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THE AMERICAN PROBLEM OF GOVERNMENT

THE AMERICAN PROBLEM *of* GOVERNMENT

☆☆☆

By

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FIFTH EDITION

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PREFACE

This book started out to be a revision of the author's *The Problem of Government,* originally published in 1925. Before the work had gone far, however, it became clear that mere revision would not do. No book in the mood and mould of 1925 could adequately treat the problem of government in the era of the Great Depression. Therefore the book has been entirely rewritten and in the process considerably reconstructed. Nevertheless certain features characteristic of the original work have been retained.

The author reaffirms his preference for approaching the study of American government from a background of political fundamentals; also his belief in the value of stressing principles, processes, and problems rather than forms and mechanisms of government. The present volume embodies these viewpoints quite as completely as its predecessor. It also undertakes to view basic processes and problems in the whole, not as phases of the government of this or that political subdivision. A large amount of new material has been introduced and special attention has been given to the developments of the depression and recovery periods. Accordingly it has seemed desirable to modify the title of the book so as to declare its character and contents more exactly.

The writer wishes to acknowledge his indebtedness to Professor Arthur N. Holcombe of Harvard University whose careful and critical reading of the manuscript has been exceptionally helpful. For a similar service he is under obligation to Lieutenant Colonel Herman Beukema of the United States Military Academy. To Miss Ruth Reynolds and Miss Julia Schmitz, librarian and assistant librarian of Whitman College, he also wishes to express thanks for numerous services which have lightened his labors and speeded the completion of the task. To his own account all errors and defects should be charged.

C. C. M.

PREFACE TO THIRD EDITION

Besides bringing factual matter up to date, it has been my purpose to make this edition of *The American Problem of Government* more useful than its predecessors. The general organization and content of the book have not been changed, but many of the chapters have been entirely rewritten, and those not rewritten have been extensively revised. The endeavor throughout has been

to retain all features which have been favorably regarded and to improve the book as a whole. Particular effort has been made to render the section on "Political Fundamentals" more serviceable than in former editions.

For critical suggestions of great value I am grateful to Professor Arthur N. Holcombe of Harvard University, Professor P. H. French of Yale University, Lieutenant Colonel Herman Beukema of the United States Military Academy, Professor H. Arthur Steiner of the University of California at Los Angeles, Professor T. S. Kerr of the University of Idaho, Professor O. Douglas Weeks of the University of Texas, and Professor S. R. Gammon of the Texas Agricultural and Mechanical College.

C. C. M.

PREFACE TO FOURTH EDITION

Although the text has been entirely rewritten and revised, the fourth edition of this book retains all of the characteristic features of its predecessors. So many have found these useful that the effort in preparing the present edition has been chiefly aimed at bringing the book up to date and improving the serviceability of its already established principles and plan.

I am indebted to Colonel Herman Beukema of the United States Military Academy for valuable counsel in the preparation of this as well as previous editions of the book. I am deeply grateful also to Lieutenant Colonel H. A. Gerhardt of the same distinguished institution for a kindly and critical reading of the manuscript of the present edition, which has prevented many errors both of judgment and fact. My colleague, Mr. Walter L. Riley, has graciously duplicated this service, also much to my advantage. I wish also to express my thanks to Mr. A. D. Barre, Director of Student Employment, Whitman College, for supervising the typing of the manuscript.

C. C. M.

PREFACE TO FIFTH EDITION

In the years that have elapsed since the publication of the fourth edition of this book there have been many changes in government and politics in the United States. In the present edition, I have endeavored to revise the text in such a way as to bring it up to date without modifying the fundamental structure of the book. Many users of the book have indicated that they would not want to see any change in its organization. I am glad, of course, to defer to their judgment.

C. C. M.

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PART I: POLITICAL FUNDAMENTALS

CHAPTER 1

POLITICAL SOCIETY

The Individual and Society

The greatest power on earth. A power which, at a word of command, can hurl millions of human beings into the inferno of war is a power no living person can afford to ignore. Ignored it may be, but it can never be escaped. No individual can successfully resist it; no individual can so manage his life that it cannot reach him and decisively shape his fate.

The modern state has such power. Not only does it have power to send men to death; it also has almost equal power to determine how they shall live. Its action or nonaction may determine, to a very large extent, what kinds of bodies its subjects shall have, what kinds of minds, and even what kinds of souls. It may have much to do with the character of their homes, the quantity and quality of their food, and the number and value of their possessions. Their inmost thoughts it cannot control, but it can, and often does, exert a large degree of control over the kind of information that comes to their eyes and ears—over the materials, in other words, with which they do their thinking. It cannot directly command their loves, hates, and other emotions, but it has means of controlling many of the circumstances which enter into the making of the strongest human emotions.

There is no power on earth which can match this power. The mightiest mechanisms that men have invented are enslaved to its service, and the strongest organizations that men have developed give obedience to its authority. It is a power which stands over every individual, to which every individual in some way contributes, but which every individual wants restrained in some degree.

Man as an individual. Every human being is born an individual—a bit of plastic material distinct from every other thing on earth. That body of plastic material, a product of heredity and physiological environment, is his very own. Being a living thing, the body comes into the world with great potentialities for growth. If it could be kept within four walls, entirely apart from all external influences, but at the same time adequately nourished, it probably would grow into a mature biological organism and would function as such. What it would be like in other respects, no one

can imagine. No such human being has ever existed. In other words, no human being has ever grown up as a solitary and absolute individual.

We may start, therefore, with the fact that there are no total individuals except newborn babes. What we call an individual is in reality a creature shaped both physically and mentally by the surroundings in which it has developed. That does not mean that it is wholly the product of its surroundings. Nature implants in every newborn babe certain capacities for action, especially capacities for the kinds of action which will be most likely to serve its basic needs. The same basic capacities are found in every infant, but not in the same degree. The infant begins life by exerting its inborn capacities as best it can, and these exertions bring it into contact with its surroundings. Including, as they do, persons and things of many kinds, these surroundings constitute a sort of framework on which the native capacities of the infant exert their powers. Just as a vine growing on a wall is not a shapeless and unfettered tangle, but a growth following the contours of the wall, so the infant growing up in a certain environment is not a totally detached being, but a person shaped to the environment in which he has grown. Like the vine on the wall, he retains his native capacities, but they tend to manifest themselves in patterns fashioned by his environment.

Accordingly, when we speak and think of man as an individual, we should be careful not to be deceived by our imaginations. Abstractly, it is easy to imagine a human being detached from any relationship with other human beings, but such a creature probably never has existed on this earth. The foregoing counsel—against assuming an imagined thing to be a real fact—is very important, because in political science it is frequently necessary and useful to speak and think of man as an individual. But we should realize that wrong conclusions will be reached if we start with an assumption that man as an individual is a being such as can exist only in abstract thought. Man *is* an individual, but he is an individual *in society*. He does not wish, and probably is not fitted, to be an individual *outside of society*. Nature has endowed him with qualities which sometimes bring him into conflict with society, but what he desires, in such conflicts, is not to get out of society or do away with it, but to relate himself to it in ways that specially satisfy him but are not equally satisfying to the prevailing opinion and usage of society. He still clings to the wall and conforms to its contours, but also strives to pull portions of the wall to himself and make it conform with his way of being.

Man as a social being. Man is a social animal because he has to associate with others of his own kind in order to live, but society is not a thing in itself apart from man. It is a mistake to think of society as a structure consisting of human beings added together, or as an abstract entity consisting

of the blended psychologies of many human beings. Society consists of the relationships between man and man. These relationships always take the form of behavior or action. A good example of what we mean is a football team. A football team is commonly said to consist of eleven men, but that is not an accurate statement of fact. Eleven football players at the dinner table are not a team; nor are they a team under any circumstances except when actually playing football. Even on the playing field, they are not a team until the game begins; and, of course, there would be no game if there were no opponents. It really takes the relationship of twenty-two men actually playing football to make a football team. Eleven players, each assigned to a special position, line up at one end of the field to defend their goal; eleven others, similarly drilled, line up to defend the opposite goal; the referee's whistle blows, and the ball is put into play. Each player immediately attempts to do something in association with his fellows and against the opposing side. On offense and on defense, each has a certain action to carry out—each, in other words, must continuously act in certain relationships to the men of his own side and those of the other side. It is what they actually do in these relationships, how they actually behave, that makes them a football team, and not just a number of young fellows playing around with a football. Moreover, it is what they actually do in their relationships *on the football field* that makes them a good football team or one not so good.

The behavior of men in relationships to one another is what makes society. Football is merely a special kind of society. There are innumerable other kinds, some very simple and others highly complex. Every person participates in some of them, and some people participate in a great many. Participation in society begins at birth and continues until death. The earliest participation is in the family, and this is followed, as the scope of one's life broadens out, by participation in scores of other societal relationships.

Our discussion has now reached the point where we must recognize a tremendously important fact. It is this: *Many of the relationships of man to man (it is nearly always true of the most vital ones) result in the formation of groups.* Everybody is familiar with groups, but not everyone clearly understands just what a group is. Superficially viewed, a group is merely a number of persons associated in a common interest, purpose, or activity; but a more accurate view is that a group is a cluster of persons participating in a particular relationship or set of relationships. A very simple example will make this clear.

On a sunny Saturday afternoon two boys with a baseball are playing catch on a vacant lot. A third boy appears, possibly a stranger. He is an outsider, but he is friendly and so the players invite him to join them and

make it a three-cornered game. Thus, by taking part in the relationship (that of tossing the ball around), he becomes one of them. Should other boys appear, they cannot get into the group without getting into the game. So long as they stand around, taking no part in the relationship, they are outsiders—mere spectators. It is the sharing of the common activity and the relationships incidental to the activity that makes the group.

Another thing to note is that by getting into the game, each boy comes to acquire a more or less definite place in the activity and its relationships. Even though the game be entirely informal and unorganized, each player gains a position in the scheme of things. It may be a physical position, such as occupying a certain corner of the lot; and it is certain to be a psychological position, such as taking the lead or following, playing skillfully or poorly, or something else that marks him as different from other boys. Sooner or later he acquires a status in the group, i.e., a place in the activity and its relationships that he and all others regard as his. Because of this he is expected to do certain things and behave in certain ways, and he generally does as expected. To put it briefly, being in a group not only means associating with others in common activities and relationships, but taking a role or part. It may be an active or passive role, a dominant or submissive one, a desirable or undesirable one; whatever it may be, if one does not fit into a role, he will not long fit in the group. For a group is a kind of association in which the members have to do things in common. In that respect it differs from a crowd, an aggregation, or a collection of people who come together and associate, but do not join in mutual functions or activities. The members of a group must coöperate, and coöperation is not a hodgepodge affair. People cannot coöperate unless their mutual relations are so arranged that they do not work at cross-purposes. That is why the formation of groups is always accompanied by a positional arrangement under which each member has a fairly definite part to play.

This positional arrangement need not be expressly agreed upon and formally established. In many groups it never is. Tacit understandings, firmly rooted habits, fixed attitudes, individual characteristics, and the special feelings that men come to have one to another often bring about positional arrangements that are just as clear and certain as could be achieved by definitely expressed terms. A good example of this is the family. You are well aware that your own family, like every other family, is not made up of persons who are merely blood kin and nothing more, but of persons who stand in certain positions relative to each other. These positions are the roles they play in the common affairs and activities of the family. There is a father position, a mother position, and eldest child position, a middle child position, a youngest child position, a brother position, a sister position, a grandfather position, a grandmother position,

a grandchild position, and so on. When you occupy one of these positions, you play a part or role. You are never strictly yourself. Toward your father, you behave as a son or daughter; toward your child, as a father or mother; toward your brother, as a brother or sister, and so on. Toward an outsider, your position is not the same as toward members of the family, and your behavior toward him is different.

If it were not for such positional arrangements, it would be hard for the members of a group even so closely knit as a family to get along harmoniously and coöperate effectively in their common endeavors. Nobody would know what to do in any situation, and there would be all sorts of confusion, misunderstanding, and conflict. The family would not be a family at all, but an ill-assorted collection of biological kin. Even though mutual affection draws blood relations close together, positional arrangements are necessary if they are to function as a unit. They are even more necessary in groups lacking such ties of affection.

The number and variety of the relationships which may result in the formation of groups is almost without limit. No one has ever known or ever could know them all. Some relationships engender groups of short duration; others go on year after year, generation after generation, century after century. Some arise involuntarily, the members having no design, at the time they enter the relationship, to form a group; others are intentionally established with specific purposes in mind. Some bring their members into direct and intimate personal contact; others operate at long range. But all involve coöperation, and therefore require positional arrangements, the essential means of coöperation. Some groups, however, are obliged to pay far more attention to the means of coöperation than others. Large groups, engaged in difficult and complex enterprises, necessarily have to make sure that their positional arrangements are appropriate and adequate, and it is a great advantage in many small groups. The common way of doing this is to organize.

Organized society. Organized groups are those which have a systematic method of securing coöperation. The methods of unorganized groups may be just as effective—in some circumstances even more so. Very few organized groups get better coöperation than the family, which is not organized at all. On the other hand, very few groups have or can have the naturally evolved positional arrangements which make it possible for the family to get coöperation without formal organization. Most groups, especially the larger and more complex ones, cannot get along with informal positions. They must have, oftentimes, a great many positions; positions that are easy to recognize and easy to use for particular purposes. So they organize—which is just another way of saying that they establish in some way a scheme under which positions are created as needed; under

which each position has its own special tasks, functions, and powers; under which each has a definite title and rank; under which each has a fixed and definite place in relation to all other positions. Organization does not really bring anything new into the group structure; does not modify the essential nature of a group's positional arrangements; it merely makes them more precise, more orderly, more understandable, and more cohesive.

Organization is a habit of such long standing in human affairs that it is one of the easiest and most natural things we do. Do we plan a day's outing in the mountains? Then we must have a committee on transportation, a committee on refreshments, and committees for who knows what else. Do we propose to form a bridge club? Then we must have a president, a secretary, a treasurer, and a goodly array of committees. Do we wish to form a business company, a labor union, a fraternal order, a religious society, an athletic association, or a group for any other purpose? Then we must have officers, bylaws, and all of the other paraphernalia of organization. And when we get our organization, each of us takes an allotted place in the scheme. Each of us feels impelled, both consciously and subconsciously, to play the part assigned to his position. Even though one may feel that his position is not suited to his own personal aptitudes or merits, he commonly tries to perform as the position requires. That is what every member of the group expects him to do; consequently, it is what he generally feels he ought to do. From infancy, first in the family and subsequently in other group relationships, every individual learns by experience that all groups are made up of positions of some kind and, furthermore, that without positions groups cannot "do their stuff." So we all take it for granted that every group we enter will consist of positions, that each member will occupy a certain position and behave according to his positional status.

By the same kind of experience we learn something else about groups and positions. We learn that not all group positions stand on the same footing. One of the first social facts to dawn on every living person is that a parent's position is one thing and a child's position another. Not only is the child's position different; it is in many respects subordinate. We do not reason this out; we simply accept it as a necessary and natural fact. Whether the parent is by nature a tyrant or meek as mush, the child finds that being a child obliges him to be subordinate to the parent in many respects, regardless of the parent's personal characteristics. The same fact is encountered in all other groups. In most of them it stands out more prominently than in the family. All groups, we discover, are made up of positions, of which some are dominant and others submissive, irrespective of the persons who chance to occupy them.

In the same school of experience, we learn that there are many variations of dominance and submission. Some positions are constantly and consistently dominant; others are just as regularly submissive. Some are occasionally dominant as a result of exceptional events or conditions. With some, dominance and submission vary with the personalities of the persons holding the position. But in all cases, the position provides the individual with his main opportunity to play a part in group affairs; he seldom has an opportunity to assert himself as a wholly detached individual. In this respect a group is basically unlike a crowd, a mob, and other casual collections of people, in which there are no fixed positions and each individual is entirely on his own.

The linkage of dominance and submission with position is especially apparent in organized groups. This is not surprising, because organization is for the purpose of arranging positions logically, systematically, and harmoniously. This could not be done without arranging them according to their dominant or submissive functions in the group. In all organized groups, therefore, we find that there are top positions, bottom positions, and positions in between; and that each position bears a pretty definite and well established dominance or submission relationship to every other position. The top positions are always few, the intermediate positions are never numerous. Most group members occupy bottom positions. You cannot have organization any other way. If you want unity, system, and collaboration, you must have the many in orderly subordination to the few.

Human beings learned this lesson many thousands of years ago, and learned it so well that there is never any question now of positional equality in organized groups. When organized groups are formed for any purpose whatever, the first thing men do, and the most instinctive, is to create positions and arrange them in some order of precedence with the many at the bottom and the few at the top. In such arrangements, every person, according to his position, yields submission to those above him and exercises dominance over those beneath him. This does not mean that those higher in the positional scale impose their wills, by force or otherwise, on those lower down. Dominance and submission in organized society are not a matter of will over will, but of position over position. It is the will of every person in an organized group that there be a positional arrangement on the basis of dominance and submission. If that were not true, there would be no such thing as organization. People must will that, if they will organization at all. Every one knows that higher positions must prevail over lower ones or there can be no organization, and everyone intends that they shall. Thus it follows that everyone recognizes for himself and for others that persons in lower positions should submit to persons in

higher positions in all matters touching their respective positions. The members of a football team do not execute the signals of the quarterback because he forces them to, but because he is the quarterback, the man in the signal-calling position. Like the members of all organized groups, they regulate their dominance-submission behavior according to their position in the group.

Authority and obedience. Persons in dominant group positions are said to have authority. Just what does this mean? That they can make others knuckle under at will? Far from it. A bully makes others knuckle under, but he has no authority to do so. Nor has a robber, a bandit, or a pirate. Authority comes from position, not force. When a person is in a duly recognized group position that entitles him to receive the submission of others, he has authority. Not otherwise. And when a person occupies a group position that obliges him to yield submission to one in a different position, his rôle is obedience. Bowing to superior force is not obedience; it is compliance all right, but not obedience. You don't obey, unless you comply because the other fellow has a positionally recognized right to receive compliance. You obey or disobey a person in a rightful position of authority—a policeman, for example; but your behavior towards a thug is neither obedience nor disobedience. You yield or you don't, as seems the thing to do at the moment. You never feel that there is any right or obligation to be considered.

Authority and obedience always go together. Neither can exist without the other. They are an integral part of all group processes and relationships. Groups simply could not function without them. Therefore all groups that endure any length of time develop fairly clear and permanent lines of authority and obedience, and this is particularly true of organized groups. Following the positional arrangements of the group, authority converges in the higher positions and obedience falls to the lower ones. Thus it comes about that fewer positions of authority are found in most groups than positions of obedience. This is notably true of large groups, and invariably true of organized groups. The allocation of authority in organized groups is usually determined by constitutions, laws, and rules which expressly state which positions are to bear authority and which are to obey. Those bearing authority must be relatively few in number, because dispersion of authority correspondingly disperses obedience; and when obedience is too widely dispersed, is too much divided and owed to too many authorities, group unity is destroyed. Groups cannot hold together and successfully carry on their activities when the few obey and the many wield authority. It has to be the other way around.

Because it happens in all strong, successful, and durable groups that authority gravitates or is given to the few, human beings have become

habituated to that scheme of things. If not born with an instinct for obedience to authority in the hands of the few, they become accustomed to it at so tender an age and are so strongly confirmed in it by repeated social experience that it seems a wholly normal and natural thing. They form groups of every conceivable kind, for every purpose imaginable, and weave these together in vast and complex social systems. These are all constructed on positional patterns, and all contribute to the conditioning of mankind for political society.

It is sometimes stated that authority is a process whereby the one or the few in authority impose their wills on the many, or whereby the collective will of the group made articulate through those in authority is imposed on the many. In reality, as we have seen, it is not so simple as that. Correctly speaking, the will which prevails through the exercise of authority in group affairs is not the personal will of any individual nor the total will of many individuals. When a person standing in a position of obedience obeys one standing in a position of authority, it is an act of will, but not of purely personal will. He may obey because it would be his personal wish regardless of position, but this is usually accompanied by the feeling that it is his position to obey. And it very often happens that he obeys because he feels that his position calls for obedience, no matter what his personal inclinations. In fact, if he were to follow his personal inclinations rather than his position, he would disobey as often as obey.

