constitutional legislation to be found in America. The precise metes and bounds of the new county with detailed provisions for a temporary organization have become a part of the organic law of the state. Thirty-three pages of the constitution is devoted to the description of these new counties though the boundaries may be changed by the legislature without amending the constitution.

The two hundred and seven representatives of these one hundred and sixty-one counties are not regarded as representatives of the whole state but as mere delegates to register the will of the small constituencies which they represent. The Governor, the representative of the whole people of the state, has been stripped of most of the limited powers originally accorded him and reduced to a figure-head. And Georgia is little more than a confederation composed of one hundred and sixty-one separate principalities, each sending delegates to a General Assembly to represent only itself and secure legislation in its own interest.

The selfish ambition of every fair sized town to be a county site and derive the local benefits resulting therefrom has brought about this senseless multiplication of counties with little regard for public convenience and advantage and wholly unmindful of the enormous increase in expense. This local ambition is also responsible for the cutting up of judicial circuits until some are so small and the public business so limited that the judge, without neglecting his judicial duties, can easily devote two-thirds of his time to cultivating his constituents so as to insure his reelection or his elevation to Congress if his ambition is for the forum instead of for the bench.

The "near sightedness of statesmen concerned only with local progress," borrowing the expressive phrase of Pope Brock, is responsible for the establishment of branches of the State University until Georgia now boasts of twenty-two institutions

of so-called higher learning supported by the state, all clamoring, each for itself, for as large a share as possible of the meager and inadequate fund which the legislature divides among them. And thus Georgia has become the laughing stock of the educational world.

Truly it is a far cry from the Constitution of 1877 to that of 1930, using the term in the broad sense of the system of fundamental laws or principles for the government of the state. The written instrument as it came from the hands of the Convention no longer contains those principles upon which the state is controlled. It is a lifeless thing whose mutilated remains lie in the path of progress. It is only useful to defeat the will of the people and to set at naught laws enacted for their benefit. Almost every act of the General Assembly is attacked as violating some of its restrictive provisions. More than thirty different suits calling in question tax acts adopted by the legislature at its 1929 session have been filed and doubtless the end is not yet. Judge Hines, in the masterly address already quoted said: "Scarcely a single case comes before the Georgia Supreme Court without some question being raised as to constitutionality. In fact, it is made to appear that any law that stands in the way of anything that anybody wants is unconstitutional."

Our constitutional and governmental situation is growing steadily from bad to worse. The last legislature proposed thirteen amendments to the constitution, twelve of them being purely local measures in which only one or at most two counties or cities have any interest. Most of them have referendum clauses and though they will doubtless be ratified and become parts of the constitution they may never become effective. The sole general amendment proposed limits the power of the General Assembly to levy income taxes and reduces the rate of the state ad valorum tax, thus further restricting the power of the legislature.

Georgia is cursed with an antiquated, unjust and inadequate tax system. This is now generally recognized. The legislature seems willing to change it, but it is met with a constitutional restriction at every turn. We can never get a proper and just system until these limitations are removed.

The state government should be reorganized, simplified and coordinated. As now organized it is inefficient, wasteful, unwieldly. But there can be no adequate, no real reorganization under the present constitution.

The number of legislators must be materially reduced or the

General Assembly will continue to be little more than an unorganized mob instead of a deliberative body. The legislature must have more power and more responsibility if we are to command the services of men of first rate ability. The first step, the indispensable necessity in legislative reorganization is a new constitution.

Is the time ripe for calling a convention to prepare a new constitution? I doubt it. Georgians as a rule do not understand the present situation, and therefore do not appreciate the need of a new constitution. They have not learned to think in terms of the state. They are still following the fetish of local self government and pure democracy. They are still suspicious and unwilling to trust either executive or legislature and are bent on keeping the judiciary under the direct control of the people. There must be a radical change in the thinking of the people before it would be safe to call a constitutional convention.

The immediate task before us is one of education. The people must be taught. They must be aroused. They must face the facts. No longer must they be soothed with the alluring slogan, "It's great to be a Georgian."

In this task of educating the people this great old institution which has played so important a role in the life of the State should have a large share. Time was when at the annual commencements of the University the leaders of thought would gather in these classic halls, confer together and formulate plans for the advancement of the State. In those brave old days Athens was the political as well as the intellectual center of the commonwealth. Let us make it so again. Now as never before since the days of reconstruction Georgia needs guidance, direction, light on the path, leadership. Where can she turn for help if not to her own University?