THE GREAT IDEAS ONLINE

Mar '05 Nº 315

SIX AMENDMENTS TO THE CONSTITUTION: A COMMENTARY BY MORTIMER J. ADLER

Three features in the Constitution have a bearing on its future—they point to its alterability and give direction to ways in which it may be altered. First, the Constitution explicitly announces itself as the fundamental law of the land, which makes any laws or acts contrary to it unconstitutional. This is the foundation of the Supreme Court's power of judicial review whereby what is unconstitutional can be declared null and void. Second, Article Five provides for amendments to the Constitution. Hence, the Constitution is not engraved in stone; it has a malleable future. Third, the Ninth Amendment declares that the rights enumerated in the first eight amendments do not deny or disparage other rights retained by the people. What are these other rights?

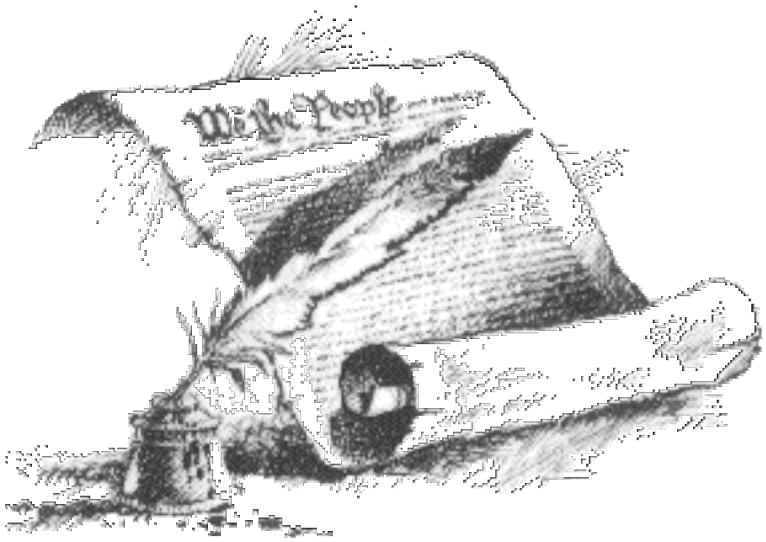
They must be either the civil rights previously conferred on the citizens by the several states or the unalienable, natural, and human rights mentioned in the second paragraph of the Declaration of Independence. It is most likely that those who formulated and adopted the Ninth Amendment were conscious at the time of the unalienable (natural, human) rights mentioned in the Declaration. If the first eight amendments do not deny these rights, then, together with the Ninth Amendment, their adoption tacitly acknowledges the existence of natural rights. This extends judicial review from nullifying laws that are unconstitutional to nullifying laws that are unjust because they transgress natural rights. With this in mind, let us now consider the questions we must answer about the last two hundred years, and the significance of the answers we give to them.

We all know the basic historical facts. We know who were not enfranchised by our eighteenth-century Constitution: women, slaves, the proletariat (propertyless workers). We also know the succession of amendments that radically altered the eighteenth-century Constitution: the Thirteenth, Fourteenth, and Fifteenth Amendments in 1866-1870; the Nineteenth Amendment in 1919; and the Twenty-Fourth Amendment in 1964. This succession of amendments requires us to answer only three questions: (1) Is this a history of progress? (2) Is it a history of regress? or (3) Is it neither progress nor regress? Let us consider the three answers to these questions.

There are those who say it is progress from oligarchy to democracy, as measured by successive rectifications of the injustice in the eighteenth century, pre-Civil War Constitution. They give this answer by reference to principles of natural justice and to the existence of natural (unalienable, human) rights. This answer involves an implicit acknowledgment of natural justice and natural rights as the basis of the Constitution's rectification. However, that fact is not generally recognized, nor is what it entails understood.

There are those who say that the history of constitutional change represents regress from better to worse government. If they are not talking about efficiency, then a principle of justice appears to be involved. Unequals should be treated unequally: some given and some denied political liberty and political power. They appeal to the advantages of rule by an elite portion of the population, those who deserve to be *the people*. This represents Thomas Jefferson's ideal of a natural *aristoi* of virtue and talent; or, in John Adams'

words, rule by those with the advantages of birth, property, and education. Finally, there are those who give the third answer: the Constitution has neither progressed nor regressed, because there are no principles of natural justice and no natural rights by which the goodness of constitutions and all other man-made laws can be assessed.



The historical changes in the Constitution are not from worse to better or from better to worse, but only from what was more expedient in the eighteenth century to what became more expedient after the Civil War and in the twentieth century. These changes resulted in shifts of power—changes in where the power resided. Each was equally good for its time—relative to the circumstances then prevalent. Whereas justice and rights are always the same, expediency varies with the circumstances. If slavery is unjust, it is always unjust, but it may be expedient at one time and not at another.

The basic issue here—between the first two answers (both of which appeal to principles of natural justice) and the third (which denies such principles)—is the deepest, most long-standing issue in jurisprudence or the philosophy of law: the issue between naturalists, on the one hand, and positivists or legalists, on the other. The naturalists include Socrates, Aristotle, St. Thomas Aquinas, John Locke (and on the Supreme Court, Justices Benjamin Cardozo, Louis Brandeis, William Brennan, Harry Blackmun). Among the positivists are Thrasymachus, Ulpian, Thomas Hobbes, Jeremy Bentham, John Austin (and Justices Oliver Wendell Holmes and Felix Frankfurter, as well as Judges Learned Hand and Robert Bork).