Now let us see where this puts the man in the position receiving obedience, i.e., the man wielding authority. Does he receive the personal submission of the obedient person? Yes he does—when it coincides with his positional submission, but not otherwise. When the obeying person is governed primarily or largely by positional reasons, his submission is to the place rather than the man above him. Obviously, therefore, it cannot be said that authority essentially is a matter of anybody imposing his personal will on other persons. On the contrary, it is a matter of positional relationships, very intricate and complex ones sometimes, which impel people to follow patterns of behavior prescribed by the common understanding of what the dominance-submission status of each position is. This common understanding comprises not only what the man occupying a particular position thinks or feels about it, but also what is generally thought or felt throughout the group.

Thus we perceive that authority in group affairs is not an arbitrary, personal thing, even when it is most absolute. The authorities (call them leaders, officers, magistrates, rulers, or what you will) cannot wield authority, cannot invoke obedience, unless they occupy positions which are commonly recognized as entitled to obedience. And when they do occupy such positions, they are expected to exact obedience only in those particu-

lars and to the extent that positions subordinate to theirs are expected or required, by the common understanding or arrangement of positional relationships, to give obedience to their positions. Military authority furnishes a perfect example of what we mean. There is no authority more absolute. Armies are made up of individuals in positions. The lowliest position is that of private and the highest that of commander in chief. The position of private calls for obedience and little else, but for obedience only to those in positions entitled to receive his obedience. The position of corporal calls for obedience to his superiors and a little bit of authority in certain matters over a few private soldiers. In like manner every position on through the noncommissioned and commissioned grades clear to the top has its respective quotas of obedience and authority. The commander at the top may occupy a position that requires him to obey no one, a position of pure authority. His commands are absolute in military matters, but only in military matters. Not even the lowliest private would be expected to obey him or would obey him if he should order the private to divorce his wife and marry another person. Everybody would agree that the commander had exceeded his authority—in other words, had stepped out of position, had demanded a kind of obedience not due from other positions to his.

To be sure of obedience, the military commander must respect his position and also the position of every member of the army. The same is true of every person in authority, even the most absolute autocrat or dictator. It is true, of course, that one man may have personal qualities that enable him to use a particular position of authority so as to get more obedience than other men occupying the same position. But no man has ever possessed enough personal genius and magnetism to make it safe for him to disregard altogether the limitations of his position. There are some things that not even a Stalin dare command, because he is simply not in the position to do so. If, for instance, he should command all Russian men to wear pigtails, they would not obey him. A Chinese emperor did that, many years ago, and was obeyed. But his position was very different from Stalin's, more absolute in some respects and much less so in others.

The development and firm establishment of systematic authority and obedience is one of the most important occurrences in any set of group relationships. It introduces and maintains greater cohesion, greater certainty, greater order, and greater harmony—in short, better coöperation —than would otherwise be possible. Without it, group relationships, except those of the most intimate, face-to-face nature, inevitably disintegrate and fail.

Political society. Organized, systematic authority is the basis of political society. We have already noticed that society consists very largely of

groups and group relationships, and also that all groups develop some scheme of authority and obedience. When many groups exist side by side, as they do in every numerous body of people, every person participates in several sets of group relationships and becomes involved with several different schemes of authority and obedience. His position in each group entails authority and obedience, but not the same authority and obedience in each case. His position in one group may require behavior just the opposite from that demanded by his position in another group. What shall he do—confine himself to a single group and thus escape the dilemma of divided loyalties? This is not always possible; in a large and complex society it is never entirely possible for any person. In a great society no person can isolate himself, nor can any group. Overlaps and conflicts of group authorities are therefore inescapable. Without some way to reconcile and adjust these frictions and duplications, to allay the rivalries and conflicts of authority and obedience, social life would be characterized by unceasing turmoil and disorder. The development of such processes of adjustment and harmonization has been one of the great accomplishments of advancing civilization. It has come about step by step through the specialization and gradation of group authorities.

There was a time when family authority claimed the whole loyalty of the individual. As social life expanded and grew more complex, other than family relationships intruded and the individual became involved in groups that did not recognize the exclusiveness of family authority. There were religious groups apart from the family, occupational groups, military groups, and scores of others. Gradually the horizon of individual interests and connections expanded to such an extent one group could not possibly compass them all. The family could not be everything to the individual, and family authority could not possibly be stretched to cover all of his relationships. Similar limitations tended to confine the scope of religious authority, occupational authority, and all others. Since it could not monopolize the life of the individual, each social group began to emphasize a single relationship or a limited number of relationships in which it could claim his loyalty to the exclusion of all others. This led to group specialization. The reconciliation and adjustment of competing and conflicting authorities was greatly facilitated by specialization, though specialization alone could not solve the problem. It was also necessary to achieve some process of general or over-all authority by means of which all lesser authorities could be ranked and graded as higher or lower relative to each other and to the general authority itself. It was also necessary that this all-embracing authority extend in some degree to all individuals and groups in the social system.

This process of general regulatory authority was not quickly and easily

worked out. It took many centuries of trial and error, of struggle and strife, of experience and effort. Eventually, however, there emerged in different parts of the world, not more than five or six thousand years ago, the type of social organization that we now call political society. It is called political society because it consists of a huge number of individuals participating in widely diversified group relationships all of which are under the supreme authority of an all-enfolding group relationship which exists primarily for the sake of government. Just as the family exists for procreation and subsistence, the religious group for worship, the occupational group for production or exchange, so the political group, which includes them all, exists for the purpose of governing; for the purpose of regulating, adjusting, harmonizing, and controlling all relationships of consequence to the society as a whole. Governing authority of this kind is known as political authority.

Political authority is the highest authority in political society. In regulating all lesser authorities, it decides how far each may go in compelling obedience and which in this circumstance or that shall be the higher or lower authority. Political authority itself is unlimited. It reserves to itself the right to unrestricted physical coercion. Without its sanction, no lesser authority may employ physical coercion at all. This means, of course, that political authority and political obedience may readily take priority over all others.

We should not forget, however, that political authority, like all other kinds, is in substance nothing more than the by-product of a system of positional arrangements. It originates in the positional arrangements of political society; is the kind of authority that is characteristic of political groups, just as family authority is characteristic of family groups, religious authority of religious groups, and so on. It has achieved mastery over all other kinds of authority because political relationships have come to be the most comprehensive and the most imperative of all social relationships. Political relationships provide the binding tie and political authority the paramount collaboration which enable society to grow to large dimensions. Remove or destroy political authority, and what is the result? Society promptly breaks up into fragments, not one of which is large enough or diverse enough to serve the needs of an advanced civilization.

When a political society definitely and permanently establishes itself on a portion of the earth's surface, and evolves there a set of institutions that operate independently of all other political societies, it is called a state. This is the broadest meaning in political usage of the word "state." It is also used in various other senses. Sometimes it is applied to any form of civil government. It is also used in some instances to designate the members of a federal union such as the United States of America. The

word is frequently used as the equivalent of nation or country. And in strictly legal usage it denotes the corporate being to which the law attributes sovereign powers. However, these and all other variant meanings are outgrowths of the primary meaning as stated in the first sentence of this paragraph, namely, a society occupying a specific portion of the earth's surface and having, as its uniting and supreme regulating authority, a positional organization that serves as a common government.

The Modern State

The nature of the state. Political writers have long had difficulty in making clear the nature of the state. Being the absolute monarch of France, Louis XIV said, "I am the state." He was thinking of the state, as multitudes have done and still do, in terms of the human beings who carry on the process of government. If the state consists of the persons who carry on the government, and, if Louis XIV was the one person whose will controlled all others in the process of government, he was right in saying that he was the state. Clear-minded political thinkers no longer think of the state and the government of the state as being one and the same thing. The government consists of the daily activities of human beings, both officials and private citizens, in carrying on their political relationships. These activities reflect the nature of the state, but they are not the state. Louis XIV would have been more nearly right if he had said, "I am the government"; but he would not have been entirely correct even in saying that.

There has also been a tendency to dehumanize the state, and give it the character of an impersonal will or abstract entity. This view conceives the state to be a body corporate, endowed with legal but not physical attributes. If this were true, it would be possible to trace the origin of the state to some sort of legal authorization. For if the state is a legal entity, like a corporation, it must, like a corporation, be created by law. There is no other way that a corporation can come into being. All corporations are created by the law of the state; but by what law is the state created? Not by any higher law, because there is none capable of such creative action. Not by its own laws, for that would mean that the law of the state existed before the state.

The state is not a thing composed of human beings, nor is it an abstract being like a corporation. The easiest way to comprehend the nature of the state is to remember that we are studying human society. We agreed at the beginning of this chapter that society consists not of human beings, but of the *relationships between* human beings. This point cannot be too

strongly emphasized. Bring a thousand strangers together under one roof; blindfold each and plug his ears, and then place him in a seat. This is no society, and it never will be unless you remove the blindfolds and earplugs and permit those people to enter into some sort of relationships one with another. Society in the broadest sense is the sum total of social relationships. *A* society, as distinguished from society in general, is the union of a number of relationships in such a way that they form a distinct cluster or combination. Political society is society regulated by political relationships, and *a* political society is a society regulated by one particular arrangement of political relationships. The state is a political society which has become dominant in a clearly and definitely marked portion of the earth's surface, and which is the outgrowth of an underlying structure of political relationships peculiar to that area. Putting it another way, the state is an established and enduring combination of political relationships which has authority in excess of all other authority-giving relationships within the bounds of particular geographical area, and which, for that reason, is universally recognized as being the one rightful source of government in that area.

A world of states. The modern world is made up of states—the American state, the British state, the German state, the Italian state, the Japanese state, and others too numerous to mention. The total number of independent states varies from time to time, as changing conditions cause some to disappear and others to emerge. Every human being now alive, save for a few technical exceptions, is included in the population of some state, and the vast majority are citizens and subjects of the state controlling the territory in which they reside. It was not always so. There have been periods in the history of mankind when considerably more people lived outside the confines of state jurisdiction than within. The era of universal state building began about five hundred years ago, and seems to be reaching its climax in our own time.

There was a time, easily remembered by the fathers of persons still living, when one who did not wish to hold allegiance to any state could find somewhere on the earth a stateless society in which he might cast his lot. To do that is no longer possible. There are no stateless societies now, and the prospect that any may develop in the future is very slight. Anarchists and some communists have dreamed of doing away with the state, and certain political theorists have envisioned the possibility of a pluralistic state in which political authority would be reduced to a mere shadow of its present stature; but the trend is all in the opposite direction. The state is becoming more rather than less powerful, and the overthrow or destruction of a modern state does not result in statelessness, but in the immediate absorption of its territory and people by another state.

We live in a world of states, and one that plainly promises to continue as a world of states. Our lives, and the lives of our descendents as far ahead as we can see, are in the hands of the state—and not only of our own state but of other states as well. We of the federal state called the United States of America have preferred not to be involved in the affairs of states on other continents, but we have often found ourselves unable to ignore the doings of other states. When two great states, such as Great Britain and Germany, go to war, we are affected regardless of all our wishes to the contrary. What the modern state does or does not do is apt to be not merely of state-wide but of world-wide significance. The reason for this fact will become apparent when we examine the rôle of the state in modern life.

The rôle of the state. The hand of the state is visible in almost every aspect of daily life. The reason is that the state, being a firm and lasting union of relationships springing from the need, the desire, and the increasingly habitual proclivity for an over-all control of human affairs, has become the chief organizer of social relationships. First it organizes the government, and then, acting through the government, it hedges in and sometimes actively shapes the organization of all other social relationships. Organized society, as we now know it, is the kind of organized society that the state either causes or permits to exist. There may be conflicts between the government and the family, the church, or other social groupings, and such conflicts may end in the defeat or overthrow of the government. But the government is not the state. It is merely a convenient, and often quite temporary, instrumentality of the state. It is one thing to beat down the government; it is a wholly different thing to beat down the state. When the government goes down, the same political society continues, a new government taking the place of the old one. But when the state goes down, the political society exemplified by that state also goes down. In 1938 Germany invaded Czechoslovakia and overthrew not only the Czechoslovak government but the Czechoslovak state as well. The people ceased to be citizens of Czechoslovakia and became German subjects; Czechoslovakia went out of existence, and all of the relationships of allegiance, authority, right, duty, and collaboration which had been the essence of Czechoslovakia vanished. In 1940 Germany invaded France and overthrew the French government but not the French state. Frenchmen continued to be French citizens and subjects, even in the portions of France occupied by the German armies. A new government was established, but French political society was not destroyed. The Germans undoubtedly could have extinguished the French state, but they chose not to do so at that time.

This contrast vividly illustrates the point we are trying to make—that

the state is the keystone of organized society as it now exists. When the keystone drops out, the arch crumbles and falls. Conversely, so long as the keystone remains in place, the arch continues to stand, though not perhaps in its original condition. The keystone dominates the arch—determines its size, strength, shape, and so on. Equally does the state dominate organized society, and anything that undermines the state also undermines organized society. It follows, therefore, that any conflict between the state and any other social relationship, if it does not end in the triumph of the state, is almost certain to end in the downfall of the state and the collapse of the existing social order. For that reason, in the kind of society that characterizes the modern world, the state either is the chief organizer of social relationships or there is no chief organizer at all.

As the chief organizer, the state acts mainly through the government. The government itself is an organization called forth by the state. It is a scheme for determining which person, persons, or groups of persons shall exercise the authority of the state; how much authority shall be given; in what modes it shall be applied; and how it shall be passed on from incumbent governors to their successors. The government consists of human beings holding official positions systematically related to each other. In the eyes of most persons the government comes to be almost as exalted as the state. The ordinary person, even when he dislikes a man in public office and objects to his acts, respects his official position, and, if required to do so, yields obedience to him. Sometimes there is a veneration for officeholders, especially the higher ones, that amounts almost to worship. Thus the government comes to have tremendous power to manage and regulate affairs of life.

The government itself does not as a rule prescribe the organization of the family, the church, the industrial group, and so forth; though it must be said that instances of that sort of thing are by no means lacking. What the government usually does is to allow other groups to organize themselves, but, at the same time, prescribes or controls such aspects of their organization and activity as it deems necessary or prudent to keep in hand. The government does not, in our day, organize the family; but it forbids the polygamous and incestuous family, sets the limits of parental authority, regulates property rights as between family members, and does many other things which shape the character of the family. It does not, in most countries, organize the church; but it limits the temporal powers of the clergy, forbids acts and forms of worship contrary to the accepted code of morals, and has a great deal to say about church properties and how they shall be used. Until recent times, it has rarely undertaken to set the actual forms of business organization, labor organization, agricultural organization, and the like; but it has always set the bounds both as to power and

procedure beyond which they might not go. Thus we see that the state, through the government, has more influence over the organization of society as a whole than any other power on earth.

Not only is the state the chief organizer, it is also the chief coördinator and stabilizer of the social system. Its power extends to the relations between as well as within other social groupings. It prevents or adjusts conflicts, irons out differences, and promotes coöperation. Societies as vast as the great countries of modern times would be impossible without the coordinating power of the state; but it must be remembered that this power involves state interference and state control in many aspects of life that are not ordinarily considered political. This intrusion is the price we pay for stable and orderly society, and we have not yet discovered how to get that result at a lower price.

From the time of its first appearance in the world people have looked to the state for security and justice, and a major part of the activity of government has been devoted to those purposes. The larger the society and the more intricate its structure and processes, the more imperative is the need for governmental services of this character. It is not so much that in modern society there is greater insecurity and injustice than in former ages as that the individual and the group in modern society are less able to manage security and justice for themselves. The factors making for insecurity and injustice are too mighty and too far-reaching for any control less potent than that of the state. Hence we find ourselves increasingly dependent on the state for protection not only of person and property but also of health, of mind, of morals, of employment, and of scores of other cherished interests in life; and for justice not only between man and man, but between man and society, in countless ways.

It is important to note also that modern civilization is rapidly transforming the state into the common servant of mankind. Only yesterday, as history measures time, the state was not expected to provide capital for business, jobs for the worker, markets for the producer, highways for the motorist, annuities for the aged, and education and recreation for everybody. But these are only a few of the things that the modern state is expected to do. Why? Because the state has the power and can command the resources to do them, and the people either need them or else want them whether they need them or not. Our way of living today requires a multitude of community services which can be performed only by an agency competent to act for the community as a whole. So we turn to the most powerful thing we know—the state. Our civilization has now developed to the point where it is obvious that the continued success of any social system will depend upon planning, and, quite characteristically, we are turning to the state for the major services of planning.

The Problem of Government

Are we overgoverned? "All things organic," Oswald Spengler has said, "are dying in the grip of organization. An artificial world is permeating and poisoning the natural." [1] The gloomy author of the *Decline of the West* may or may not be right, but there is no doubt that our civilization is *living* in the grip of organization, and there are many who would agree with Spengler that this seemingly unbreakable grip will ultimately choke our civilization to death. These pessimists believe that all of our essential life processes have become so dependent on social organization, particularly political organization, that we shall eventually reach the point where not only will natural processes be stifled but where the whole thing will collapse because of the inability of the human brain to manage the machinery it has created and set going.

If there is any truth in this view, the state must bear much of the responsibility for the dire fate that lies ahead. The state, as we have seen, has been the chief organizer of modern social systems, and the state, through its own prodigiously elaborated machinery of government, has undertaken to control and manage such a multitude of details of so many departments of life that modern statesmanship must be abler and wiser than statesmanship has been at any previous period in the world's history.

Such, in a nutshell, is the fundamental problem of government. This world of states will survive or go down, according to the success or failure of its governmental machines and methods. Can the peoples of the world —and will they, if they can—set up governmental systems capable of doing the kind of work that must be done by some great regulatory agency if this magical twentieth-century civilization is to be kept going? Or, do the present-day tasks of government already so far exceed its utmost ability that its constant assumption of additional functions simply means that much more botching of social management and that much more hindrance to the development of a better social order?

Good government. Such questions as the foregoing cannot be intelligently answered by merely deciding that one does or does not like what the government of his own or other countries may be doing, and basing conclusions on such likes and dislikes. Perhaps they cannot be infallibly answered by anyone, but the only way to approximate the correct answers is to study the subject of government so thoroughly and scientifically that one may be able to judge the character of political institutions by fairly objective standards.

The kind of government that people like is not necessarily good, and

[1] Oswald Spengler, "Our Backs to the Wall!" *American Mercury*, Jan., 1932.

the kind they dislike is not necessarily bad. Good government is good because it does its job well, and bad government is bad because it does not do so. The nature of the job has a great deal to do with the kind of government that is needed. What was good government a generation or a century ago may be very bad government today. It may have been well suited to the job it had to do then, but not at all suited to the job it should do now. Anyone who believes that it is possible, or ever has been, to design a system of government that would be good for all time is just as mistaken as the man who might imagine that such a thing could be done with an automobile or an airplane. Governments wear out and become outmoded. If not changed, they finally break down.

The necessity for governmental change must be clearly recognized, but it is true nevertheless that the essentials of good government never change. Good government must be intelligent government. If it is not intelligent, it cannot succeed under any circumstances. Good government must be honest government. If it is not honest, it cannot be trusted under any circumstances. Good government must be efficient government. If it is not efficient, it will lack the ability to meet the situations confronting it. Good government must be socially minded government; that is to say, it must be government devoted to the welfare of society as a whole. If it is not socially minded, it will foster the growth of a social system so unbalanced that it cannot endure.

Such platitudes are easily uttered, but they offer little help in solving the problem of government. The crux of that problem is whether this or that particular scheme of government, under conditions as they are, is intelligent, honest, efficient, and socially minded; if not, why; and what can be done to make it so. Nothing less than the most critical and painstaking study of government in action will, therefore, suffice to give one an insight into the solving of it.

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CHAPTER 2

POLITICAL EVOLUTION

Natural curiosity, a conspicuous trait of human beings, has caused men to inquire about the beginnings of all things. In the case of political institutions there is an even stronger motive than mere curiosity for wishing to know how things began. In political controversies the question of how the state began may assume great prominence. Existing political institutions may be defended or attacked on the ground that they are, or are not, what they were originally intended to be. They may be interpreted, understood, and operated in the light of what is thought to have been their original nature and purpose. It greatly strengthens any political argument to be able to affirm that it is in line with a popularly accepted view of the original nature and purpose of the state.

