

# THE CONSTITUTION AND PUBLIC OPINION

BY

FREDERIC C. HOWE

COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK

REPRINTED FROM  
PUBLICATIONS OF THE  
ACADEMY OF POLITICAL SCIENCE

VOL. V, No. 1

NEW YORK  
PUBLISHED BY THE  
ACADEMY OF POLITICAL SCIENCE

1914

## THE CONSTITUTION AND PUBLIC OPINION<sup>1</sup>

FREDERIC C. HOWE

Commissioner of Immigration at the Port of New York

**P**OLITICAL institutions in America have been designed on the principle of distrust. *Fear* of the people, *fear* of the legislature, *fear* of the executive, has inspired constitution makers and law makers from the very beginning. *Fear* has shaped our political machinery in city, state and nation. We are indebted to Alexander Hamilton for this political philosophy, just as Germany is indebted to Bismarck for a similar imprint upon the political institutions of that country. Hamilton sought to make perpetual the eighteenth-century ideas of government of Great Britain, and up to very recent years his influence has not even been challenged.

This distrust of the people on the one hand and of officials on the other led to the creation of innumerable checks on freedom and obstacles to action. Instead of simplicity, there is confusion. In place of directness there is indirectness. For responsibility there is irresponsibility. From the beginning of the germination of a political idea on the part of the voter to its final enactment into law there is obstacle after obstacle to be overcome, each of which checks initiative and sacrifices efficiency.

Strangely enough, we have adopted a diametrically different course as to business, as to industry, as to all commercial activity. No country in the world has permitted as free incorporation laws as have we. No country has sanctioned ease of organization, directness of action and concentration of power in private affairs as has America, and in consequence American industry, trade and commerce have developed with phenomenal rapidity. The private corporation suffered under none of

<sup>1</sup> Address at the dinner meeting of the Academy of Political Science, November 19, 1914.

the limitations imposed upon the public corporation; it enjoyed freedom and the greatest flexibility.

*Obstacles to Efficiency*

Among the more important burdens which this philosophy of distrust has imposed upon our political institutions are the following:

1. Extreme rigidity in our federal and state constitutions. Amendment is made as difficult as possible; in some states it is practically impossible. The assumption of constitution makers seems to have been that eternal wisdom was possessed by the generation entrusted with the making of the constitution, and that the results of their labors should be crystallized into permanent, unchanging form.

2. A second check, born of distrust, was the indirect election of the President by the electoral college, and of the United States Senate by the state legislatures, provisions which have since been abandoned or changed.

3. Other checks are provided in the veto of one legislative branch upon the other, as well as in the power of the executive to overrule the acts of the legislative department.

4. Still further obstacles are provided in the power of the courts to review and veto legislation, as well as in the lodgment of final authority in the written constitution, whose interpretation is entrusted to the judicial branch of the government.

5. Confusion is further confounded by the different lengths of terms of officials and the different methods of selection of the different departments, the courts being appointed for life or elected for long terms, while the Executive, the Senate and the House of Representatives are chosen for different periods. Each of these branches of the government represents a different electorate; each represents a different method of selection and a different time of contact with the people. At no time can the settled conviction of the public impress itself upon the whole government, as is possible under the British parliamentary system, or as is possible in most of our cities.

*Checks and Obstacles in State and City*

This negative philosophy of distrust found further expression in the constitutions of the states, in their laws as well as in the municipal codes provided for the cities. Almost all of the state constitutions provide for biennial sessions of the legislature, on the assumption that state legislatures are a nuisance and should meet as rarely as possible and for a very short time. In many states the length of the legislative session is limited to forty or sixty days. In others it is limited to ninety days. Sessions of this length virtually preclude any serious legislation being enacted; for, as anyone familiar with legislative bodies knows, it is practically impossible for such a body to organize, select its officials, provide its machinery and acquaint itself with the procedure, much less pass legislation through the routine of readings, committees, hearings and action, in such a short period of time. Certainly a legislative session of from forty to sixty days is little more than a farce. By such limitations as these we have invited legislative control by outside interests, or, where these do not prevail, by the undue activity of the executive branch of the government.