Let me spend a moment on the shape of the issue. The positivists hold that might is right. Today, for example, the power lies with the majority in Congress. This determines what is right. Therefore, there can be no unjustly oppressed minorities. Man-made laws determine what is just and unjust at a given time and place: justice is variable and relative. There are no standards for appraising the justice and injustice of laws or constitutions. There are no *mala per se*; only *mala prohibita*. The naturalists hold that constitutions give governments authority as well as authorized force (authorization by the consent of the governed); that principles of natural justice and natural rights determine which man-made laws or constitutional provisions are just and unjust. Unjust laws are laws in name only. They have only force behind them, no authority. Might does not make right. For naturalists, there are *mala per se* as well as *mala prohibita*.

With regard to the Supreme Court justices and federal judges named, it should be said that all may be equally eminent jurists when it comes to deciding cases at common law in appellate courts. They all may be highly competent when it comes to deciding cases that raise questions of the constitutionality of a particular law or executive act. But when it comes to deciding cases that go beyond questions of constitutionality to questions concerning natural rights, involving principles of natural justice, the nomination to the Supreme Court of self-confessed positivist jurists (such as Holmes, Frankfurter, Hand, and Bork) is totally inappropriate. The Senate rejected Judge Bork for the wrong reasons. It needed only to question him about his views concerning the Ninth Amendment.

I think that the three-sided issue *must* be resolved in favor of natural justice and natural rights. Here are my reasons for thinking so. How do positivists explain the succession of amendments that the naturalists regard as rectifications of injustice and as securing natural, human rights? How do they explain the amendments that the naturalists regard as steps of progress toward democratic justice? It seems that they must say that they came about through the operation of power politics. This means that those who stood to benefit by them had enough political clout to get these amendments adopted in order to improve their own condition.

But is this true of the black slaves after the Civil War or of the militant suffragettes and the disfranchised poor in the twentieth century? Remember that the outcries against slavery came from abolitionists long before the Civil War. Those outcries appealed to principles of natural justice against the injustice of legalized chattel slavery. Remember how persecuted and mistreated were the few

women who marched for their right to vote in the second decade of the twentieth century. Later, what political clout had those who did not pay poll taxes?

If we dismiss the positivists' interpretation of how the amendments came about and *if* the positivists cannot come up with a better explanation of their adoption, an explanation of how these amendments became expedient, then our constitutional history is a story of progress toward democracy—of step after step toward greater justice according to the principles of natural justice and natural rights. The naturalists win the argument if unchanging justice, not merely changing expediency, is the standard by which the Constitution can be criticized and improved.

We must still deal with the issue of progress versus regress. Both appeal to principles of justice, not simply expediency. The error of the aristocrats or oligarchs lies in their denial of a basic human equality and their exclusive affirmation of human inequalities, especially those of nurture as well as those of nature. When both human equality and individual inequality are considered, the consequences are as follows. The equality of all humans calls for equality of status and of liberty—citizenship with suffrage. The inequality of individuals calls for inequality of power as between citizens and office-holders, assuming that those who hold public office genuinely deserve to exercise more power.

Hence, the one right choice among the three alternatives is *progress*, even though we have not yet succeeded in making all who are enfranchised genuinely citizens, nor have we yet succeeded in always getting the best men into public office.

I would now like to call attention to the difference between constitutionality and justice, and between unconstitutionality and injustice. There is a great difference between the Supreme Court's declaration of unconstitutional laws as null and void and their declaration of unjust legislation as null and void. For example, Justice Taney's Dred Scott decision was constitutional *but unjust*, because the Constitution was then *unjust*.

Let us next consider two more recent discrimination cases in which the Court handed down contrary decisions: *Plessy v. Ferguson* (in 1896); and *Brown v. Board of Education of Topeka, Kansas* (in 1954). Both tried to appeal to the same clause in the Fourteenth Amendment, guaranteeing equal protection of the law and its application without discrimination. But that clause cannot support opposite decisions without appealing to an underlying principle of

justice. Any significant discrimination (between blacks and whites, or between females and males) is intrinsically unjust.

Hence, there can be two kinds of action by the Supreme Court in exercising its power of judicial review. It has the power to nullify laws that are *unconstitutional*. It also has the power to nullify laws that are *unjust*—for example, the recent Connecticut law prohibiting the use of contraceptives by married couples. That law is unjust because it violates the right to privacy, which is *identical* with the unalienable natural right to liberty—the right to do as one pleases in all matters that belong in the private sector and so do not cause injury to others or militate against the public welfare. 🕮

From *Law and Philosophy, The Practice of Theory: Essays in Honor of George Anastaplo* (2 vols.), edited by John A. Murley, Robert L. Stone, and William L. Braithwaite, Ohio University Press, 1992 (Adler's portion, Vol. II, 747-750).

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is published weekly for its members by the
CENTER FOR THE STUDY OF THE GREAT IDEAS
Founded in 1990 by Mortimer J. Adler & Max Weismann
Max Weismann, Publisher and Editor
Marie E. Cotter, Editorial Assistant
Homepage: http://www.thegreatideas.org/

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