Small wonder, then, that the world has been blessed with many theories of political origins, and that some of these have exerted a mighty influence on the actual political behavior of mankind. As men think and believe about the essential nature of their political institutions, so very often do they act. In this chapter we shall review some of the leading theories of political beginnings, consider what modern science has to say about the origin of the state, and summarize, finally, the principal stages of political evolution from the earliest types of state organization down to the present time.

Theories of Political Origins

Divine establishment. One of the oldest theories of political beginnings is that at some remote time in the past a particular state or system of politi cal institutions was established on the earth by the direct mediation of the deity. The Old Testament tells how the prophet Samuel, acting under instructions from Jehovah, selected Saul as the first king of Israel. Greek mythology explains, with much embellishment of detail, how the gods gave the city of Athens to the goddess Athene as a prize for surpassing Neptune in a contest. The literatures of ancient peoples abound with such accounts of the founding of political institutions, and there is no doubt that many of these were long accepted as literally accurate history.

Divine descent. Another theory of divine origin is that a particular state or set of political institutions was founded by mortals who were bio-

logical descendants of the deity. Alexander the Great, the greatest empire builder of antiquity, was widely reputed to be the son of a mortal mother and a divine father, and seemingly believed the legend himself. Aeneas, father of Iulus who founded Alba Longa, the cradle of Rome, is represented in Roman mythology as the son of Anchises, a mortal, and the goddess Venus. Such folk tales have a long life. Even today the Japanese people are taught that their emperor is a lineal descendant of the sun goddess and multitudes of them devoutly believe the teaching.

Divine sanction. Another variant of the divine-origin theory is that this or that particular state was founded by men whose work was specially inspired and sanctioned by the deity. This theory has been widely popular and has appeared in many forms. It was the basis of the claim of the Stuart monarchs in England that the king's authority rested upon a God-ordained right of inheritance from ancestors whose authority proceeded from a special sanction of God. It was likewise the basis of the absolutism of the Bourbon monarchs of France, who held that the kingship was a divinely approved and necessary institution regardless of who or what the king might be. It lies at the root of the talk one sometimes hears of the "divinely inspired" or "God-ordained" Constitution of the United States.

Divine order. The foregoing types of divine-origin theory all assume that a supernatural element of some sort (divine initiative, divine descent, divine inspiration, or divine recognition), specially referable to one state and no other, was the essential factor. There is a fourth variety of divine-origin theory which rules out the supernatural. It simply takes the position that the natural order of things as they appear and develop in this world is an integral part of God's great, unfolding plan of the universe. Hence, it follows by easy deduction that the state, any state, being a part of the divine order, is divinely instituted.

None of the divine-origin theories affords a satisfactory explanation, from the standpoint of modern science, of actual origin and growth of political institutions. From that standpoint they no longer have any importance. In two respects, however, they are still worthy of attention. One is that students seeking to understand the many complex phases of political evolution must reckon with the fact that men's belief in divine origin theories has often led them to act as though such theories were true, and thus to build and operate governmental systems upon the principle of divine right. The other is that a potent residue of divine-origin theory survives in certain philosophical doctrines which influence modern political thought and behavior. Our generation is very skeptical about the divine right of kings, or any kind of divine political order; yet we embrace political philosophies and programs which endow the state with an absoluteness that God alone can possess.

Social contract. Almost as old as the divine-origin theories are the various social-contract theories. All social-contract theories agree on two basic assumptions: (1) that at some time in the dim past men lived in a prepolitical state of nature in which there were no institutions such as the state; (2) that they entered into a contract or compact, also at some unknown time in the past, to abandon this state of nature and establish political society. As to the characteristics of the original state of nature, the reasons for giving it up, the way in which this giving-up was done, and the terms of the resulting social contract, there have been such wide differences of opinion that social-contract theorists have been found on all sides of issues involving the fundamental nature of the state.

Some theorists have imagined a state of nature in which men lived in innocence and virtue, not wronging one another but associating harmoniously together. Others have imagined the state of nature to have been a condition of brutish anarchy in which every man's hand was turned against every other. Some have conceived it neither as a condition of harmonious fellowship nor of savage discord, but of primitive backwardness and disorder.

The supposed reasons for giving up the state of nature have been equally diverse. Those to whom the state of nature was a prepolitical Garden of Eden have explained its discontinuance by the supposition that outside intruders broke it up or that a few nonconforming insiders rendered it impracticable, thus necessitating the formation of the social contract. Those who held the lawless-violence theory of the state of nature contended that it had to be superseded by a social contract in order to establish peace, order, and security for all. Those whose state of nature was one of uncivilized ignorance thought that the social contract was formed when men reached a stage of advancement and enlightenment which enabled them to perceive the advantages which would come from organized political institutions.

Equally wide were the differences of opinion as to the objects and terms of the social contract. One group of theorists thought that the chief object was to restore the state of nature as nearly as possible; another thought it was to terminate the state of nature and get as far away from it as possible; a third thought it was to preserve as much of the state of nature as was good and build thereon a social order that would be progressively better. Did the social contract deprive men of the liberties they had enjoyed in the state of nature? Yes, said some theorists—completely and absolutely. No, said others—only such liberties as were incompatible with the objects of the social contract were surrendered. Could men resume the liberties of the state of nature? Never, some theorists opined; but others insisted that nothing was irrevocably given up. Did the social contract bind rulers

as well as subjects? Some thought not, because in their view it was a contract by and between the subjects to place rulers over themselves. Others were just as sure that it was a contract between the subjects on one side and their rulers on the other, and hence was equally binding on both.

The trouble with all of these speculations was that none of them could be proved. None ever has been. If there ever was a prepolitical state of nature, we now know that it must have been at a period of human development when men were too primitive to be able to make a complex social contract or have any conception of the nature of political institutions. No formal social contract has ever been discovered, and no ancient record of any kind has ever been found which would show precisely when and how the state of nature was abandoned and political society established. There is abundant scientific evidence of gradual evolution from primitive to advanced social organization, but none that discloses a sharp and complete break with the past, climaxed by a definite contract to set up political institutions.

Nevertheless, contract theories, like divine-origin theories, have cast a lasting spell on the human mind. There could be no better example of the tremendous power of wishful thinking. Scientifically unsound though they are, they have represented, in one form or another, what multitudes of persons have thought ought to be true and have willed to believe actually must have been true. And such beliefs have been transformed into dynamic political creeds. Rivers of blood have been shed in struggles over the issue of whether the rightful powers of government must depend on the consent of the governed. One version of the contract theory strongly sustains the affirmative of this proposition; another version just as powerfully upholds the negative. Does every man have certain natural and inalienable rights? One version of the contract theory says yes, absolutely; another version says positively no. Men have gladly laid down their lives for both.

Force. Certain theorists have argued that sheer physical force has been the chief factor in social cohesion from the stage of the primitive hunting and camping group down to the present. Authority was established in the earliest groups, they think, by the best fighter. Such authority, increasingly organized and recognized, is said to have been the principal factor in the expansion of tiny primitive groups into larger units which ultimately came to be large-scale political societies. Other theorists attach less importance to force in the earlier stages of social evolution, but contend that it has been the chief instrument in the transition from tribal to political society. Military conquest, they insist, has been the principal means by which supreme political authority has been established over large populations and areas. Not only do they view the state as merely a creation of force;

they assert that it can be maintained only by force, and that force will always be the deciding element in the making of states.

Few political scientists accept the force theory in full, but it is generally recognized that there have been stages and occasions in the formation of many states, if not of all, when force has been an important agency of organization and authority. Force theories, though never arousing wide popular enthusiasm, have exerted much influence on the thinking and behavior of important men of public affairs. Not one, but several, of the best-known writers on political theory and practice have upheld the view that in public affairs might makes right, and some have gone so far as to extol violence both as a means of political achievement and as a mother of political virtues. These writers have not lacked readers, especially among men grasping for political power or striving to consolidate and hold it. To some kinds of revolutionists and to some kinds of rulers, force theories have made a strong appeal and have supplied a comforting guide to action.

Kinship. Many theorists have explained the origin of political society as an outgrowth of the primitive family. This was a favorite idea of the political thinkers of ancient Greece, who viewed the state as a greatly enlarged and exalted family. One form of kinship theory is the supposition that political societies began with the emergence of a strongly unified organization among the descendants of a common ancestor. The illustrious ancestor, as ruling head of the family, is supposed to have passed his authority on to his eldest son. From heir to heir it is alleged to have come on down through the generations. All members of the family rendered obedience to the one bearing the inherited authority of the common ancestor. In time the family multiplied, expanded, and tended to subdivide. Clans grew up and later tribes—all offshoots of the original family. Among these arose disputes about many things, extending even to the question of who was the rightful bearer of the ancestral authority. A stronger bond was needed than that of kinship alone, a stronger authority than that of patriarchal head. This bond was established by setting up a formal system of government with a head who was much more than a patriarch, who was in fact primarily a ruler. How this change was effected the theorists were not sure. It might have been by force, by agreement, or by some other method; but, whatever it was, it marked the beginning of the state.

Other kinship theories offered somewhat different explanations of the expansion of the family into a political system. Some held that the kinship bond was maintained through maternal rather than paternal lines, and some held that actual blood kinship was less significant than the fiction of kinship which was preserved by the adoption of outsiders as blood brothers. But all were agreed in the belief that it was a consciousness of kinship more

than the fact of common association in one locality which first caused men to form political societies.

Modern political scientists recognize that kinship, actual or supposed, was often a powerful factor in the formation of early political societies. Few believe that it was the sole factor, and some doubt that it was the principal one. It is clear none the less that the feeling of racial unity, which has been a powerful influence on political behavior, often derives from a belief, however vague, in underlying ties of blood kinship. When, in addition, there was a common language, a common religion, a common culture, and a common homeland, the formation of political society was made easy.

Economic forces. It has always been recognized that economic forces have had much to do with the rise of organized society. Political thinkers from Plato and Aristotle down to the present have pointed out that strong government tends to make property more secure and trade and industry easier to carry on. They have supposed, and have adduced much evidence to prove, that the desire to achieve those objects has been one of the leading motives inducing men to submit to political authority and to coöperate in the formation of state systems.

But some political theorists go much farther than this. They rank economic forces above all other causes of the growth of political institutions. Some have gone so far as to maintain that the state first came into being when men combined to create an instrumentality by which they could promote their own economic interests at the expense of others. Theorists of this persuasion have denounced the state as a conspiracy of the few against the many, and have sometimes advocated the overthrow and destruction of all established governments. In this exaggerated form, the doctrine of economic determinism is a distortion of the truth; but it has become, nevertheless, the cornerstone of radical political thought and behavior the world over.

Social evolution. The doctrine of evolution, as long accepted by all scientific men, teaches that living things are not the products of single and special acts of creation but of long and intricate processes of growth. In other words, living things are not made; they evolve. Conceiving human society to be a living thing, political theorists have not hesitated to explain the state as a product of social evolution. There have been many social evolution theories.

One of the best known is called the organismic theory. This theory assumes that political society is a living organism similar in many respects to plants and animals. Hence, it finds close analogies between political evolution and biological evolution, and adduces political parallels to the origin and growth of the plant and animal structures from the single cell

to complex organic systems. Superficially, the organismic theory is very plausible, but it has one fatal weakness. Human society is not the kind of living thing the organismic theorists have supposed it to be. It is not a structure made up of tangible persons and things, but one made up of intangible relationships resulting from and acting upon human behavior. Social relationships undoubtedly are an evolutionary growth, but not of a kind closely parallel to the growth of a physical organism.

Another evolutionary theory holds that psychology is the mother of all social and political systems. It strives to explain the origin and development of the state in terms of the growth of human mentality under certain conditioning social relationships. The time may come when the science of social psychology will be able to provide a full explanation of the origin of the state, but that time is not yet here. The science of social psychology is still in its infancy. It has been able, thus far, to explain some aspects of political evolution, but not the total process.

A third evolutionary theory, which might be called the historical, holds that political evolution is the handiwork of great historical forces which operate as universal causes and unfailingly shape the courses of social evolution. Such theories, though fascinating to many minds, have little scientific value, because the historical forces which are supposedly responsible for political evolution are abstractions.

Modern political scientists are evolutionists to a man, but they do not explain the origin of the state in terms of any single evolutionary force or process. They have come to realize that, although political society is a product of evolution, the factors involved are so numerous and complex that no simple explanation will do. In studying actual political evolution, they find not one, but many, possible ways in which the state could have, and conceivably did, come into being.

Scientific Knowledge of Political Origins

Primitive society. Our knowledge of prehistoric man does not reach back far enough to reveal a time when men did not live in groups and carry on vital activities through group relationships. We shall probably never find such a time. There is abundant evidence that man has always been a social animal and that his prehuman ancestors were likewise social animals. But man has not always been a political animal. Primitive society was most certainly organized society, but it was not politically organized. Somewhere along the line of development there came a transition from nonpolitical to political organization. If we can discover the causes of this transition and the manner in which it occurred, we should be able to make a fairly good guess as to how political institutions began and why they

have developed the special characteristics by which we now recognize them.

Historians, archaeologists, anthropologists, and ethnologists have given us a pretty clear picture of primitive society. We know that the primal unit of social organization was a kinship group. This group is commonly referred to as a family group, but it may not have been very much like the family as we now know it. It consisted of kinsmen by blood, by marriage, and perhaps by adoption, associated in relationships growing out of sex, child care, food supply, shelter, and defense. It may have been a patriarchal group, composed of a father and his wife or wives, and their offspring; or a matriarchal group, composed of a mother and her husband or husbands, and their offspring. It is possible, indeed, that it may have been an even more primal affair, in which the mother and father relationship was not fully understood and in which, therefore, sex relations and lines of kinship were not as yet organized in an orderly way.

Authority in primitive groups. All primitive groups involved the same basic relationships. They were relationships inspired by the deep-lying urges of sex, hunger, and protection. They were shared by persons having a strong feeling of kinship, who probably were more or less closely related by intermarriage and by blood. Group relationships grew into habits and usages. Kinfolk associated in such relationships hunted together, camped together, ate together, worked together, fought side by side. They spoke a common language or dialect; had common fears, superstitions, and beliefs; had common ideas and ways of doing things. They tended to form a unit distinct from other folk.

One invariable product of such group relationships was authority. Continuous association in the group relations fostered the growth of dominance-submission arrangements on a positional pattern. Mutual sympathy, self-interest, common understanding, and social habit are always factors producing coöperation. In primitive social groups they were highly important factors, but not always adequate ones. Perhaps they were good enough ordinarily, but when a crisis arose, when great perils had to be faced or great labors accomplished, they were neither definite enough nor imperative enough to insure the needed conformity of behavior. But when there were battles to be fought, certain individuals showed unusual bravery and proficiency; they were accepted and followed as leaders. Eventually they came to be regarded as war chiefs, as men occupying a special position in the group. In the same way men who showed special talent in conjuring the spirits or propitiating the gods achieved recognized positions as medicine men, magicians, and priests. Men of great age, whose memories went far back into the past and who were deeply versed in the traditions and lore of the group, were also accorded a special posi-

tion; they were recognized as elders, men of wisdom and counsel. Thus groups built up, step by step, various interrelated positions—the beginnings of an organization. Each position fell into a dominance-submission relationship with others, and eventually there was a system of authority. It was not always a highly unified and effective system, but it was better than none at all. It pivoted group ascendency on position rather than person, which is the essence of authority.

The transition to political society. Primitive groups, if they survived and prospered, tended always to multiply and expand. Families grew large and divided into sibs or clans. In this division the original family virtually disappeared. Each clan included a number of families more or less closely related by blood and claiming descent from a common ancestor. Between clans blood kinship was less certain and sometimes could scarcely be traced at all. But if they spoke a common or similar language and had like ideas and customs, they were prone to believe themselves kinsmen. While this belief did not prevent conflict and warfare between clans, it did very often provide a basis for the consolidation of clans into larger units called tribes. Authority was an important factor in such consolidations. When related clans united under a common war leader, settled disputes among themselves by accepting the judgments of a council of elders, or complied with religious rites prescribed by a high priest recognized by all, they not only acknowledged authority broader than that of the clan and superior to it, but took a step which tended to bring the clans more closely together and to keep them in this relationship.

The formation of tribes brought the matter of authority to the fore in a more definite way. Family authority, even clan authority, did not need to be formally marked and organized, but tribal authority often did. The tribe was larger; it involved more numerous and more complex relationships; and, at first, it did not have a body of universally understood customs and usages. Just how tribal authority first arose is not certain. Some students of the subject think that tribal authority grew up almost imperceptibly, and gradually came to be vested in a council of elders, family heads, or leading clansmen. Some think that it was imposed by a war chief, whose personal prowess and prestige enabled him to command respect and obedience among all of the clans. Others think that priests and medicine men, playing on the superstitions and fears of the clansmen, may have brought all under their sway.

In tribal society, authority underwent a great development. The affairs of the tribe were of greater magnitude and complexity than those of families and clans. Its wars were bigger wars; its flocks and fields were bigger and more numerous; its industrial activities were more extensive and more specialized; its trading operations were wider and more varied; its in-

ternal frictions were more frequent and more serious; its external dangers were more constant and more terrible. Not only was there more need in the tribe for strong regulatory authority; *there was a great deal more work for such authority to do*. Those wielding tribal authority had to give more time and attention to that authority as distinct from other social relationships. Often the authoritative persons had to occupy themselves so largely with the business of government that people tended to forget that they were originally and primarily herdsmen, husbandmen, warriors, or priests. People came to think of them primarily as governors—rulers. When members of the tribe became habituated to this state of affairs, came to accept the idea that the right to govern went along with certain tribal positions and was the chief business of the incumbents of those positions, the stage was fully set for the transition to political society.

In tribal society, as we have just noted, authority tends to be increasingly organized and specialized. When a large tribe settles down on a definite territory which it claims as its permanent homeland, this tendency is greatly heightened. Permanent propertied and commercial interests then arise. These not only require law and order, but want fixed and definite processes of government that will continue over long periods of time, so that economic processes may go on without disturbance. A permanent priesthood grows up; religion becomes institutionalized, and acquires vast temporal concernments, such as property, special privileges, and an established social order. A military class appears—men whose chief vocation is war, and who, by virtue of this, have achieved a position of special advantage in the existing social system. Among themselves the propertied and commercial interests, the priestly interests, and the military interests may come into conflict. Such conflicts usually terminate in one of three ways: (1) the tribe is torn to pieces by internal dissensions and struggles, and ultimately disappears as an independent social entity; (2) one interest triumphs over the others and organizes its power in such a way as to govern the whole tribe; (3) a compromise is reached, and the contending interests unite in setting up a governmental system acceptable to all.

Thus, with many natural forces conspiring to provide the impetus and furnish the means, it was inevitable that large and firmly established tribes with advancing cultures should develop the specialized and over-all governmental institutions characteristic of that form of society which we now call the state. The precise steps or processes by which tribal society was transformed into definitely political society probably were not the same in any two instances. No doubt military power often had a good deal to do with it; also economic power, priestly power, and other compelling social forces.

The Evolution of the Modern State

The early empires. The transition to statehood seems to have been accomplished first by the peoples dwelling in the valleys of the Nile, the Euphrates, the Ganges, the Yellow, and the Yangtze rivers. Conditions in these fertile and congenial river valleys were favorable to the early development of settled life and complex social organization. Tribal villages sprang up along the margins of these life-giving streams. Gradually a process of consolidation set in. Conquest, alliance, trade, and intermarriage brought many villages under a common authority and resulted in the establishment of kingdoms, which were in every essential respect states. Kingdom made war upon kingdom, resulting in the further consolidation of territory and the strengthening of political authority which produced the huge empires of ancient Egypt, Babylonia, Assyria, Persia, China, and India.

These empires were built by conquest and maintained by military power. Conquered peoples were reduced to slavery, and citizens, except for the favored classes, fared little better. The system of government was a despotic monarchy, but the authority of the monarch was sustained by the favored classes, such as the priesthood and the wealthy nobles, as well as by the weight of arms. The ruler was often both a warrior-king and a priest-king, and was sometimes regarded as the patriarchal head of the clans which made up the nobility. Under the monarch was a vast array of ministers, judges, tax collectors, and other functionaries who did his bidding. Some of these great empires lasted many centuries, and others fell into quick decay. Some were conquered and destroyed by rival empires, and others broke up on account of internal weaknesses and civil wars.