Methods of nomination and election reflect the same spirit of distrust. The caucus and convention were designed to remove the nominating power from the direct control of the people. These still further confused action and paralyzed initiative. Distrust added from one to half a dozen intermediaries between the voter and his representative. The long blanket ballot was an additional burden. This idea of distrust was carried into local government. It led to the denial of home rule to the cities; it involved complete dependence of the municipality on the state, with the log-rolling, trading and ripper legislation under which almost all of our cities have suffered. Up to very recent times, cities enjoyed far less power than private corporations; in the rarest of instances were they equipped with power to perform their routine activities in an efficient and economical way. The same distrust expressed itself in limitations on the city's financial operations. The tax rate was limited, as is the amount of indebtedness that can be incurred. In some instances the limitations on the cities are so serious that they cannot per-

form their necessary routine functions in an adequate way. None of our cities are in a position to plan their development, none of them are able to control the license of property. Few of them are able to own the public service corporations, which lie at the very center of the city's life.

Nor can the city adjust its system of taxation to local needs or desires. In this, the most important side of the city's life, it has none of the flexibility of a private corporation. In small things as in large, the city has little latitude to experiment, to plan for an adequate municipal life. All cities are cast in much the same mould.

#### *Organization for Political Inaction*

As a result of the limitation referred to in the federal and state constitutions, inaction has to win but one skirmish, while action has to win a series; reaction need control but one agency of the government, while progress has to control them all. Before public opinion becomes the final law of the land it has to struggle to the point of exhaustion to bring about the change desired, while democracy has frequently to survive many elections to achieve its end. A single reaction in popular opinion may block progress for a generation, through the loss of either the legislative or the executive or the judicial department; reaction may prevent fundamental change for a century by the action of the framers of the constitution.

We have reversed all of the principles of life in the political machinery of the nation, the states and the cities. We have organized our politics in fear of the bad man, and by so doing have left little opportunity for the capable one. There is little to awaken the ambition of the man of talent, little to lure him from private life, where freedom invites initiative and power. We have crippled the power of ambitious officials in our efforts to protect the community from the incompetent one.

Not only has this spirit of distrust paralyzed the officials; it has palsied the public as well. The political psychology of America is what it is by reason of these conditions, which of themselves breed discouragement and inaction. In every walk of life men are moved to action by the hope of results. When

success is subject to innumerable obstacles, when the end desired is distant and highly problematical, when the fruits of effort are subject to veto by irresponsible judicial officials or interpretation placed upon the constitution, then initiative and effort are discouraged. It cannot be otherwise. And from the earliest step in the promotion of a political idea to its ultimate and final achievement, hurdles after hurdles are erected in the path, which tend to the impairment of effort and the destruction of courage. When one contemplates all of the legal limitations to organized political action in America, the wonder is not that political interest is so lax but that political interest is as keen as it is. And in view of the institutional obstacles and legal limitations referred to, it is unjust to assume, as most observers of American politics do, that our failures are traceable to the political incapacity of the American people; they are rather traceable to the machinery with which we have to work.

*America Alone in Its Political Philosophy*

It is true there has been but little organized protest against this political philosophy. Critics of American conditions have placed the blame on the American people. Despite this fact we have the negative criticism of other peoples which have adopted written constitutions; for while America was the first nation to adopt a constitution and the first people definitely to sanction the philosophy which underlies it, still no other nation in any section of the globe has followed the model which we offered to the world. No country has assumed that its constitution was sacrosanct; none have entrusted the courts with such absolute power over the acts of the other branches of the government. None have approved of the idea that officials should be subject to every possible obstacle in carrying out their acts. Only in America is it assumed that indirection is to be preferred to directness and that confusion is more desirable than simplicity. The constitutions of two other great nations have avowedly declared that ultimate power should be lodged in a powerful economic class, to wit, Germany and Great Britain. In Germany the imperial constitution practically reposes final authority in the feudal military caste of Prussia, while up to 1909 Great