The city-state. Even while the great empires of Egypt, Babylonia, and Persia were dominant in the Mediterranean region, a new type of state organization was growing up, particularly in the coastal areas. The great empires had never been able to establish themselves as firmly there as in the inland regions. Conditions along the seashores were more favorable to the formation of city-states, and also made it hard for the great empires to gain and hold conquests in those sections. Tribal villages grew up in advantageous locations, just as they had in the great river valleys; and villages were consolidated into kingdoms in the same way. There the parallel ended. Further consolidation to form great empires was prevented by geographical barriers. The shores of the Mediterranean were broken by forbidding mountain ranges and almost impassable deserts. Thousands of islands dotted the sea, and deep gulfs and bays cut off large sections from direct contact with the rest of the world. City-kingdoms growing up

on islands, in isolated valleys, or on secluded harbors could not easily expand their land dominions. What they could and did do was to grow into strong and independent city-states, and many that were located on the seashores became powerful commercial and maritime states. Athens, Sparta, Corinth, Syracuse, Tyre, Sidon, Carthage, and early Rome, to mention only a few, played important parts in history and developed remarkable political institutions.

Most of the city-states began with a monarchical form of government, and many retained that form to the end. Some, however, were transformed into republics, and a few became democracies. It was in the city-state era that men first became politically conscious to a high degree, and began to experiment with different schemes of government. The old empires became gradually enfeebled, and for a long time the city-state was the prevalent form of political organization throughout the Mediterranean region.

The Macedonian and Roman empires. The conquests of Philip, king of the city-state of Macedon, and of his son Alexander the Great, created a vast empire which put an end to the city era in the eastern Mediterranean. Alexander's empire did not hold together long after his death, and the end was hastened by the emergence of the Roman Empire in the west. Rome began as a city-state on the banks of the Tiber. Technically she remained a city-state to the end of her career. She extended her dominion by conquest until she ultimately became mistress not only of the whole Mediterranean area but also of large portions of Asia, Africa, and Europe. None of the conquered peoples was ever politically consolidated with Rome. They were ruled by Rome but they were never politically a part of Rome. Supreme political authority resided in Rome, and could be exercised only by processes originating in Rome and duly sanctioned by Roman citizens actually in Rome. The earliest system of government in Rome was a monarchy. This was superseded by a republican form of government, and the republic was gradually transformed into a military dictatorship with a ruler called an emperor or *imperator*, a term which in its early meaning signified commander-in-chief.

Feudal Europe. In 364 A. D., the Roman Empire was divided into an Eastern Empire with its capital at Byzantium (now Istanbul) and a Western Empire with its capital at Rome. The Eastern Empire survived until 1453, but the Western Empire fell under the attacks of the barbarians in 476. The Eastern Empire, though it lasted a long time, was unable to maintain throughout its vast dominions a truly Roman vigor of organization and administration, and local areas came to be largely self-governing. The collapse of the Western Empire left nothing but local government to take its place. The period which followed is usually known

as the feudal period, because it was widely characterized by social organization based on a system of land tenure which originated in a special form of contract known as a feud or fief. In the anarchy following the fall of Rome, small landholders found themselves exposed to all sorts of marauders, and there was no strong government to furnish protection and secure justice for them. Their only recourse was to place themselves under the protection of a neighboring landlord whose greater wealth had enabled him to build a strong castle and employ men to help defend it.

The small owner would transfer his land to the large owner and then receive it back under certain terms and conditions. Thus the large owner became the lord and the small owner his vassal. The lord was bound to aid and protect the vassal, and the vassal in turn was bound to render certain services and pay certain dues to the lord. This system grew to such proportions that no general authority could exist. Multitudes of vassals owed allegiance to multitudes of local lords, but not to any supreme overlord or central political authority. The Roman Catholic Church claimed universal authority in spiritual matters, and, as a consequence of that spiritual authority, the right to exercise jurisdiction over feudal rulers in some particulars. But the Church was never able to substitute itself for the temporal governments and completely reëstablish universal rule of Roman times.

The national state. The feudal period was brought to an end by a new process of political consolidation and state building. Several forces combined to render this possible. Exceptionally able and aggressive feudal lords succeeded in making themselves masters (in the feudal sense) of vast territories. They conquered other lords and assumed their feudal rights, inherited properties and feudal rights from both paternal and maternal lines, traded services or possessions for enlarged feudal domains, married heiresses, and the like. A few became so potent that they were able to make themselves kings, though at first they were kings more in the sense of being at the top of the feudal hierarchy than in the sense of being political rulers. However, some of the populations brought under the suzerainty of such kings were developing a common language, a common culture, common interests in commerce and industry, and were beginning to feel the desire for a common government.

Feudal kings in the regions where such populations existed found that the people wanted unity, independence, and community of life so keenly that they would submit to the king as supreme political ruler as well as supreme feudal overlord. They felt themselves to be one people; the territory they inhabited was their fatherland. Land and people together constituted a nation—a society produced by associations linked with a definite homeland, similar ways of life, a community of interests, a feeling of

separateness from other lands and peoples, and a sharing of common beliefs, faiths, and hopes. The establishment of a common government in such a society, independent of all external political authority, resulted in what we now call the national state, and in a political development which we call nationalism.

There had never been anything exactly like the national state in the previous political history of mankind. The city-state of former times had possessed some of the qualities of the national state, but not all. The city-state was essentially a local political society. Some city-states acquired large empires beyond their own narrow boundaries, but not by organizing unified political institutions for vast areas and populations, not by merging widely scattered multitudes of people together as a single entity under one government. The largest empire of antiquity was that of Rome. There was Roman government in Rome, and there only. Elsewhere there was government subject to Rome and largely conducted by Romans, but it was no part of the government of Rome, nor was there any government common to the subject portions of the Empire. In the national state, by contrast, there was one people and one government for all, regardless of territorial size and number of inhabitants. Not only that; the people of the national state were also highly conscious of their social and political unity, and were attached to their state by a spirit of passionate loyalty which we call patriotism. Such flaming devotion to a political society as such was very uncommon prior to the advent of the national state.

The first national states to emerge were the kingdoms of England, France, and Spain. Others quickly followed. Indeed, the political history of the world during the last five hundred years is very largely a story of the rise of national states; their expansion, conflicts, wars, and various transformations. The first national states had a monarchical system of government, the king being both the feudal and the political head of the state. In most of these the king was able to consolidate his power and rule as an almost absolute despot. Often he claimed to rule by divine right. The eighteenth and nineteenth centuries witnessed a succession of revolutionary upheavals. Kings, in most national states, were shorn of their despotic powers and in some instances lost their thrones. National states tended to become either constitutional monarchies or republics; many became thoroughly democratic. But all continued to be national states, and the tide of nationalism never ran higher than in the frequently recurrent periods of revolution.

By nationalism we mean the state of mind which causes a body of people to wish to have a separate and distinct social identity, and to strive for the realization of that desire through the formation of an independent politi-

cal society. During the past two hundred years the spread of nationalism has far exceeded the actual growth of national states. There have been scores of national movements, but only a few of these have culminated in the formation of independent national states. For the force of nationalism, though unabated, has been met head-on by the equally potent force of national imperialism.

The struggles of national empires. National ambitions and national rivalries have made the national-state era one of almost continuous international war. National states have attacked one another for many reasons, but principally in order to gain or preserve advantages in the endless struggle for preëminence. Losers in such struggles often yielded territory and population to the victor, and sometimes lost their political independence altogether. Aggressive and powerful national states were able to extend their wealth and dominions, and, as they grew in might, began to feel the ancient urge to imperialism. The discovery of America, the opening of new routes to the Orient, and the exploration of Africa provided unparalleled opportunities for empire building. Inevitably there was a mad race for colonies, possessions, and dependencies. Spain, France, England, and the Netherlands were first in the field and came off with most of the loot. These states became the head of great empires. None was able to hold all of its original plunder, but all save Spain held enough to remain in the empire class. The United States, after the separation from England, was by no means slow to take its place in the select circle. In less than a century and a half she had not only spread clear across the continent but had acquired many overseas possessions. Russia, though slow to start, had the advantage of facing few obstacles to expansion eastward. By the end of the nineteenth century she had pushed through Siberia to the Pacific. Germany, Italy, and Japan did not achieve statehood until the latter half of the nineteenth century—much too late for the really fat pickings. But all these were national states of imperial might and ambition, and would never be satisfied with less than full imperial stature.

The struggle for empire was much intensified by the industrial revolution of the nineteenth and twentieth centuries. Powerful economic motives were added to already powerful political motives. It became a prevalent political doctrine that natural resources and markets were essential requisites of national independence. The land surface of the globe was now divided among some fifty national states. Eight of these, by reason of their magnitude, wealth, and military power, were said to be Great Powers. The remainder, though independent national states, were of minor rank. The Great Powers dominated the world, and the little fellows got along as best they could. Of the eight Great Powers, four (Great

Britain, France, Russia, and the United States) had built up huge empires. The other four (Germany, Austria-Hungary, Italy, and Japan) were truly Great Powers, but had not fully satisfied their imperial ambitions.

The rivalry of the Great Powers in Europe was intense, and resulted in a system of treaties and diplomatic understandings whereby Great Britain, France, and Russia were allied on one side and Germany, Austria-Hungary, and Italy on the other. This alignment was thought to have brought about a balance of power. The aggressive tendencies of each combination were supposedly neutralized by the other. It did not work out that way at all. In 1914, Austria-Hungary made demands on Serbia which that small state refused to meet. Russia backed Serbia in this resistance, and trouble between Austria-Hungary and Russia then developed. Germany backed Austria-Hungary, and France, in turn, backed Russia. Mobilizations were ordered, and, before there was any realization of what it would ultimately mean, the First World War was on. Great Britain soon went in on the side of Russia and France. Italy, however, refused to carry out her treaty obligations. After holding off for more than a year, she decided there was more to gain by going along with the British, French, and Russians than by enlisting in the aid of her erstwhile allies. The United States and Japan were not directly committed to the balance-of-power combinations, but their interests were so deeply affected by the war that both eventually were drawn in, on the so-called Allied side.

This was the first general war involving all of the Great Powers of Europe, Asia, and America. It was a war of many issues, but its fundamental cause was national imperialism. Every one of the Great Powers entered the war for imperialistic reasons. The reasons were not in any two cases identical or closely similar; but in every single case they were reasons having to do with vital interests which would not have been vital at all if the war-entering state had not been a national empire with world-wide concerns. We are not discussing motives, but causes. The entrance of the United States, in 1917, illustrates the difference very clearly. The immediate cause of our declaration of war upon Germany was a clash between our government and the German government on the issue of the freedom of the seas. But had both countries not been national empires with so much at stake on that issue that their continued existence as Great Powers depended (in their judgment) on the outcome, their differences regarding freedom of the seas could have been settled without war. The motives behind the policies of the two governments probably were very different, but it is unlikely that these opposing motives would have culminated in war, had it not been for the factor of national imperialism.

The rock-bottom question at issue in that first free-for-all brawl of the Great Powers was whether there was room in the world for eight na-

tional empires as gigantic, as powerful, as ambitious, and as unrestrained by law as those eight were. The end of the war found that issue as far from settlement as it had been at the beginning. The peace treaties wiped out one of the Great Powers (Austria-Hungary) and redistributed her territory. They stripped Germany of all of her overseas possessions and of large slices of her European dominions. Italy and Japan expected much larger rewards than they received for their part in the defeat of the Central Powers. Russia, owing to the strains of her war efforts, suffered a violent internal revolution, and, while in a helpless condition, was shorn of some of her most valued provinces. Great Britain and France took the lion's share of the spoils, and the United States recoiled from the whole business, gaining nothing and refusing to have any direct part in carrying out either the treaty arrangements or the appended League of Nations.

In the postwar era the rivalries of the Great Powers became more envenomed than before and their imperial ambitions more irreconcilable. Germany became increasingly determined, at any cost, to recover her position as a great national empire; Russia, Italy, and Japan, believing they had been betrayed, were deeply disgruntled; Great Britain and France could not coöperate effectively; and the United States held aloof. The stage was set for a new alignment, and, possibly, a new struggle between the Great Powers. It was not long in coming. The revival of German military might under the leadership of Adolf Hitler enabled that country to take the lead in the formation of new combination called the Rome-Berlin-Tokio Axis. Under this alliance Italy, Germany, and Japan (largely under German leadership) set out to realize to the full their imperial ambitions. Great Britain and France made feverish but futile attempts to check the Axis by diplomatic means. The German move against Poland in September, 1939, precipitated a crisis in which Great Britain and France felt that further yielding on their part would leave the Axis (and Germany in particular) in a position to dictate the terms on which they might continue as Great Powers. Germany declared war on Poland on September 1, and two days later Great Britain and France declared war on Germany. Thus began the Second World War.

As in the First, so in the Second World War, the paramount issue was whether there was room in the world for the rival states to exist as independent, sovereign national empires, each seeking its own ends and forging its own destiny regardless of the consequences to the rest of mankind. The War ended in the total defeat of the Axis powers. The victors imposed terms designed to reduce Germany, Italy, and Japan to the status of second-rate powers for many years to come, if not forever. It was the aim to extinguish their ability to make aggressive war. In 1945, the states which had joined hands against the Axis formed an organization known

as the United Nations. The stated purpose of this organization was to unite the strength of all peace-loving states in promoting and maintaining international peace and security. However, in order to make sure of the adhesion of the Great Powers, it was made possible for any one of the five permanent members of the Security Council to impose an absolute veto. This meant that the United Nations could act unitedly only when the Great Powers were unanimous. It soon appeared that the Great Powers were not going to be unanimous about many things that were important to the peace of the world. Between Russia on the one hand and the United States and Great Britain on the other, there developed a sharp cleavage on many vital questions. This cleavage appeared not only in the United Nations but in the special conferences to work out the final terms of the peace settlement.

By World War II the number of Great Powers had been cut down to not more than three, the Soviet Union, the United States, and the British Empire. But these three apparently were no more able to compose their differences than the eight whose rivalries and machinations had precipitated World War I. The central question of both world wars was still unanswered. Is there room enough in the world for any state to be fully sovereign and independent? If that question cannot be answered without resort to war, it is not sounding a false alarm to predict a third world war.

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CHAPTER 3

POLITICAL INSTITUTIONS

The state, as we have seen, is an independent political society with an organized system of government which functions in that society as a supreme regulator of social relationships. No two states are, or ever have been, exactly alike. Each has developed its own institutions of government. Upon comparing the political institutions of different states, one finds both similarities and contrasts of such number and variety that scientific classification is rendered very difficult. It does not greatly aid the understanding, for example, to classify Great Britain, Italy, and Japan as monarchies. All three, it is true, have monarchical institutions, which are in some respects quite similar; but they likewise have other institutions which are radically dissimilar. The same difficulty arises in classifying the United States, the Union of Soviet Socialist Republics, and the Swiss Confederation as federal republics. Though all three have federal and republican institutions, they also possess other institutions which mark them as separate species.

In order to study and compare political institutions intelligently, it is necessary to classify them according to type; but such classifications are dangerously misleading if they are not both accurate and complete. The trouble with the illustrative classifications in the preceding paragraph is that they are only partial classifications, and are not totally accurate even as such. It is not always easy to work out a fully accurate and complete classification for every system of political institutions in the world, but there are, fortunately, three universal bases of comparison which can be used to achieve approximately accurate classifications.

Close comparative study of political institutions has shown there are three fundamental ways in which they commonly vary: (1) in respect to the headship of the state, (2) in respect to the possession and distribution of governing authority, and (3) in respect to organic structure and operation. By examining and understanding the principal forms of variation under each of these heads, it is possible to find descriptive terms by means of which satisfactory classifications may be made.

Variations as to the Headship of the State

Every state has an official head. It may be one person or more than one. The official head may be a power-wielding head or merely a nominal,

and largely symbolical, head. And the official head may be hereditary, elective, or chosen by some indirect, but nonhereditary, process. All these matters are determined by the basic law and usage of the state.

The monarchical head. When the headship of the state is hereditary, the state is said to be a monarchy. This is true regardless of any other characteristics which the head of the state may or may not possess. There have been governments in the history of mankind with elected kings, but such kings were not fully and truly monarchs. Only when the headship of the state descends by legitimate succession in one family or family line is the government properly entitled to be called a monarchy. The title of the monarch makes no difference, be it king, prince, archduke, duke, emperor, czar, kaiser, sultan, mikado, shah, or any of their feminine equivalents. It is hereditary headship which distinguishes a monarchy, and nothing else.

The republican head. When the headship of the state is determined by some other method than heredity, the government is called a republic. Many different ways of selecting the head of the state have been used under republican government. Election by direct vote of the people, election by special classes of people, choice by legislative assemblies, appointment by electoral committees or colleges, selection by political parties, and designation by lot are some of the modes that have been employed. Republican heads of state have borne as many different titles as have monarchs. The title most widely used today is president—but governor, protector, doge, chancellor, consul, and director are examples of others that have been employed. There have been instances of republican heads called kings, though they were not such in fact.

The imperial title. Both monarchies and republics have styled themselves empires, and are equally entitled to use that term. Some emperors have been monarchs and some have been republican heads of state. As used today, the title of empire does not refer to the headship of the state at all, but to the magnitude and scope of the state's dominions and its suzerainty over subject countries and peoples.

Real and nominal heads. The official head of the state may also be the real head, exercising great powers in his own right. This is true of the President of the United States and of the presidents of most of the other American republics. On the other hand, the official head may have very few actual powers, though all official acts are done in his name and formally under his authority, as is now the case with the King of England and several other monarchs.

Single and plural heads. Usually the official head of state is a single individual, but there are governments which vest the headship in a committee, board, or council. There have been some instances of legislative as-

semblies designated as the official head of the state, but this arrangement is unusual.

Variations as to the Possession and Distribution of Authority

Political institutions have always been marked by conspicuous variations as to the possession and distribution of governing power. This variation is a much more significant basis of classification than according to the official headship of the state. The disposition of power determines what the government will be in reality, regardless of form. Power arrangements are usually of three kinds: (1) as between individuals or classes, (2) as between general and local areas, and (3) as to control and responsibility.

Between individuals or classes. When ruling power is centered in one person the government is technically called a monocracy, meaning the rule of one. Monocracy and monarchy are not the same thing. An absolute monarch would be a monocrat, but a constitutional monarch would not. A dictator would be a monocrat, but not a monarch. Monocracies may be of different sorts. A monocracy established by usurpation or carried on by illegal methods is frequently characterized as a tyranny, whereas one of unquestioned legitimacy is said to be a despotism. A dictatorship is, of course, a monocracy, and it may be either tyrannical or despotic. In former times a dictatorship was looked upon as a purely temporary arrangement to meet extraordinary conditions, but modern dictatorships are often designed to be permanent. The feature which chiefly distinguishes them from other monocracies is the fact that the dictator is a party chieftain as well as the absolute head of the government. It is obvious that a monocracy may be either a monarchy or a republic.

When ruling power is centered in a few favored individuals or classes, the government is known as an oligarchy, meaning a rule by the few. An oligarchy of the nobility is usually called an aristocracy; an oligarchy of the rich is termed a plutocracy; an oligarchy of elder persons is known as a gerontocracy; an oligarchy of professional officeholders is styled a bureaucracy; an oligarchy of priests, clergymen, or other religious leaders is said to be a theocracy; an oligarchy of military chieftains is technically a praetorianism. An oligarchy may be either a monarchy or a republic.

When the ruling power is vested in the people as a whole, the government is a democracy. Democratic government has taken various forms. There have been democratic monarchies as well as democratic republics, democracies with a single chief of state and with a plural head, and democracies with direct popular control and with indirect or representative control.

Between general and local areas. When the full power to exercise

political authority over the whole of a state's territorial dominions is vested in one central government at the national capital, the government is said to be unitary; and, when it is divided between a central government and regional or local governments, the government is said to be federal.

Unitary governments of necessity have many regional and local subdivisions, but all of these derive authority from grants by the central government and have only such powers as the central government permits them to enjoy. The states or provinces of a federal government, on the other hand, derive their power from the same source as the central government. To the central government are assigned certain powers of general importance and to the states or provinces other powers which are not deemed to be of general importance. This division of power is made by the national constitution, which provides that each shall be independent of the other and paramount in its own sphere.