Britain lodged the right of perpetual veto in an hereditary upper chamber, composed almost exclusively of great land owners. In both countries the constitution was practically almost unchangeable, except by revolution or the consent of the classes entrusted with power. In America indirection and confusion resulted in the ascendancy of a similar privileged economic class, which ruled almost uninterruptedly in the nation, state and city for nearly half a century.

And it should be frankly acknowledged that the avowed motive of Hamilton and his associates was to lodge power in the privileged classes. Hamilton distrusted democracy, he distrusted representative government, and he carried his convictions as far as it was possible in the federal constitution. And it was the provisions incorporated into the federal constitution and copied into the constitutions of the states that made it possible for privileged interests to acquire an ascendancy in the government and retain that ascendancy almost unchallenged for the greater part of a century. These conditions made it easily possible for the slave-owning, aristocratic South to control at least one branch of the government for a generation prior to the Civil War. It made it possible for the privileged interests of the North to control the government, in whole or in part, up to the end of the nineteenth century. For confusion, indirection and divided responsibility, with a fixed written constitution, to be interpreted only by the courts, make it difficult for democracy to achieve its will; they make it easy for the boss and privileged interests to control at least one of the branches of the government.

#### *Proposed Axioms of Politics*

Is it possible to formulate principles in the framing of a constitution, in the planning of the political machinery of a people? Is it possible to lay down axioms of politics, like those which Adam Smith enunciated for taxation? And if such axioms may be formulated, are those upon which we have been operating for a century the correct ones? Should public opinion be compelled to square itself with the opinions and phrases of generations long since dead; should the opinion of to-day be

called upon to convince in turn varying groups of elective officials and appointive ones as well? Should every presumption be against change and in favor of the *status quo*? Should the common business of all of us be conducted on the principle of inaction, and the private business of each of us be granted a liberty of action close to license? For the principle underlying American industrial life is freedom,—the greatest possible freedom to organize, to act, to play, not only with property but with the destinies of the community as well.

I believe there are axioms of politics as fundamental as those of taxation, as fundamental as those of private business. Among those axioms I should include the following :

1. Politics should be simple and easily understood by all. Issues should be free from confusion. There should be a direct line of vision between the voter and the end desired and a means for the immediate execution of the common will, once it is declared at the polls.

2. The relation of the voter to the government should be as direct as possible. There should be the fewest possible intermediaries, such as electoral colleges, delegates, conventions, and caucuses between the citizen and his servant.

3. Government should be responsive on the one hand and responsible on the other,—not to the past, not to political parties, not to interests, but to people.

4. The machinery of legislation and administration should be equally simple, direct and final in its action. Once the public will express itself, it should be registered into law.

*Principles to be Considered in Framing New York Constitution*

Reducing these political axioms to the subject in hand, that is, the constitution and public opinion, I should suggest :

First, the constitution should be as short as possible, following the model of the federal constitution, which is little more than an enumeration of the powers of the various branches of the government, to which was added the bill of rights. State constitutions departed from this model. They have been enlarged to indefensible lengths, and by reason of their enlargement and the inclusion of many legislative provisions, the under-

lying idea of a constitution as a framework of government has been lost sight of.

*Constitution an Evolving Instrument*

Second, the constitution should be an evolving instrument, not an inflexible, finished thing, complete in all its details for a generation, or as in the states of Kentucky, Indiana, Rhode Island and Connecticut, practically unchangeable for all time.