Both past and contemporary history supply many examples of unitary and federal government. The United Kingdom of Great Britain and Northern Ireland, the French Republic, the Kingdom of Italy, and the Japanese Empire are unitary; whereas the United States of America, the Union of Soviet Socialist Republics, and the Swiss Confederation are federal. It is important to note, however, that in the foregoing instances, as in all other unitary or federal systems, the particular unitary or federal arrangements are never exactly the same in one country as in another.

Many theoretical arguments have been employed to show the superiority of unitary over federal government, or vice versa. Many of these arguments have merit when confined to particular cases, but are certainly not valid when extended to all circumstances and situations. The fact is that the choice between the two has always been dictated, in actual political life, by the necessities and advantages found in the special situation to be met. Some countries have shifted from one to the other, and always for immediately practical reasons. It was not theory but practical politics which transformed the unitary government of Czarist Russia into the federal government of Soviet Russia, or the federal government of pre-Nazi Germany into the unitary government of Germany under Hitler. Diverse populations, especially in large areas, often find it easier to unite under a federal than a unitary government, but there are instances to the contrary. Local differentiation in public policies and administration is as a rule somewhat more readily and happily accomplished under federal than unitary government, but here again there are instances to the contrary. Unitary government is sometimes more vigorous and better coordinated in operation, but not invariably so. Unitary government tends perhaps to foster national unity more easily, but there have been cases in which it seemed to have the opposite effect.

Control and responsibility. When the persons wielding supreme authority in a state are subject to no legal control other than their own will and are legally responsible to themselves alone, the government is said to be an autocracy or an absolute government. Such a government may be monarchical or republican, monocratic or oligarchic, unitary or federal. It is conceivable in principle, though extremely improbable in fact, that government by a majority in a democracy could be autocratic. Absolute government has existed in all ages of human history, and there are conspicuous examples of it in the modern world.

The opposite of autocratic government is constitutional government. A constitution is a body of basic and universally accepted rules and laws which regulate the possession and exercise of political authority. Such rules and laws may be embodied in a written document, or in a series of such documents; or they may be embodied in unwritten, but long and habitually observed, usages and practices. The constitution determines who shall have political authority, how it shall be apportioned, how it shall be exercised, how extensive it shall be, what rights subjects shall have against their rulers, how rulers shall obtain their positions and how long and under what conditions they shall remain in office, and, most important of all, by whom and by what processes rulers are to be held accountable for their acts. Supreme and final authority is in the constitution, and not in any ruler or set of rulers. Hence, under constitutional government, the ruler or rulers, so long as they follow the constitution, cannot be autocratic. Yet it is a fact that constitutional rulers may, and often do, exercise just as much power as any autocrat. The difference is that their power is provisional, not absolute.

Constitutional government is of two major types—direct and representative. Some constitutions provide for lawmaking by direct action of the people, and for the choice and removal of public officials by direct vote of the people. Most constitutions, however, provide for representative government or for government that is mainly representative. Direct government on a large scale is impracticable, but representative government is adaptable to the most populous and extensive political societies on earth. Under representative government, the rightful holders of supreme political authority (the whole people, the members of the ruling oligarchy, or whoever they may be) choose agents or representatives to carry on the government in their behalf and subject to their control. Some of these agents usually are chosen directly, but a great many are chosen indirectly by some process of appointment performed in whole or in part by those who have been chosen directly. The indirect agents are nevertheless just as truly representatives, under the constitution, as those directly chosen. They are responsible as agents and are subject to control as such.

The overthrow of autocratic government has almost always meant the establishment of constitutional government with representative institutions of some sort. Not always democratic institutions, however, for democratic government is only one variety of representative government. A government of the few may be just as representative (of the governing classes) as a government of the many. It is a mistake to think, as some apparently do, that a governmental system is unrepresentative unless all the people are represented. Under those circumstances a government may not be democratically representative; but, if all the people who under the constitution have a legal right to share in the exercise of political authority are represented, the government is fully representative in the constitutional sense.

Variations in Organic Structure and Operation

Every observer is aware that political institutions vary greatly in organic structure and operation. These variations are so prominent that it is easier to classify political institutions organically than in any other way.

Organic specialization and adjustment. In the earliest systems of government there were few, if any, specialized organs of government. All power was centered in one person or group, and all of the activities of government were directly carried on by those persons. The king or the ruling oligarchy made laws and enforced them, interpreted laws and administered justice. This arrangement was possible in small-scale political society, but not when states grew to gigantic proportions in area and population. The time came when authority had to be divided and delegated, and it was natural to divide and delegate according to the special characteristics of the work to be done. Thus, without any definite intention that such organs should be created, there grew up parts of the governmental machine which were devoted chiefly to lawmaking, others to administration and management, and still others to the adjudication of personal rights and duties under the law. Because of this specialization, there was a tendency for the parts devoted to specialized work to take the form of separate units of organization. When this stage was reached, the specialized parts were ready to be shaped into distinct organs of government, each with functions all its own. Then, of necessity, came the question of how they would work together in actual operation. This question was answered, in the main, in two basic ways.

One answer was that the specialized organs should be closely intermeshed, even overlapping, parts of a single mechanism. This scheme resulted in what is known as organic unity. In such a plan there are specialized processes of legislation, administration, and justice and usually

specialized organs for carrying them on, but each organ exists wholly or in part within one or more of the others, like intersecting circles. One man or one body of men, forming a connecting bond between the different organs, may hold official positions in each and may act in one capacity as legislators, in another as administrators, and in a third perhaps as judges. One organ always has controlling power over the others and keeps them in harmony with it. Good examples of organic unity are found in the parliamentary, the soviet, and the totalitarian systems of government which are described in the next chapter.

A second answer to the question of organic structure and relationships was that the major organs of legislation, administration, and justice should be separately established, that each should be independent of and coordinate with every other, and that no individual or body of individuals should hold official positions in more than one organ at the same time. This scheme is known as organic separation or the separation of powers. Each organ functions alone in its own sphere of specialization, is not subject to control by any other, and enjoys certain powers by means of which it may check the others and thus preserve the balance between them. The government of the United States furnishes the world's most eminent example of organic separation. Most of the republics of Latin America have similar systems.

Legislative organization. The position of the legislative organ in the governmental system may be to a large extent determined by whether the principle of organic unity or that of organic separation has been followed. Under organic unity the legislature may be the paramount organ of government or it may be little more than a "stooge" for the executive head of the state. Under organic separation the legislature is a legally independent and coördinate branch of the government, able always, if it chooses, to assert and exercise the legislative power. Various examples of paramount, subordinate, and coördinate legislature will be encountered in the next chapter, which deals with contemporary governmental mechanisms.

The internal structure of legislatures is subject also to a good many variations. The two-house, or bicameral, legislature is common in national governments, though single-chambered, or unicameral, legislatures are not unknown. The unicameral type is more often found, however, in the regional and local subdivisions of national governments. In a bicameral legislature, the two houses may be of equal rank and power, or one may enjoy some legal or political advantages over the other. One is usually styled the upper and the other the lower house, but this distinction is not necessarily indicative of rank and power. There are governments in which the lower house is much more powerful than the upper. The basis of rep-

resentation in a unicameral legislature may be the same throughout, or the membership may be divided into classes or groups representing different sorts of interests or constituencies.

Executive organization. The position of the executive is determined by much the same factors as that of the legislature. Under the separation of powers, the executive is independent and coördinate, free to exercise whatever powers are allowed by the constitution, though subject always to certain legislative and judicial checks. If the government follows the principle of organic unity, the executive may be the dominant organ of government, as in Nazi Germany; the leading though legislatively controlled organ, as in parliamentary England; or the faithful agent of the legislature, as in modern Switzerland.

The chief executive may be a single individual, a board, a commission, or a council. The single is more common than the plural type, but the plural form is found in some of the major countries of the world. Executive organization under the chief may consist of departments and subunits closely knit together as a hierarchy under the chief executive, or it may consist of loosely connected or entirely disconnected agencies not composing a single organization. Both types have been common in the past and are still to be found.

Judicial organization. The position of the judiciary varies almost as widely as that of the legislative and executive organs of government. Under the principle of organic unity, the judiciary may be reduced to a status of servile compliance with the behests of one or both of the other branches of government, or it may occupy a position of independence in strictly legal, but not in political, matters. Good examples of judicial servility are found in Fascist Italy and Nazi Germany, where the courts merely echo the mandates of the supreme executive. The parliamentary system of England furnishes an excellent example of courts enjoying large independence in dealing with ordinary private litigation but obliged to follow the will of the legislative branch in decisions involving political issues. Under organic separation, of course, the judiciary is an independent and coördinate branch of the government in all matters which come before it. This independence has enabled the judiciary in the United States, for instance, to assert and maintain the right to declare laws unconstitutional. Some have thought that American courts are thus placed in a position of supremacy over the other branches of government, but supremacy is not the right word to describe the situation of American courts accurately. They have an absolute veto and so are able to exert a negative control over the other organs of government, but they possess no means of continued affirmative control. They can thwart the other organs but cannot hold sway over them.

The judicial system is commonly organized on the plan of an ascending series of courts with a tribunal of last appeal at the top. Part of this machinery may be incorporated with other organs of government, as in Great Britain where the House of Lords (functioning through a judicial committee) serves as the supreme court of appeals. Generally, however, the courts are all separately organized, and under the principle of separation of powers this plan is an absolute requirement. The judges of the courts may be appointed by the executive, appointed by the executive and legislature jointly, elected by the legislature, or elected by the people. Various combinations of these four basic methods of choice are also to be found.

Electoral processes. Governmental systems vary widely in the use of electoral processes. Autocratic governments often dispense with electoral processes altogether, but sometimes resort to them as a means of giving apparent popular sanction to the rule of an autocrat. This has been the practice in Nazi Germany and Soviet Russia, where the people have not only been allowed, but compelled, to vote for the regime in power. Constitutional governments always employ electoral processes to some extent, and those of a democratic character place great reliance upon them. The constitution usually determines, or fixes the mode by which it shall be determined, who may vote, for what purposes elections shall be used, and how they shall be regulated and conducted.

Elections are most largely used to choose members of legislative bodies. Sometimes the members of both houses are elected by popular vote, and sometimes the members of one house only. Popular election of the chief executive is the rule in governments following the principle of organic separation, but not in other systems. Popular election of lesser executives is prevalent nowhere save in the governmental subdivisions of the United States. Under most systems of government judges are not chosen by direct popular vote, but exceptions to this rule are found in the United States and a few other countries. Elections are largely used in a few governmental systems to remove officials from office, enact laws independently of the legislature, veto acts of the legislature, and pass on proposed changes in the constitution.

Typical Systems of Government

In the next chapter we are to examine the characteristic features of the major systems of government now operating in the world. This task will be made much easier if we remember that each of these major types, and likewise the special forms of each major type as found in this or that particular country, are nothing more than varying combinations of the basic institutions which have been explained in the present chapter. These basic institutions have taken form in political society all over the world. Not

all of them are to be found in a single political society, but all are found in more than one political society. All systems of government are monarchical or republican; monocratic, oligarchic, or democratic; autocratic or constitutional; unitary or federal; organically unified or organically divided. These institutions provide the basic materials which go into the structure of every system of government. If there are other building materials, more basic than these, they have not yet been discovered.

Any system of government can be given an accurate description in the terms of its basic institutions. The United States, for example, is a democratic, constitutional, federal, organically divided, republic; Great Britain is a democratic, constitutional, unitary, organically unified, monarchy; Switzerland is a democratic, constitutional, federal, organically unified, republic. We could classify every government on earth in such terms. Intelligent comparison of the political systems of different countries requires such classifications, but it also requires something more. That something more is a knowledge of how, in each country, a particular combination of basic institutions has resulted in a vast and complicated mechanism of government with characteristics all its own.

Students of comparative government deal not only with basic institutions but with every minute detail of different systems of government. These, it has been found, fall into certain general patterns which are typical of all governmental mechanisms embodying substantially the same combination of basic institutions. One pattern constitutes the parliamentary type of government, another the check-and-balance type, a third the soviet type, a fourth the national-leader type, and so on. Governments of the same general type always exhibit many differences of detail, but their general characteristics are so similar and so significant that a fairly good comprehension of the governmental systems of the world may be acquired by a brief survey of major types.

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CHAPTER 4

CONTEMPORARY POLITICAL INSTITUTIONS

The Parliamentary Type

The parliamentary system of government originated in England. It came into being after the Revolution of 1688, which ended a struggle of more than four hundred years between the Crown and Parliament. At that time it was settled that the King had no constitutional authority to govern independently of Parliament. No longer could he claim the right to make laws without the approval of Parliament, and he was obliged to consent to all laws enacted by Parliament. No longer could he veto acts of Parliament, or overrule a minister acting under the sanction of Parliament. No longer could he choose his own ministers, but had to appoint ministers agreeable and responsible to Parliament. No longer could he exercise any of the great prerogatives of sovereignty, such as the power of pardon, without the assent of Parliament. This meant that the paramount authority of the state was lodged exclusively and indivisibly in Parliament.

But England remained a monarchy, and the King was still the official head of the state. He reigned, it was said, but did not govern. Everything had to be authorized by Parliament and done by ministers responsible to Parliament, but everything so authorized and done was authorized and done in the name of the King as the official head of the state. The legislative power was vested in "the King in Parliament"; the ministers were "His Majesty's Ministers"; but His Majesty did the bidding of Parliament. Out of this curious mingling of fact and fiction grew forms of organization and modes of procedure which shaped themselves into a distinct pattern that the world now recognizes as the parliamentary type of government.

Other European countries, upon establishing constitutional government, found the parliamentary type apparently well suited to their needs. Though not slavishly copied, the parliamentary system in its basic features was widely adopted. At one time parliamentary government, or something resembling it, existed in all of the major states of Europe save Russia and in most of the minor states. Parliamentary government had a brief spurt of increased popularity in the years immediately following the

First World War, but this popularity was followed by a reaction which resulted in the overthrow or voluntary abandonment of parliamentary institutions in Italy, Spain, Germany, France, Belgium, Norway, the Netherlands, and several other European countries. Great Britain and the self-governing British Dominions were left as the leading exemplars of parliamentary government.

Principal characteristics. The basic features which distinguish parliamentary government from other types are as follows:

1. Supreme power in all affairs is placed in the legislative branch (or parliament), and all organs and agencies of government are subject to its authority and control.

2. The government is carried on in the name of an official, but nominal, chief of state, who may be a king if the state is a monarchy or a president if it is a republic.

3. The executive machinery of the government is united at the top with the legislative, this being achieved by means of a group of ministers who are regular members of the legislature and at the same time heads of the principal executive departments.

4. The ministers are elected members of the legislature like all other members and are named as ministers by the chief of state, who is obliged to select his ministers from the membership of the legislature and must appoint only those who are acceptable to the majority party or party coalition in the legislature.

5. The ministry forms, or there is formed within the ministry, a cabinet headed by a prime minister or premier.

6. The prime minister and cabinet function as chief executive and executive council on the administrative side and as party chieftains and parliamentary leaders on the legislative side.

7. The prime minister and cabinet hold their ministerial and cabinet posts at the pleasure of a majority of one or both branches of the legislature, and must resign such posts upon losing the support of the legislative majority. In this way they are held responsible to the legislature.

8. The judiciary may be organized partly or wholly in conjunction with the legislature, or may be independently organized. The judges, though not politically responsible to the legislature like the ministers, are subject to legislative control and may not overthrow an act of the legislature or the ministry.

How it works. The easiest way to understand these basic features is to view them in actual operation. Let us start, therefore, with the election of the legislature or parliament, which is naturally the first step in the functioning of the parliamentary system.

Such an election will occur under one of two circumstances: (1) upon

the expiration of the legal term for which the members of parliament were elected, or, (2) upon the dissolution of parliament by order of the cabinet when it has failed to get the vote of a parliamentary majority on a crucial question.

In most parliamentary countries the lower house of the national legislature is elected by the people, whereas the upper house is made up of hereditary members, ex officio members, appointed members, indirectly elected members, or of some combination of the foregoing. The chief purpose of the election, therefore, is to choose members of the lower

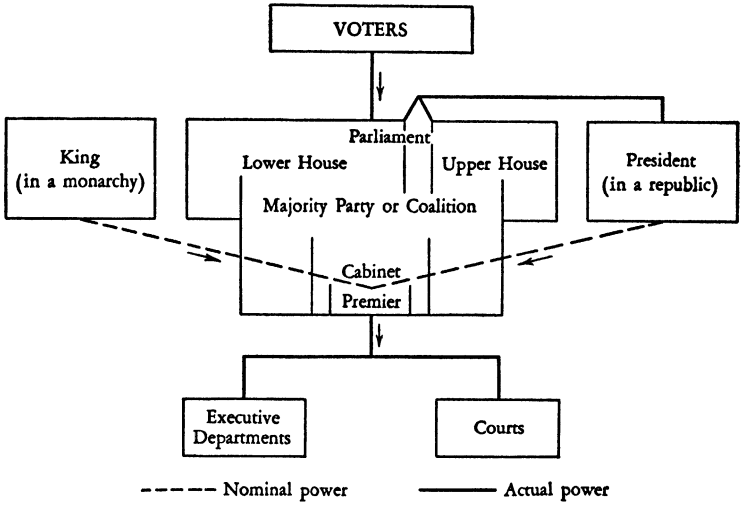


Chart 1. The Parliamentary Type

house. The country is divided into geographical constituencies, each of which is entitled to elect one or more members of the lower house. Various systems of election have been used. In Great Britain, where parliamentary government has been most successful, each constituency elects one member of the House of Commons by a simple majority in case there are only two nominees and by a plurality if there are more than two. Plural-member constituencies and divers schemes of proportional representation have been employed in some parliamentary systems, but not with conspicuous success.

Since the election is a party contest, the members elected are usually party nominees and regard themselves as morally obliged to unite with other members of their own party in forming a solid front in parliament. The main object of each political party is to elect enough members of

parliament to enable it to organize and control that body. Achieving this object is the only way a party can come into power, for parliamentary seats are the only offices filled by popular election.

If the election gives a majority of the parliamentary seats to one political party, the king or president then summons the leader of that party and requests him to "form a government," that is, to name a cabinet. Should no party win a majority of the seats, the chief of state asks the leader of the party with the largest number of seats to choose a cabinet. The party leader designates himself as premier or prime minister and also decides whether he will head the department of foreign affairs, war, treasury, or take some other executive portfolio. He then makes up his cabinet by assigning the other portfolios to prominent members of parliament in his own party (if it has a majority) or to members of his own and one or more other parties (if his own party does not have a majority). A cabinet made up of more than one party is known as a coalition cabinet. The king or president officially appoints the persons on the prime minister's list to the designated executive posts, and thus the formation of the cabinet is completed.

The prime minister and cabinet in parliamentary countries are often spoken of as the Government. This usage does not signify that they are the whole government, but that they have been given the power to run the whole government and are held responsible for so doing. By taking over the leading executive portfolios, they have made themselves, with the sanction of parliament, the general overseers and managers of the administrative processes of the state. By virtue of this fact and of the further fact that they are members of parliament and outstanding party leaders, they have become a legislative council (a sort of legislature within a legislature), and, as such, it is their business to initiate and manage all important public policies.

So long as they can hold their parliamentary majority, the prime minister and cabinet are fully able to run the whole government. But the gun of parliamentary disapproval is always pointed at their heads. Parliament can throw them out of office at any moment, in various ways. One way is for a dissatisfied member of parliament to propose a resolution of censure or a vote of "no confidence." Another is for parliament to refuse to pass a measure proposed and supported by the cabinet. An adverse vote on an important measure in the lower house of parliament always forces the members of the cabinet to resign their executive portfolios and cabinet posts; an adverse vote in the upper house rarely has this effect, though there are some instances to the contrary.

The "fall" of the cabinet means one of two things: (1) the chief of state asks the leader of the opposition, which overthrew the cabinet, to form a

government; or, (2) the chief of state, at the request of the prime minister, dissolves parliament and orders a new election, thus giving the voters a chance to choose between the cabinet and the opposition. The first alternative means that, if the leader of the opposition can form a government acceptable to a majority, he and his associates become the Government, and the members of the retiring cabinet remain in parliament but become members of a new opposition. The second alternative means that all members of parliament lose their seats and have to seek reelection. If a majority favorable to the old cabinet is returned to parliament, it continues in power; if not, the leader of the new majority is asked to form a government.

Strong and weak points. The most striking feature of parliamentary government in operation is its direct and immediate responsiveness to the elected representatives of the voting population. Not only do these spokesmen of the voters have the power to change the Government at any moment, but they themselves are obliged to stand before their constituents as either sponsors or opponents of the Government. This accountability must always be rendered at the expiration of their fixed terms of office, and may be forced upon them at any time by the dissolution of parliament. Because of these relationships, parliamentary government is highly sensitive to changing states of opinion among the electorate. Given a democratic electorate, parliamentary government probably is the most completely democratic system of representative government the world has ever seen. At least that characterization is true, if by democratic government we mean the kind of government which most faithfully mirrors the day-to-day shifts of popular feeling. Of course, parliamentary government is not necessarily democratic government. With a nondemocratic electorate, it will faithfully reflect the opinions and attitudes of an aristocratic, plutocratic, theocratic, or otherwise limited voting public. Like a weathervane, it responds to the winds, whatever their force and direction.

Responsiveness to electoral pressures is not always a virtue, nor is it always a vice. It has had the effect in parliamentary countries of keeping the government in tune with public opinion and solidly based, sometimes, on general public support. But it has also had the effect, at times when public opinion has been seriously divided or confused, of rendering the government highly unstable. Where coalition cabinets have been the rule, on account of the multiparty system, parliamentary government has tended to be at its worst in the most critical times. In easy times the necessary coalitions could be formed and maintained without much trouble, but under crisis conditions parliaments worked the other way. This fact explains, in large part, the misfortunes of the parliamentary system in Germany, Italy, France, and several other countries.

Another conspicuous feature of parliamentary government is its concentration of power, leadership, and management in what is in substance both a central committee of the legislature and a central committee of the dominant political party or party combination. The party or party coalition becomes the Government, and the Government is empowered to legislate and also to superintend the executive and judicial processes. There is a unity here, so long as the Government holds its supporting majority, which can brush aside delays, obstructions, and compromises and move swiftly and surely to the goal. But it is sometimes a very precarious unity, because it depends on a not always reliable and loyal parliamentary majority. Therefore, parliamentary government may function on one occasion with the perfect rhythm and efficiency of a well constructed motor, but on another occasion it may falter like a contraption assembled from the junk pile. It takes *party* unity as well as *organic* unity to produce harmony in parliamentary government.

The organic coördination and the concentration of power which characterize parliamentary government tend, under favorable circumstances, to produce a political mechanism that is flexible and readily adjusted to the changing problems of state existence. But this quality often disappears when the parliamentary majority is narrow and unreliable, or when it is based on an unstable party coalition. Then there is extreme reluctance to take any risks which might jeopardize the cabinet's continuance in office. The Government becomes timid, hesitant, dilatory, and unprogressive.

On its face, parliamentary government is majority government and cannot function otherwise. Obstructive minorities have no means of checkmating the majority. It must be remembered, however, that there are majorities and majorities. Some majorities are internally strong and cohesive; others are loosely thrown together by undependable political alliances. Majorities of the latter type are majorities mainly in name. It has not been rare in parliamentary government for minority groups within the governing majority to have more say about things than would be possible if they were not an integral part of the cabinet's supporting majority. So it may be said that the theory that parliamentary government is synonymous with majority government is sometimes a fact and sometimes a fiction.

From what has already been said, it is apparent that political parties have a large rôle in parliamentary government. It is not much wide of the mark to say that the quality of parliamentary government varies with the quality of the party system under which it operates. It is susceptible to all of the ills that go with party warfare and party machinations. The good results of partisanship—and there are some very decided ones—also show up in parliamentary government. The bad and good results of the politi-

cal activities of pressure groups likewise appear prominently in parliamentary government.

The ease with which parliamentary government in many instances has given way to dictatorship has led some critics to conclude that it possesses a naturally low resistance to the kind of demagogy that often ends in dictatorship. There may be some truth in this view. The weathervane nature of parliamentary government is a great advantage to agitators. No parliamentary cabinet wants to "crack down" hard on such gentry if they have an important popular following. And if the cabinet holds under a coalition, it may be powerless to act even when it sees the need and has the desire. Often the best thing the cabinet can do is to try to compete with the rabble rousers for the favor of the multitude. Of course the odds are all against the cabinet, for it is the Government that has to take the blame for everything that everybody dislikes. If the rabble rousers can stir up enough discontent, they can easily make a bid for power. Nor do they have to wait until they win a majority of the electorate in order to succeed. If their faction is well organized, determined, and ruthless, two relatively easy paths are open. One is by way of a coalition in which they can seize the upper hand, and the other is to take advantage of the impotence of the opposition and install themselves in office by violence, either actual or threatened. Once in office, the parliamentary system places the whole authority of the state in their hands. With that absolute and undivided authority at their command, it is no trick at all to transform a parliamentary system of government into a dictatorship.

The Check-and-balance Type

The check-and-balance type of government originated in the United States. Most of the republics of the Western Hemisphere have followed this pattern, more or less faithfully. Elsewhere it has had little appeal. It has not, however, met with the reverses which have overthrown parliamentary government in so many countries since 1918, and is, therefore, functioning today in more countries than any other type.

Principal characteristics. The outstanding characteristics of check-and-balance government may be summed up as follows:

1. The constitution, following the principle of separation of powers, assigns the legislative, executive, and judicial functions to three independent and coördinate organs of government, which are entirely divorced from one another in personnel and structure.

2. Each of the three branches is given certain powers which enable it to impose checks upon, but not to override and control, any of the others.

3. The members, or at any rate the chief members, of each branch are responsible under the constitution to no one but themselves and the electorate.

4. The chief executive and the members of the legislature are usually chosen by direct vote of the electorate, though there are instances of indirect election of the chief executive and the upper house of the legislature. The judges are chosen by direct popular vote, or are appointed by joint action of the chief executive and one or both houses of the legislature.

5. The members of all three branches hold office for the duration of the terms for which they were originally chosen, and cannot be ousted by reason of any change of public sentiment or withdrawal of public support during that time.

6. The chief executive (always called the president) is the official head of the state, but this position results neither in his subordination to the legislative branch (as in parliamentary government) nor in its subordination to him (as in the national leader type).

How it works. Every American is familiar with the major processes of check-and-balance government. The contrast with other systems of government is striking.

Every two, four, or six years, as determined by the constitution of a check-and-balance country, a president and a legislature are elected, and sometimes also, all or part of a supreme court. The president is elected at the same time as the legislature, but independently. The same is true of the judges, in case the constitution provides for their choice by popular vote. The president takes and holds office regardless of whether he has a supporting majority in the legislature, and the same is true of elected judges. Nor can an adverse majority in the legislature affect the tenure of either the president or the judges. The legislature's position is correspondingly independent. It is elected and holds on until the end of its elected term, no matter what happens in the other two branches.

The lawmaking power is given to the legislature, subject to certain checks by the executive and the judiciary. Consequently, the legislature proceeds on its own initiative and its own responsibility to do its work. The president may recommend legislation, but may take no direct part in its enactment. His recommendations always have weight, and, if he is the leader of a great political party and the legislative majority is of the same party, most of his recommendations will be followed. But there is no obligation on the part of the legislature to follow them, and the president is not required to retire from office if it fails to do so. The president generally has a provisional veto power, which means that he may refuse to approve acts of the legislature. But the legislature may pass them over his veto by an extraordinary majority.

The process of administration is placed entirely in the hands of the chief executive and his subordinates. Once a law is enacted, it is the duty of the executive to carry it out. The legislature has no more to do with the matter. It has no supervisory authority over the executive and no means of calling him to account for executive actions it does not approve. It can turn him out of office only by impeachment, and this means that he must be found guilty, after formal accusation and trial, of some sort of criminal behavior. It is very seldom that a criminal case can be made against the executive. However, the legislature has certain means of imposing checks and restraints upon the executive. It can limit his discretion

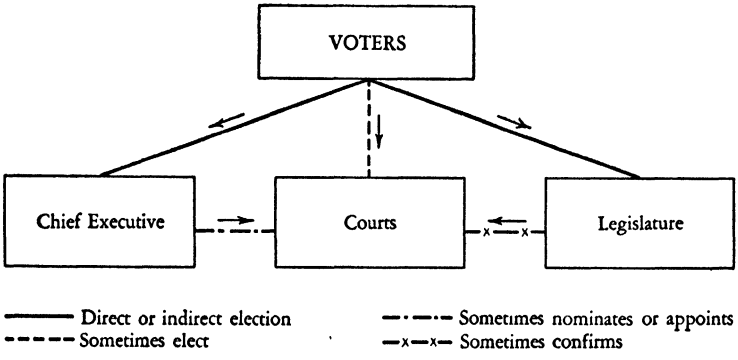


Chart 2. The Check-and-Balance Type

and freedom of action by minute stipulations in the statutes enacted by it. It may refuse to enact laws giving him the authority he desires to carry on certain administrative activities. It may decline to appropriate money for him to spend, or may strictly regulate the way in which the money is to be used. It may investigate the conduct of executive business and require a full disclosure of executive proceedings.

The power to try and decide lawsuits is given entirely to the judiciary. Being unconnected with the other branches and uncontrollable by them, the judges may render decisions politically at odds with the preferences of the legislature and executive. They interpret the statutes and the constitution according to their own understanding, and are not bound to follow interpretations made by the other branches of government. Since violations of the law can be punished only after conviction in court, the judicial interpretation of the statutes and the constitution is the final one, and therefore the one that must eventually prevail. Thus the judiciary may impose checks on the other branches. But the courts are dependent on the executive for the enforcement of their decisions and upon the legis-

lature for financial support and for authority to take jurisdiction over many forms of litigation. Moreover, the judges, in some instances, owe their appointment to executive action or to executive and legislative action combined. Hence, though they may check the other branches, they are unable to overbear and defy them.

Strong and weak points. In theory check-and-balance government is supposed to result in equipoise between the three coördinate branches. Sometimes it does. Just as often, however, it results in friction and collision between them. Equipoise, when attained, rarely lasts long. Something is sure to be done to cause one or more branches to invoke the checks provided by the constitution, and then comes a struggle which ends only when one side gives way or a compromise is reached. Because each branch is free to assert itself independently and may for a time hold the upper hand over the others, some observers have thought of the perennial struggle between them as a battle for supremacy. This view is mistaken. There can be no battle for supremacy under check-and-balance government so long as the constitution is fully operative. Enduring supremacy for any one of three branches is impossible, though one may achieve a temporary supremacy on a particular issue. Invariably, however, the threefold system of checks sooner or later comes into operation and undermines this supremacy. There have been times in the history of the United States when Congress or the President or the Supreme Court was supposed to have gained supremacy, but something has always happened, just when this belief approached certainty, to change the whole complexion of the situation. Sometimes Congress has had things pretty much its own way, sometimes the President, and sometimes the Supreme Court; but there has never yet been time when one had complete mastery over the others, nor a time when the constitutional checks have failed in the end to bring the high-flying branch back to earth. In this country, in brief, the check-and-balance principle has in the long run always worked, because our constitution has been faithfully observed.

Other check-and-balance countries have not always had this experience. The military power, the power to conduct foreign affairs, and certain powers of an extraordinary nature are usually given to the executive. The other branches have means of checking these powers, but in some of the Latin American countries they have not had a supporting public opinion which would enable them to do so. Hence it has been easily possible for the president to suppress all opposition by military force and make himself a dictator. Having an independent tenure of office and the legal right to act in the executive sphere independently of the other branches, he could employ force against them with impunity if they did not have broad public support, which often they did not.

When check-and-balance government works according to principle, each branch is both strong and weak. In the sphere of lawmaking the legislature, if it so chooses, may proceed entirely on its own initiative, choose its own leaders, and pass whatever laws it will. The presidential veto may check it somewhat, but this veto may be overridden. However, as soon as a law goes on the books, the legislature loses control of the situation. From there on the executive and the judiciary take over, and the legislature must rest content with merely checking them if they get out of bounds. The executive is similarly able in its sphere to act without restraint until it reaches the end of its tether. No parliamentary prime minister can ignore his parliament as the President of the United States ignores Congress in such a matter, for example, as the negotiation of treaties; but, on the other hand, the prime minister can be almost certain that parliament will ratify a treaty submitted by him, whereas the President cannot be certain what will happen to a treaty that he turns over to the Senate. The President can have his own way up to the point of ratification; the prime minister cannot, and, because he cannot, he can be surer of ratification. United States courts can interpret laws without regard to legislative or executive opinion; parliamentary courts cannot. But parliamentary courts are seldom told by the chief executive, as on occasion American courts have been, to enforce their own decisions if they can.

Thus it is easy to perceive that there is a division of power in check-and-balance government which makes against unity and harmony. This has practical effects of great importance. It shows up in the matter of leadership, both official and unofficial. Instead of being centered in one person or in a small group of persons who provide leadership for the state as a whole, leadership develops independently in each branch of the government and also outside of the government. Truly unified leadership is rare. The chief executive is often, though not invariably, the leader of his own political party and is commonly thought to be the leader of the nation. Sometimes it works that way, but very often it does not. Since he is not a member of the legislature, the ability of the chief executive to achieve leadership in that branch of the government depends on his personal prestige and upon his control, if any, of the party having a majority in the legislature, which are highly variable circumstances. The president's party may not have a majority in the legislature, or it may have a majority that is very hard to hold together. The personal prestige of the president is usually greater than that of any other official of the government, but there are always occasions when it sinks below par. On those occasions legislators of his own party are apt to desert his standard. They do not have to stand by him in order to maintain their legislative majority, and his fall from popularity may furnish an opportunity, as they see it, to make political

capital for themselves. The legislature evolves its own party and committee systems and its own leadership, but it does not have unified leadership. Judicial leadership is similarly independent, and is likely to be, in the main, of a negative character.

Divided leadership means divided responsibility—a striking characteristic of check-and-balance government. No one can be held totally responsible for whatever happens or fails to happen. Not the president, nor the cabinet, nor the legislature, nor any legislative leader or committee, nor the judges singly or collectively. All may be responsible in part, but there is no way of bringing all to account at one time or as one answerable group. Evasion of responsibility—"passing the buck" it is called—is an everyday occurrence in check-and-balance government.

Because of its want of unity in power, leadership, and responsibility, check-and-balance government is slower in action than governments constructed on the principle of organic unity. More time is needed for reaching decisions, and more time is required to get them fully carried out. The results of this inertia are both good and bad. When the utmost speed is essential, check-and-balance government is often found to be cumbersome, unwieldy, and dilatory. But when undue haste is a danger, it makes for retardation and deliberation. For the same reason, although check-and-balance government does not turn like a weathervane with every shift of popular sentiment and thus often lags far behind the public opinion of the moment, it is generally inclined to stability and conservatism. A minority intrenched in one branch of the government can block any majority, however strong, in the other branches. Sudden swings from one extreme to the opposite do not come off very easily. And this statement is just as true when sudden and sweeping changes are desirable as it is when they are undesirable.

The Soviet Type

The soviet type of government came into being in Russia after the revolution of 1917. It has not spread to other countries. However, it merits special attention because Russia occupies one-sixth of the earth's surface and any governmental system of such scope is important. The soviet system takes its name from the fact that it is a structure made up of soviets. First of all, then, it is important to understand what a soviet is. The nearest English equivalent of this Russian word probably is "committee." Some think, however, that "council" comes closer to what the Russians mean by soviet, and others prefer commission.

From time immemorial the Russians have employed soviets to carry on the work of assemblies or groups, just as Americans have formed com-

mittees. When the imperial government of the Czar was overthrown in March, 1917, the Duma (the national legislative assembly) established a provisional government to serve until a permanent constitution could be adopted. The provisional government was not strong, and there was fear, especially among the workmen, soldiers, and sailors, that a successful counterrevolution might be engineered by the Czar's supporters. To prevent this, voluntary soviets (one might think of them as vigilance committees) of workmen, soldiers, and sailors were formed in all of the leading cities. These, at first, were mainly under the influence of the Menshevik Party, the Moderate Socialists. The Bolsheviks (Radical Socialists and Communists) wanted to get control of the government. To be sure of this, they had to win the support of the soviets. After a vigorous campaign of propaganda and intrigue, Lenin, Trotsky, and other Bolshevik leaders got the soviets behind them, whereupon they proceeded to overthrow the provisional government and install themselves in power during November, 1917. The next year they put into effect an elaborate constitution under which soviets were provided to carry on the government in all divisions of the country. The constitution of 1918 was superseded in 1936 by a new constitution, but the soviet was retained as the central feature of the governmental system.

Principal characteristics. A soviet is a body of persons chosen by election or appointment to carry on the government of a village, city, county, province, or nation. In Russia the soviets are organized in an ascending series. Russia is a federal state made up of sixteen soviet republics, its official name being the Union of Soviet Socialist Republics. Each of the member republics has its own constitution, providing for a soviet system of government; and each participates in the top federal soviet, which is known as the Supreme Council. The outstanding characteristics of the soviet plan, as found in the several republics and carried over into the federal system, may be summed up as follows:

1. The voters of each governmental area (village, city, county, province, republic) elect a soviet. The size of the soviet depends on the population and area of the unit to be governed by it. The smaller soviets have around twenty-five members and the larger ones may go from a hundred to a thousand members.

2. The scope and degree of each soviet's authority are determined by the federal constitution and the constitution of the constituent republic to which it belongs. Local soviets have jurisdiction over specified local matters, provincial soviets over provincial matters, and so on.

3. Each soviet has charge of the legislative and executive business of its area, and has a large degree of control over the judicial business.

4. Each soviet chooses a praesidium, which is a board that serves as a general overseeing and supervisory commission.

5. Each soviet chooses a council of commissars or ministers. As a body this council is head of the administration; the members individually serve as heads of administrative departments.

6. There are local courts in each county, elected directly by the voters; and higher courts in the larger areas, appointed by the area soviet.

How it works. How the soviet system would work if it were not under the dictatorship of the Communist Party, no one knows. It has always been under the domination of that Party, and the constitution of 1936 gives the power to nominate candidates for public office to the Communist Party and organizations controlled by it. The government itself is not a mechanism fashioned for monocracy, as the German and Italian governments have been. One-man rule in Russia has come through the Communist Party and not through the governmental system itself. Stalin rose to dictatorial power because he was general secretary of the party. As the chief party boss, he was able to dominate the government, but he held no executive position in the government until the summer of 1941. Upon the outbreak of the war between Russia and Germany Stalin took the post of Minister of Defense; later he became chairman of the Union Council of Ministers, chairman of the special State Committee of Defense, and generalissimo of the Red Army. He retained his position as secretary of the Communist Party and his membership in the two controlling bureaus of the party.

The supreme soviet of the Union of Soviet Socialist Republics is commonly known as the Supreme Council. Under the constitution it is given paramount authority throughout the Union in foreign affairs, foreign trade, national defense, economic policy, civil and criminal law, finance, agriculture, industry, transportation, communication, money and credit, natural resources, education, public health, and labor legislation. The member republics and lesser units have subordinate powers within these fields and independent powers in other fields.

The Supreme Council has two branches—the Council of the Union and the Council of the Nationalities. The Council of the Union is made up of deputies elected by districts throughout the Union as a whole. The election is by ballot, and all citizens of eighteen years or over are entitled to vote. The Council of Nationalities is made up of twenty-five delegates chosen by the soviet of each of the Union republics, eleven from each of the autonomous republics, five from each of the autonomous provinces, and one from each national region. The two councils are related as equal branches of the Union soviet. The assent of both is necessary to legisla-

tion, and in case of disagreement between them a conciliation commission is chosen. If it cannot bring them into agreement, the Council is dissolved and new elections are held. The two branches of the Supreme Council, in joint session, elect the Praesidium, the Council of People's Commissars, and the Supreme Court.

The Praesidium consists of a chairman, eleven vice chairmen, and twenty-four members. It performs the sort of duties that would be given to a president, a chairman, or even a prime minister in other countries. Among its duties are: to convene and dissolve the Supreme Council, to interpret existing laws, to issue decrees, to order new elections when the two councils of the supreme soviet disagree, to order and hold referenda, to grant pardons, to appoint and remove the high command of the army, and to bestow decorations and titles. In intervals between sessions of the Supreme Council the Praesidium has authority to revoke illegal acts of the councils of ministers both of the Union and of the constituent republics, to declare war, to mobilize the armed forces, to ratify and denounce treaties, to appoint and recall diplomatic representatives, and to receive the credentials of the diplomatic representatives of other countries.