The constitution should reflect changing social conditions and changing needs. It should mirror the seasoned convictions of the nation, rather than lag many years behind them. It should have more permanence than a legislative act, and amendments should be approved by the people. But it should not be necessary for two successive legislatures to approve of a resolution permitting an amendment to be voted upon, and the majority within the legislature for submission ought not to be prohibitive. It should provide that a two-thirds majority of any general assembly or a mere majority of two successive assemblies may submit an amending resolution. Further than this, provision should be made for amendment by the direct action of the people themselves, acting through petitions submitted for this purpose. If five or eight per cent of the electors of a state like New York are sufficiently exercised over a condition to go to the trouble and expense of preparing petitions, then their petition should be given a hearing by being placed upon the ballot, the same as a resolution regularly submitted by the legislature; and if a majority of those voting upon the proposal favor it, it should become part of the organic law of the state. This is the very essence of the right of petition, sanctioned in every constitution, for the right of petition is empty unless it can be made effective. It is also of the essence of responsive and responsible government, as well as of the idea of an evolving, changing constitution, reflecting the seasoned opinions of the community. It is unfair to a people to require it to accept for a generation's time the deliberations of a group of representatives, whose opinions can be known only after they have deliberated, without power to escape from their opinions by any action which the people themselves may take. This is not representative government; it is government by chance.

*Separate Submission of Debated Questions*

Third, in keeping with the above suggestions, amendments to the constitution, involving radical departures like woman suffrage, prohibition, the initiative, referendum and recall, should be submitted as separate proposals for the discriminating action of the voter. Alterations in the fundamental laws such as these should not be incorporated into the body of the constitution when submitted but should at all times and under all circumstances be open to unincumbered action by the electorate. The Ohio constitution of 1912 contained many separate and detached amendments, placed before the people in separate columns, upon which the electors passed individual judgment. About one-half of these proposals were adopted, the other half were rejected, showing a more highly developed political intelligence than the electorate is generally assumed to possess.

*Commission Government for State*

Fourth, in keeping with the idea of simplicity and efficiency, the commission form of government should be substituted for that which now prevails. The legislature should consist of a single chamber of a relatively small size. A legislative body composed of one representative from each congressional district would be adequate for all purposes. It should be in continued session all the year, as is the Congress of the United States. Surely, if the needs of the smallest town require the attention of its council for twelve months in the year, the legislative body of a commonwealth of 10,000,000 people, more than three times the population of the United States when the constitution was adopted, requires the same continuous legislative service.

The commonest complaint of our assemblies is that they pass too many laws and too hasty legislation. Much of this is due to the size of the legislature. Each member feels that at least one measure must bear his name. As a consequence, state laws command little respect, and for the most part are entitled to no more respect than they receive. A small legislative body

in continuous session, acting with the informality of a city commission, would result in more mature deliberation, more intelligent action and a great decrease in the number of ill-adjusted laws which issue from our state legislatures, even when they are in session for but a few months in the year.

In addition, I should suggest that the governor should appoint the members of his cabinet, including the attorney-general, the secretary of state and the executive heads of other departments. The governor and each member of the cabinet should have a seat in the legislature, with the right to discuss all measures, but not to vote. This is a provision now found in many city charters; it has resulted in greater unity of action and increased municipal efficiency.

This is perhaps as near an approach as is possible to the British idea of responsible cabinet government. It should tend to bring into politics a more highly trained type of man, as well as greater unity in the administration of public affairs. In connection with this, I would entrust the governor with the appointment and easy removal of the directors of all executive departments, whose relations to the governor should be somewhat similar to those of the department heads in a great city.

#### *Short Ballot*

Fifth, the short ballot. The commission form of government would lead to the short ballot. It would reduce the number of elective officials to the governor and the member of the state assembly. This would simplify elections and automatically make it possible to select a higher type of man than those who now go to the assembly. Further than this, it would lure better men into politics, for the opportunities of real service offered would prove attractive to the best-equipped men in the community.

In addition, I favor longer terms of office for the governor and the members of the assembly. I should suggest a term of four years, with the right of recall. By this means the official would always be responsible to his constituents, while a

continuing policy, covering a reasonable period of time, would be open to achievement by an administration.