The Council of Ministers (the term "commissar" was abandoned in 1946) is composed of a chairman, a vice chairman, a varying number of ministers, and several other high officials. Members of the Council are nominated by the Praesidium and confirmed by the Supreme Council. The Council of Ministers is the chief executive and administrative organ of the Union government. Its duties comprise the direction of all administrative departments, each minister being the head of a particular department; the preparation and execution of the budget; the management of the monetary system; the maintenance of law and order; the organization of the army and navy; and the creation of agencies as needed to carry on other operations of government.

The members of the Supreme Court are elected by the Supreme Council for a term of five years. It is the highest court of the land. Below it are the supreme courts of the constituent republics and various territorial, provincial, and regional courts, each elected for a term of five years by the soviet of the area served. At the bottom of the pyramid are the so-called People's Courts, each elected by the voters of a county by direct secret ballot.

The soviet system of the Union, which we have just surveyed in broad outline, is more or less closely duplicated in each of the Union republics and also in each of the lesser governmental units.

On its face the soviet governmental mechanism appears to provide for the rule of the people through representatives elected to the soviets. It is not monocratic in form, as there is no constitutional provision centering

authority in one man. Nor is it, strictly speaking, oligarchic, for public office is open to any qualified citizen. Yet, under the dictatorship imposed through the Communist Party, there is one-man rule carried on by an official hierarchy as absolute and arbitrary as that headed by the Czar in former times. The real truth is that Russia since 1918 has been governed, not by the soviets, but by the Communist Party; and the Communist Party has been dominated by a boss who thus became the unquestioned dictator of the nation. The constitution of 1936 recognized this fact and gave the Communist Party a special status.

The Communist Party has approximately 6,000,000 members, being less than four per cent of the population of the country. But these mem-

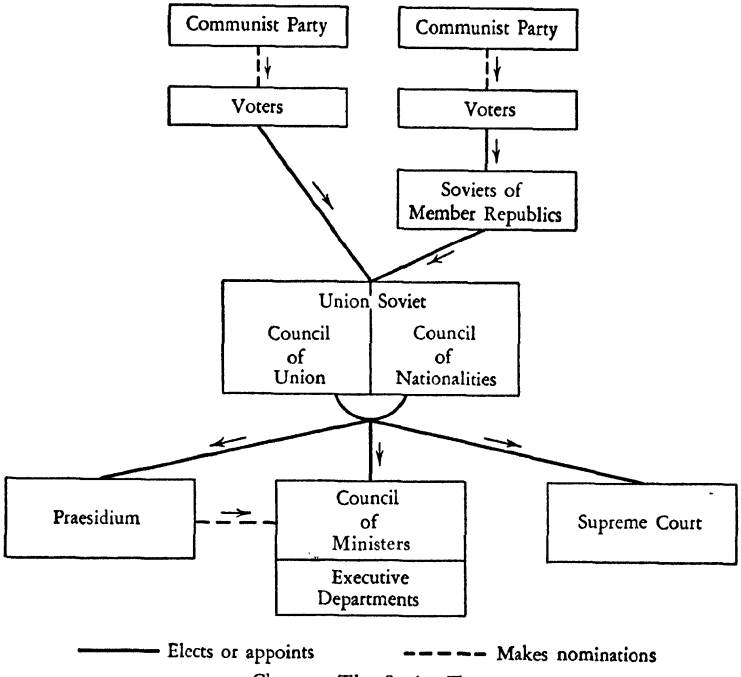


Chart 3. The Soviet Type

bers form a highly disciplined body of political shock troops. The Party organization is made up of closely knit units operating in every political subdivision and also in every office, factory, farm, military company, or other enterprise where there are three party members. These all take orders from the All-Union Central Committee of the Party, which in turn is run by its secretariat headed by a secretary general (at present

Stalin). Although the Party does not wholly monopolize the government, something like eighty per cent of the soviet members are, on the average, either members of the Party or candidates backed by it.

Strong and weak points. What the soviet system would be without the Communist dictatorship, one can only guess. It has many interesting features, but they have not been allowed to function in a normal way. In form, for instance, we find throughout all units of government in Russia a plural executive, but, owing to the dictatorship, there has never been a plural executive in fact. Nominally there is an exceedingly significant separation of administrative power and responsibility, in the division of work between the praesidium and the council of commissars; but it is doubtful if it has ever worked out in fact. Constitutionally there is a federal system, and each constituent republic is expressly given the right freely to secede from the Union; but the dictatorship has brought about such absolute centralization that Russia is for all practical purposes a unitary state.

The strong and weak points of soviet government as it actually operates are, therefore, merely those of any dictatorship established and maintained by strong-arm methods. These will be fully treated in the next section, where we deal with the national-leader type of government—a system frankly based on the principle of one-man rule.

The National-leader Type

The reaction against parliamentary government in continental Europe following World War I produced a form of government usually called Fascist or Nazi. Because its outstanding characteristic was the concentration of governing authority in one person as the supreme leader of the nation, we term it the national-leader type. In popular discussions this scheme of government was put down as an unqualified dictatorship, which was correct; but it was dictatorship grounded on principles which multitudes came to regard as sounder than the principles embodied in any other form of government. This belief led to the adoption of constitutions or constitutional provisions giving those authoritarian principles the sanction of fundamental law.

Principal characteristics. The characteristics common to all of the national-leader states are as follows:

1. All authority is vested in one person who is officially the head of the government and the leader of the nation, and may also be the official chief of state.

2. The monocratic position of the ruler is achieved not by heredity, not by appointment by a higher authority, not by election of any sort. It comes from

the fact that the ruler is the top man in a political party that has been merged with the state.

3. Only one political party is allowed to exist, and this party not only is an integral part of the state but is the sole custodian of the government of the state.

4. The members of the party, though a small minority in numbers, are said to be the elite of the nation. They are an oligarchy, not of blood or caste or wealth, but of political superiority. By reason of its restricted and selected membership, its modes of training and discipline, and its devotion to the state as an end in itself, the party is supposed to include that portion of the population best qualified to govern.

5. There is a national legislature, but it has no authority to propose or enact laws without the sanction of the leader.

6. There is a system of courts, but their pronouncements must conform with the edicts of the leader.

7. The leader is the chief executive both in name and in fact, and all departments and agencies of administration are under his direct control.

8. There is a party central committee or council of which the leader is the head, and this committee has authority to make important decisions in matters of state as well as in party matters.

How it works. The national-leader form of government is thought, by its proponents, to exemplify the principle that confidence should come from below and authority from above. This, in their judgment, is a demonstrably sound principle of political science. It is a completely proved fact, they assert, that large masses of people are incapable of wielding authority intelligently and efficiently. No form of political organization has been or ever can be devised, they contend, which can enable the masses to rule. To claim such a result for any system of government is to claim the impossible. The conduct of government, so the argument goes, is necessarily a task for the few; and the fewer the better, when it comes to the possession of authority. As for supreme authority, concentration in one person is the only way to achieve the dynamic intelligence and efficiency that make for strong government.

But we have stated only one half of the theory. Authority from above is not enough. It may produce strong government, but it will not produce the most desirable kind of strong government unless it is supported by confidence from below. Strong government that does not rest on the confidence of the masses may be able, it is said, to drive, but it cannot lead. If it cannot lead, its power must be exerted negatively more than positively, and it is unable to give the nation the great constructive service

which every government should render. Confidence from below is just as important as authority from above.

Critics of the national leader system have no doubt that it imposes authority from above, but are much less certain about the confidence from below. The champions of this system claim, however, that it does achieve confidence from below more largely than any other scheme of government. This result comes, they insist, from the peculiar virtues of the one-

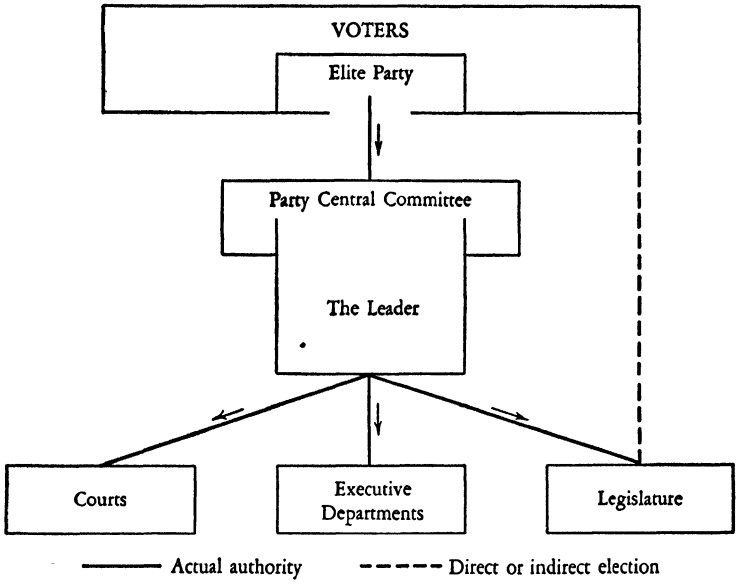


Chart 4. The National-Leader Type

party system, the leadership principle, and the psychic unity of people, party, and leaders.

The theory behind the one-party system amounts to nothing more than a belief that the party favored with monopolistic control of the government numbers in its ranks the persons best fitted in character, ability, mentality, ideals, and devotion to the service of the nation to lead the people and carry on the government. The political elite, as these are termed, are said to represent the whole people more adequately in every way than a party devoted primarily to some special economic, class, or religious interest. They constitute the quintessence of the nation from the standpoint of patriotism, civic virtue, and capacity for leadership and administration.

It is, therefore, not only right, but also necessary, that the party made up of the political elite should be the sole vehicle of popular expression in the government. It is the only party through which the *whole* people can speak, and the only one in which the *whole* people can have confidence. True, it is but a small minority of the whole people, for the political elite are necessarily few in number; but, because they *are* the political elite, they are truer spokesmen of the whole people than the people themselves would be if it were possible for them to act directly for themselves.

The leadership principle assumes not only that leadership is essential to mass action on any scale but that leadership must be centered in one person who is implicitly obeyed. Divided leadership, it is said, breaks down the solidarity of the group, and in reality is not leadership at all. The same is said to be true of leadership that carries no obligation to follow. The only sound way to organize the state for government is, therefore, to provide for single leadership throughout. At the top is the national leader whom all must obey; under him is a leader in every unit and subdivision of the government. The national leader is the leader of the people and also the leader of leaders. Every subordinate leader must obey the national leader and all other leaders of higher rank than himself, and must be obeyed by those of lower rank. Thus arises a perfect hierarchy of leadership and obedience.

The combined result of the one-party system and the leadership principle is said to be a fusion of heart and mind and will embracing people, party, and leaders in a unity so all-comprehending and so powerful that each is no more than a varying aspect of the others. The people become indivisibly one people, the party is the people's one party, and the leader is the supreme personification of it all.

One unaccustomed to this mode of thinking has difficulty in understanding the rather mystical process by which popular confidence and autocratic authority are thus joined in holy matrimony. To convinced believers, however, it seems to be very real. And whether true or false as an objective fact, it must be conceded that there have been times when the national-leader system has seemed to produce an exceptionally high degree of public unity and political efficacy. Whether these have been results of the national-leader system of government, of the special circumstances under which it has emerged and operated, or of a combination of both, only time can tell.

The process of government under the national leader system is at once very simple and very complex. On the surface it appears that everything converges in the national leader. He seems to be the author of all laws, the supreme executive, and the ultimate dispenser of justice. Actually,

however, the government is not totally centered in the person of the leader. Much that is done by him or on his order represents his will as leader and not his will as an individual. His will as an individual can have no more force than his own personal intelligence, ability, and character can engender; but his will as leader is the will of the state. The will of the state—any state—is a harmonization of individual wills expressed in social relationships which bring into a single network enough individual wills to dominate the whole society. The heart of this circulatory system, in parliamentary government, is the prime minister and cabinet; in check-and-balance government, it is the constitutional linkage between the three branches of the government; in soviet government, it is the supreme soviet. In the national-leader system the leader obviously is the heart of the dominant network of socially related individual wills.

It should be clear, therefore, that the national leader cannot be a dictator in the sense that the state is ruled by his personal will. The only will that he can declare and enforce as the will of the state is that which flows with and not against the general current of wills in the social network which holds him in power. This current, in the national-leader system, flows more in underground channels, such as party conclaves, leader conferences, police organizations, and military services, than in electoral and legislative processes. But it limits the will of the ruler just as effectively as though it were out in the open. The leader puts out as his will decisions that go along with the general current of wills flowing in these channels. If his personal will happens to be traveling in the same direction, as is most often the case, his personal will is also that of the state. But, if his personal will is opposed to the general current, he can assert it only at the peril of losing his leadership. This is a risk he seldom takes. It is better politics to subordinate his personal will and adopt that of the general current as his own. Indeed, his chief problem as a monocratic ruler is to keep in line with the flow of wills in the system of social relationships which has raised him to power. Only two things can throw him out of power. One is his own failure to understand and respond to the forces which have thrust him to the top. The other is the breakdown of the system of social relationships on which those forces depend.

Strong and weak points. Italy under Mussolini and Germany under Hitler had stronger and more vigorous government than under their previous parliamentary regimes. Of that there can be no question. The national-leader system was designed primarily for the implementation of absolute power. It was nothing more than a modern variant of a governmental type that is as old as political society. The strong and weak points of monocratic government have been well established by experi-

ence. Whenever you want simplicity, speed, energy, and prompt decision above all else, the thing to do is to concentrate all power and responsibility in one person. But you cannot have these qualities and also have safeguards against the abuse of power. The experience of Germany and Italy under the national leader system additionally confirms that age-old truth.

The Swiss Type

Most of the liberal and democratic governments of the modern world have been of the parliamentary or the check-and-balance types. The most notable exception to this rule is the government of Switzerland. The Swiss have developed a political structure which is a model of liberalism and democracy, and yet lacks certain of the basic features that are thought to have contributed to liberalism and democracy in the governmental systems of other countries.

Switzerland is a federal state made up of twenty-five partially sovereign cantons and half-cantons. The central government has delegated powers similar to those enjoyed by the national government of the United States, and the cantons and half-cantons have reserved powers similar to those enjoyed by the states of the United States of America. The central government is carried on by a national legislature known as the Federal Assembly. All kinds of legislative, executive, and judicial powers have been conferred on this body, thus resulting in complete organic unity. The Federal Assembly is composed of two houses. The lower house is known as the National Council, and is composed of members elected in the cantons and half-cantons by direct popular vote. The number of members for each canton and half-canton depends upon its population. The Council of States consists of two members from each canton and one from each half-canton, chosen in a manner to be determined by the canton or half-canton itself. Direct popular vote is the prevalent method.

The two houses sitting together as a unitary body choose the executive and judicial officials of the government. The principal executive agency is the Federal Council, composed of seven members. The Council as a body is the chief executive and each councilor is head of an executive department. The chairman of the Federal Council is designated as the President of Switzerland, though he has no powers in that capacity. He is the ceremonial head of the state, but his only legal powers are those of a member of the Federal Council. He presides over the meetings of the Council, but has no more authority than any other member.

The Federal Council acts as a preconsidering body for the Federal Assembly, and most of the business coming before the Assembly is initiated by the Council. Private members may introduce bills, but before

they are considered by the Assembly they are referred to the Council for examination and drafting. The Assembly may or may not follow the recommendations of the Council. If it votes the Council down, that body does not resign, as a parliamentary cabinet would be obliged to do, but continues in office and carries out the legislation enacted by the Assembly to the best of its ability. The Council is not so much a ministry as a board of governmental experts employed by the Assembly to give it professional assistance and advice and to carry out its policies with the highest efficiency.

The Federal Tribunal, or supreme court, consists of twenty-four judges elected by the Federal Assembly for a six-year term. Its jurisdiction is limited to federal and intercantonal matters, and it has no authority to declare legislative acts unconstitutional.

The cantonal governments are of the same general pattern as the national government. In five of them there is no legislature, but an annual assembly of all citizens which chooses the executive officials and makes all laws. The others have a unicameral legislature elected by direct popular vote, an executive council chosen by the legislature, and a series of courts which are either elected by the people or appointed by the legislature. Much use has been made both in the cantons and in the national government of those well-known devices of direct legislation, the initiative and the referendum.

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CHAPTER 5

POLITICAL POWER

A knowledge of political evolution and of political institutions and mechanisms is not enough to explain satisfactorily the real nature of the modern state. We must also strive to gain some insight into the essential character of political power, for the state in the last analysis is nothing more than a name for political power multiplied to the highest degree.

The State: a Power System

What is political power? No one has yet been able to give an adequate definition of political power. It is one of those things we know a good deal about, but not enough to be certain that our definitions are fully comprehensive and at the same time sufficiently precise. In the first chapter of this book we learned that one of the products of group relationships is authority and that political society is a union of social relationships embracing many different groups, with a common authority over all. It would be plausible, therefore, to say that political authority and political power are one and the same, but it would not be accurate; for authority is not power, but a result of power. Authority is the prerogative, growing out of social relationships, of exacting obedience from others; power, on the other hand, is the underlying something which causes human beings in a given set of social relationships to recognize authority and yield obedience to it.

There would not be great difficulty in isolating and describing that "underlying something" if it were always the same something. Unfortunately it is not. Its ingredients are so numerous and under differing circumstances so varyingly combined that scientific research has not yet been able to single out a definite number of basic factors and say, "These are the exclusive components of political power." Description rather than definition is, therefore, our best approach to the subject of political power. It cannot be fully described, but some of its chief ingredients can be examined, and its principal modes of functioning can be brought to view.

Ingredients of political power. If the members of a political society, both as groups and individuals, did not respond to the positional relationships of that society in such a way as to yield fairly uniform obedience to persons in dominant positions, there could, of course, be no such thing

as political power. And, without political power, there could be no political authority and no genuine political society. Hence, we may reasonably conclude that anything which contributes to political obedience is an ingredient of political power. Some ingredients of political power are as obvious as sunlight and rain; others are not plainly apparent and are not fully understood; and many, no doubt, are totally obscure. This discussion will deal only with those which are generally recognized and fairly well understood.

Obedience, some think, is chiefly the product of fear. Though this view is somewhat one-sided, students of human society universally recognize that fear, of one sort or another, is, and has always been, a powerful agency of social control. The fears of man are as numerous as his days on earth and as varied as the circumstances of his life. There are physical fears and mental fears, individual fears and social fears, present fears and fears of things to come. Perhaps it would not be true to say that most social relationships are largely built on the fears of the participants, but it is literally a fact that most of them are deeply affected by such fears. How could it be otherwise, when men fear the violent forces of nature, fear other species of living things, fear other men, fear want and privation, fear solitude, fear social disapproval, and even fear the unseen and unknown? Because, in every group, there are individuals who can make others fear them or can allay the fears of others and give confidence, the members of the group naturally tend to follow these exceptional individuals and yield obedience to them. In political society, which contains group relationships of every kind, this tendency is even more pronounced than in lesser social units. Power to govern flows to those whose mastery of the fears of the multitude enables them to secure obedience.

But fear is not the only thing which causes people to obey. Not far below it in point of influence, certainly, is group loyalty. The relationships which make a group and the associations experienced in those relationships beget a strong feeling of attachment and devotion to the group. Conformity with the way of the group wins approval; nonconformity means disapproval and sometimes very unpleasant consequences. As a rule there is a strong inclination to conform voluntarily. When certain individuals are singled out as the recognized spokesmen, leaders, or agents of the group, conformity is not ordinarily to be achieved by going contrary to these individuals but rather by going with them—in other words by yielding obedience to them. Thus, by the loyal conformity of the many, power accrues to the few. In political society, group loyalty reaches its highest pitch. Loyalty to country is the loyalty to which all others must be subordinated. Patriotism, the most fervid and imperative of all emotions, impels every citizen, regardless of his private conceptions and interests, to

adhere to his own country, to conform with its processes and institutions, and to render obedience to its rulers. He does this, to a very large extent, not under fear or compulsion, but spontaneously—and thus spontaneously helps engender power above all other species of social power.