*Right of Judicial Review*

Sixth, I have never believed that the federal constitution contemplated the power of judicial review of congressional or executive acts. The constitutional provisions seized on by the courts to justify their interposition are entirely inadequate to sanction such assumption. The recently adopted constitution of Ohio recognized this protest against judicial usurpation and provided that no act of the legislature should be held to be unconstitutional by the supreme court, except when such decision was concurred in by six out of seven members of the highest appellate tribunal.

*Complete Municipal Autonomy*

Seventh, complete home rule should be accorded municipalities. They should be permitted to prepare their own charters; to determine for themselves what activities they shall perform; what industries and activities they shall engage in; what salaries they shall pay, and what powers they shall exercise over persons and property within their midst, subject only to the constitutional safeguards. Municipalities should have the same freedom to experiment that a private corporation now enjoys; they should be permitted to decide for themselves as to the sources from which they shall collect their revenues and as to the way in which they shall spend them. The amount of their bonded indebtedness should be determined by the community itself, as well as the purposes for which such indebtedness is incurred. Cities should have the same autonomy now enjoyed by the state and the nation. Within their own sphere of action they should be sovereign, much as are the cities of Germany and some of the cities in our western states.

Such a devolution of power would relieve the legislature from the burden of considering local demands and would render it possible for the city itself to develop its own life and adjust its administration to local needs, as is not now possible when the financial limitations of a municipality are fixed and

determined by the constitution or the state laws, and are necessarily unresponsive to local necessities.

#### *Direct Legislation*

Eighth, adequate responsiveness to public opinion involves provision for direct legislative action by the people themselves, through the initiative and referendum; and of these two devices the initiative is by far the more important. The referendum is negative. It usually relates to questions in which the people have no great interest. And the failure of large numbers of people to vote upon referendum measures is no index of the response which would follow to measures initiated by the people themselves. The initiative is the final step in democracy; it involves a government which mirrors public opinion. That it is not likely to be used for radical purposes is indicated by the experience of western states, as well as of Ohio, where the presumption of the unenlightened voter is against a new measure rather than in favor of it. But most important of all is the educative influence of referendum elections on measures initiated by the people themselves. They lead to constant discussion, to a deeper interest in government, and to a psychological conviction that a government is in effect the people themselves. And this is the greatest gain of all. It has been said that the jury is the training school of democracy. To an even greater extent is this true of the initiative and referendum.

#### *Political Freedom—a Principle*

The underlying motive of the foregoing philosophy is fluidity, responsiveness, freedom; freedom of society, in its collective capacity, to develop its own political life; freedom to evolve, to grow by change, just as does the individual, just as does the whole animal and even the vegetable kingdom. And I have no more fear of mankind in its collective capacity than I have of mankind in its individual capacity. And if there is any quality which stamps American life, American character, American industry, it is freedom. Freedom explains our

achievements, it explains our industrial development. It explains the ingenuity, resourcefulness and courage of the nation. And freedom is, I believe, the law of all nature—a law as immutable in its ultimate blessings as any that nature sanctions,—not the patch-work freedom with which we are familiar, the freedom that gives privileges to some and burdens to others; not the freedom that fails to distinguish between that which is essentially public and that which is essentially private; not the freedom which grants license to the individual and chains to the community; but the freedom of each man to live his individual life, so long as he does not interfere with the equal freedom of his fellows and the right of the community to live its life and to control the individual, so that he will not exceed the freedom vouchsafed to him.

Finally, these are the principles I would apply to government affairs. Politics should be simple, rather than confused. Officials should be responsive, not irresponsible. There should be an end of checks and balances. There should be a direct vision between the citizen and his servant, and easy means for the community to achieve its will, and an equally easy means to change its decisions when it finds itself in error. In fine, I believe that government should be responsive to public opinion and free to reflect that opinion in legislation when expressed.