Closely linked with group loyalty is group conditioning. In fact, group loyalty is in no small degree a result of group conditioning. Psychologists have long been aware that any social relationship that is frequently repeated tends to become habitual. As happens in the formation of all human habits, there takes place in the brain and nerves of the individual an adjustment to the condition or conditions which have stimulated his behavior equipment into action. When such an adjustment occurs over and over again, it results in a fixed pattern of behavior which the individual will almost automatically go through every time he is subjected to the conditions underlying this adjustment. He is then said to be conditioned or permanently adjusted to that particular set of behavior-arousing circumstances. He has passed through the same process of habit formation as Pavlov's famous laboratory dog, which, having been regularly fed at the sound of a bell, would invariably lick its chops and drool at the mouth whenever the bell was rung.

The conditioning of behavior always takes place in every long-continued social relationship. It is one of the powerful cohesive elements in all durable group relationships, and in political society it is one of the strongest bonds of union. Experience in group relationships always conditions the members of the group to a number of special forms of behavior—such, for instance, as modes of coöperation, acts of courtesy, ways of expression, and, usually, habits of obedience. Under all circumstances where obedience plays a regular part in group relationships, the members of the group are subjected to a conditioning process which tends in the end to make obedience a normal mode of behavior and disobedience an abnormal one. The members of the group may entirely forget how the habit of obedience originally got started and may no longer be subject to the causes which gave it being. They continue, none the less, to obey, because obedience is "the thing to do" in that particular relationship. One of the best examples of this is the effect of military training. By long and rigorous discipline a soldier is taught to give unquestioning obedience to the orders of his superiors. He gives the same obedience to new officers as to the ones who trained him, the same obedience in new units of the service as in the one to which he first belonged, the same obedience when he returns to military service after years of civil life. In military life conditioning for obedience is deliberate and systematic; in other group relationships it takes place more imperceptibly, but in many instances not less effectively.

Self-interest may sometimes be a potent factor in inducing obedience.

The element of self-interest is seldom totally absent in group relationships. Personal gain or loss, both material and nonmaterial, may hinge upon their outcome. In groups engaged in economic relationships this is invariably the case. When disobedience might mean the gain or loss of property, of profits, or of a job, there is naturally a strong incentive to obedience. In political society the economic incentive is ever present, for political society includes and has vital bearings on innumerable relationships involving property and business enterprise. Obedience to the governing few comes easy to those who can see in such obedience a possible economic advantage, and there are usually so many who see or think they see such possibilities that economic interest is often one of the main bulwarks of political power.

We may also put down coöperation as one of the important ingredients of political power. There are times when every person is stubbornly individualistic, but there are as many or more times when he is eagerly and enthusiastically coöperative. The truth is that we really enjoy coöperation, and often do it just for fun. When we can coöperate in an enterprise of strong appeal to our interests and emotions, we are deeply impelled to suppress all contrary inclinations and join together in the common undertaking. Sometimes we are greatly torn between the desire to coöperate and the desire to withstand; but, if the common enterprise is of high concern, we are more likely to coöperate than not. Obedience always accompanies coöperation. There can be no coöperation without rules and compliance, even though the latter be entirely voluntary. Indeed, voluntary compliance in response to a desire to coöperate provides a more solid basis for governmental power than compliance under compulsion.

Implements of power. It is now necessary to consider the difference between latent power and active, effective power. Everyone is aware that ingredients of power exist in wind, steam, electricity, and other phenomena of nature, but that no useful work can be expected of them unless they are properly harnessed and directed. It took the steam engine to utilize the latent power in steam, the dynamo and motor to employ the latent power in electricity, the sail and the windmill to take advantage of the latent power in wind. Essentially the same condition is found in social relationships, especially in large-scale social relationships. Ingredients of power exist in great abundance, but they remain very largely latent unless they are suitably harnessed and directed.

The devices or means by which latent power is transformed into dynamic power are known as implements of power. All implements of power are applications of two fundamental principles, namely canalization and control. We say that a thing is canalized when it is made to exist or operate in fixed and limited canals, channels, or courses. The steam engine

canalizes steam in boiler and cylinder, and, as a result of this forced confinement, steam develops the pressure which makes for power. The dynamo and the motor, as is well known, are merely devices for canalizing electricity; the sail and the windmill, devices for doing the same with air currents. But canalization alone is not enough. There must be ways of applying the power in definite amounts, forms, and directions, and also of turning it on and off as needed. In other words, there must be controls. For this purpose, in the realm of mechanics, we employ such devices as valves, switches, and ingenious systems of wheels and gears.

The implements of political power likewise are based on canalization and control, but the devices by which these ends are achieved are very little understood. Partly this is because they are exceedingly complex and have not as yet been fully analyzed and described; partly, also, we must frankly admit, it is attributable to the fact that we have prejudices which blind us to the truth when we see it. We are ourselves a part of the implements of political power, and with regard to them, as with regard to our own selves, the objective view is hard to attain.

Organization. One of the most important implements of political power is organization. In social relationships organization is achieved by the conscious or unconscious establishment of fixed attitudes, regular forms of behavior, systematic procedures, and definite gradations of position. Thus every individual fills a place which constitutes a rank or station, plays a part appropriate to that rank or station, and consistently, even methodically, does what he is supposed to do and expects every other individual to do likewise. Such a development always takes place in the formation of group relationships—is, in fact, one of the chief agencies in the making of groups. In small groups it often takes place informally and without preconceived planning (as in the family, the neighborhood play group, or the community "sing"); but in large groups it always proceeds according to a definite form or pattern which has been wholly or partially thought out in advance.

Organization is a most effective means of canalizing and controlling social relationships. In organized relationships individual behavior, respecting those particular relationships, is confined to defined and limited courses of action in an integrated arrangement which puts some individuals in controlling positions. This is merely a scientific way of explaining what is a matter of everyday experience to every business man, every union labor man, every farmer, and millions of other persons—that organization begets power. Why does it beget power? Because it confines, correlates, and controls human behavior, and thus enables the many to act as one. In political society organization naturally begets more power than in other group relationships, for the simple reason that political re-

lationships are broader in scope and, by common consent, more vital than any others. Political society began with the organization of political relationships, grew to universality with the progressive expansion and organization of such relationships, and has culminated in that modern Lord of Hosts, the state. It is important to remember, however, as was pointed out in Chapter 1, that state organization and governmental organization are not one and the same. State organization includes governmental organization and a great deal more. It includes, in addition to the governmental organization, all of the social relationships, organized and unorganized, which have been united in one social system under a common government.

Law. Not less important than organization, as an implement of political power, is law. It is impossible to say whether organization came before rules or rules before organization. The two seem to go hand in hand, and are always found in group relationships. In political society, rules are raised to the stature of law—rules which are recognized as universally binding and are enforceable by public officers, who may, if necessary, employ physical means of coercion. Law, like organization, so channels and controls human behavior that those whose place in the political system enables them to make and administer law can wield enormous power. It appears sometimes as though law and organization are linked together in a vast and well-nigh unbreakable power circuit. In the modern state, law produces organization and organization produces law, and each is an instrumentality by which the other is made an effective implement of power.

Economic institutions. Here we have an implement of political power that is not difficult to understand. Economic institutions are the organized and relatively permanent ways of managing the production of goods and services in order to satisfy human wants and needs. Business corporations and partnerships, landholding systems, farming units and organizations, manufacturing firms, marketing systems, labor unions, and money and credit arrangements are examples of modern economic institutions. All of these are ways of channeling and controlling human activity in economic matters, and as a result are producers of economic power. They may also be important implements of political power. Economic institutions cannot operate successfully in a society where life, property, and contractual arrangements are insecure. It is natural, therefore, for economic power to uphold, so far as it can, those social relationships which make for the firmest and broadest security for the dominant economic institutions. Government—the power mechanism of political society—is generally more capable of maintaining order and preserving economic security than any other social apparatus. For that reason we usually find

economic power reinforcing political power in every state in which there is a governmental system responsive to economic interests. The holders of political power can marshal behind them the power of great economic institutions which seek the favor and protection of political power.

Symbolism. One of the most interesting implements of political power is symbolism. A symbol is a visible or audible sign which, in the mind of the person seeing or hearing it, stands for an object, an idea, a process, a relationship, a form of behavior, or some other thing different from the sign itself. For Pavlov's experimental dog the sound of the bell was a symbol of food, so he behaved just as though food were present. He had been conditioned to respond in the same way to the symbol as to the real thing. Human beings are likewise conditioned to many kinds of symbols, sometimes consciously but more often unconsciously. When we learn our numerals in arithmetic, we are learning symbols which stand for ideas; when we learn musical notes, we are learning symbols which stand for sounds; when we wear a fraternity badge, we are displaying the symbol of a social relationship; when we place a dollar sign before a series of numerals, we are using a symbol which represents a material object, an economic process, and also a very complex social relationship. Thus we perceive that a symbol serves as a sort of mental shorthand. In a very simple way it may represent something that would take thousands of words to explain, and may even represent things that words can hardly explain at all. However, since the symbol calls to mind the thing it stands for, it is possible to sway the behavior of people by symbols just as readily as by other means.

Symbols play a large part in social relationships, particularly in those of a political character. The experiences of political association give birth to innumerable symbols. The flag is a symbol of national unity and glory, the national anthem a symbol of devotion to country, the kingship or presidency a symbol of national government, the patriotic holiday a symbol of national exaltation and consecration. Imaginary figures, such as Uncle Sam and John Bull, are symbols of supposed national characteristics; the eagle, the lion, the bear, and other animals serve as symbols of national sovereignty and power; famous heroes of the past, such as Washington and Lincoln, become symbols of national virtues and ideals; battlefields, monuments, and shrines develop into symbols of national sacrifice and duty; popular mottoes, slogans, and phrases ripen into symbols of national purpose. The foregoing are just a few examples of political symbols. The reader will quickly think of many more, for the number and variety of political symbols are countless.

The plus sign in mathematics is the symbol of a mental process or operation; the letter H, as used in chemistry, symbolizes the element hydrogen; the period mark in written discourse says to the reader, "This is the

end of the sentence." Such symbols—and there are many like them—have no emotional content. They arouse no feelings of love, hate, fear, enthusiasm, pride, loyalty, duty, or the like. Nearly all political symbols, on the contrary, are highly charged with emotion, and hence can be mighty implements of political power. Most people obey their emotions more promptly and fully than their reasoned judgments. When confronted with a symbol of high emotional content, they are very prone to act before they think—in fact, never to think at all. Clearly, then, any symbol which invokes in multitudes of people the same emotional reactions can be a tremendously proficient implement for channeling and controlling human behavior. In politics, he who understands the value of symbols and knows how to use them has learned one of the most valuable secrets of power. The state is a social system intertwined with a power organization, known as the government, and symbolism is one of the principal means by which the latent power of the multitudinous social relationships embraced by the state is converted into active political power in the hands of definite human beings. Indeed, in modern thinking, the state itself has become a symbol—the symbol of generalized political power.

The Struggle for Power

The keys to power. Whoever controls the apparatus of government holds the keys to power. Control of the governmental mechanism gives extensive influence over the organization of the state—not only over its political organization, but also over its economic organization, its family organization, its educational organization, and its organization of various other social processes. Control of the governmental mechanism gives authority to make and administer law. And control of the governmental mechanism gives access to the symbols by which large masses are most readily swayed. It is the universally recognized right of those in authority in the state—which means those holding the chief posts of government—to compel obedience by physical coercion. This right has come to be recognized because, in the long course of social evolution, the possession of political power has enabled its holders not only to employ physical coercion more successfully than the holders of other kinds of power but also to say whether others might employ it at all. In the modern world, only the state may inflict such penalties as death, imprisonment, and forfeiture of property. It is an offense against the state for any other authority, without the sanction of the state, even to attempt to do so. For all practical purposes, then, the state has a monopoly of physical coercion, and the rulers of the state are the everyday managers of the monopoly.

Economic coercion, emotional coercion, and intellectual coercion are

also available in large degree to the rulers of the state. Armed with the supreme right of physical coercion, they have the means of determining in no small measure each individual's enjoyment of property and possessions, of occupational activities and privileges, of industrial and commercial opportunities. They have also the means of generating the most terrible fears and the most passionate loyalties, and of controlling the stocks and sources of information necessary to rational thinking and understanding.

Taking into consideration all of its possible means of coercion, it is apparent that the governmental mechanism is society's paramount vehicle of power, and that control of this vehicle is the surest way to dominance in the affairs of men.

Drives for power. The question of who is to run the government and exercise political power is of immeasurable importance to everyone. All human beings are members of social groups, classes, and organizations which are vitally affected by the processes and policies of government, and many persons have a passion for power and like to wield authority over their fellow men. Nobody wants to have political power fall into the hands of persons who will use it contrary to his own interests and desires, and many are determined to get it into their own hands or into the hands of persons friendly to their aspirations and interests. Innumerable individuals and groups are constantly engaged, therefore, in drives for power—intense endeavors, by every means conceivable, to get possession of the controlling offices of the government or to gain influence over those in possession. The result is a continuous and fiercely competitive struggle for office and influence. This eternal struggle takes many forms. Sometimes it becomes so bitter and desperate that it breaks into armed conflict and civil war, the victor taking control of the government by force and imposing his rule upon the loser. More generally, however, it is conducted by measures short of violence, but not less effective. In representative systems of government the processes of election and appointment to office are the focal points of the struggle. Money, intrigue, oratory, and various techniques of influencing individual and mass opinion are the principal weapons used. In governmental systems affording no access to office by electoral methods the focal points of the struggle are the monarch, the dictator, the army, or whatever functionaries have ability to determine the personnel of the government; and the weapons used are intrigue, intimidation, flattery, money, and other ways of wielding influence.

Numberless groups and interests engage in the struggle for power, and it is very seldom that any single one of these is strong enough to gain power by itself. In the political arena, vying for power or for influence over those wielding power, are religious groups, industrial groups, labor

groups, agricultural groups, veterans groups, old-age-pension groups, professional groups, and others too numerous to mention. Since none of these can have assurance of success by its own efforts alone, the most successful drives for power are carried on by alliances or combinations of power-seeking groups. Such coalitions may be the outcome of deliberate and formal arrangements, but they are more likely to come about as the result of bids for support made by politicians and political parties striving to line up a winning combination of pressure groups and interests. As a matter of fact, it often happens that pressure groups with very different, and sometimes antagonistic, interests find themselves lined up together in a drive for power because of throwing their support to parties or political leaders who made alluring promises to all.

The process of government. The apparatus of government must always be in the hands of the few. This restriction is necessarily true, whether the government be a democracy, an oligarchy, or a monocracy. The present population of the United States is approximately 132,000,000; the total number of public officials and employees is not over 4,000,000, and it is estimated that scarcely more than 200,000 of these hold posts which carry much discretionary power. This estimate probably is too generous, for, as everyone knows, the chief wielders of power in the United States are the President of the United States, the governors of the forty-eight states, the mayors of the principal cities, a small number of leading administrative officials in each unit of government, a few key members of Congress and the various state and local legislative bodies, and the judges of the higher federal and state courts. It is not far from the truth to guess that our vast democracy actually is ruled by fewer than 10,000 persons. In an oligarchy, the holders of decisive authority doubtless would be even fewer; and, in a monocracy, the right to exercise power would be centered on one person, from whom it would be delegated to others of inferior rank.

The few always control the apparatus of government and direct the process of government for the obvious and simple reason that workable government is not possible when power is greatly divided and diffused. Too many cooks spoil the broth, divided command paralyzes an army, and headless government is feeble and inefficient. The few must always rule the many, if there is to be any rule worth having. In a democracy, they do this with the consent of the many, who participate in the selection of the ruling few and have some degree of control over them. Let it not be supposed, however, that an oligarchy or a monocracy can be carried on in total disregard of the many. No autocrat can rule by his own personal force and will alone. He must have the police behind him, and also the armed forces. If religion is a matter of prime concern to the masses, he

cannot ignore the wishes of the clergy and the priesthood. If he would have money, he must have support among the magnates of property and finance. If the workers, the farmers, and other occupational groups are politically conscious, he must keep them placated. In short, absolute rule, just like democratic rule, must rest on the support of willing subjects; but the supporting base of democratic rule is broader and the subjects have readier means of giving and withholding their support.

Now we have the stage-setting of the endless drama of government. On the one hand are countless individuals and groups, and diverse combinations of individuals and groups, seeking to preserve or advance their interests through the agency of political power; on the other hand are rulers or would-be rulers, needful of support in order to hold or gain office. The stage on which they meet is the state. The action which takes place there is a never-ending and inordinately complex process of barter, appearing to the view as a bewildering continuity of popular elections, legislative maneuverings and enactments, administrative operations, and judicial determinations. Behind all of the sound and fury, however, the discerning spectator will not fail to perceive that what actually happens is, on the one side, a myriad-motived quest for benefits through political power and, on the other, a response designed to facilitate the acquisition or consolidate the possession of power. The governmental apparatus, whatever its type, invariably oscillates in orbits marked by the interplay of this intricate alignment of forces.

We now see that actual government from day to day is the product of a complex interchange of forces originating in the impulses, attitudes, interests, ideas, desires, and activities of multitudes of politically conscious individuals and groups. These are not forces directed by one intelligence, one principle, or one interest, but forces proceeding from many intelligences, many principles, and from all of the interests, both selfish and unselfish, that men can have. They are not forces working to a common end, but forces working toward different ends and often pulling at cross-purposes. They are not constant forces, but forces ever changing in direction, intensity, and combination. The motive power of government, like that of the sailing vessel, comes from the winds that blow, and, like the ship of sail, government must tack and turn with the shifting of the winds. This does not mean that the course of government is wholly haphazard. Just as a competent navigator, by ingenious use of rudder and sail, can steer a course "in the wind's eye," so capable statesmen and strong alliances of social and economic interests may from time to time set the ship of state on a definite course and hold it there. But it is rarely possible to hold government on such a course for prolonged periods of time. In political society, not only are there frequent changes of both winds and navigators

in mid-course, but the navigators are moreover so deeply influenced by the social forces playing about and upon them that they rarely have long-enduring ideas of the course to be pursued.

Does this mean that intelligent and scientific government is impossible? The answer to this question depends on one's conception of what is intelligent and scientific. A steamboat, which develops its own power, can be designed and operated to go against the wind, but a sailing ship, which gets its power from the wind, can never travel in the teeth of the gale. Yet a sailing ship, by scientific construction and intelligent operation, can be made to take advantage of the wind and cruise the seven seas as circumstances permit. We can never hope to have government of the steamboat type. Intelligent and scientific government of the self-propelling type is impossible. But intelligent and scientific government of the sailer type—necessarily propelled by social forces—is not only possible, but is absolutely indispensable if the state is to survive the storms of modern civilization. It is possible to have governmental systems of superior design with respect to the cyclonic forces that must inevitably beat upon them; to have the apparatus of government in the hands of persons with expert knowledge of the nature and behavior of these forces, and of how to set and sail a course before them; to have, in short, political sailing craft which can withstand the storms and be utilized by capable and clear-visioned statesmen to carry us to socially desirable destinations. To some extent this is now being done, and it is the hope of all believers in human progress that eventually mankind will be sufficiently enlightened to bring it to pass on a much vaster scale.

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CHAPTER 6

POLITICAL DOCTRINES

The conclusion reached in the previous chapter—that the process of government is a reflex of the endless struggle for political power—is not the common conception of the nature of government. Most people are not deeply analytical students of political processes. They want explanations, to be sure; but prefer explanations which confirm their views of what ought or ought not to be rather than explanations of how things actually are. This accounts for the tremendous vogue of political doctrines.

A doctrine is usually a rationalization of some belief, hope, faith, or ideal. To rationalize is to formulate reasons explaining or justifying a belief, hope, faith, or ideal. Events and actions are also widely subject to the same sort of treatment. Rationalization is the direct opposite of scientific thinking. In scientific thinking the conclusion is the final step, reached after a rigorous process of investigation, analysis, comparison, and logical induction or deduction. In rationalization the conclusion comes first. Something has happened; something is assumed; something is believed; something is desired. Then reasons are sought and marshaled in logical array to uphold and sustain that something.

Not all rationalization is false; truth as well as untruth can be rationalized. But all rationalization proves what it sets out to prove, true or false. Hence, all rationalization is treacherous, and must be regarded with a suspicious eye. Falsehood may be made to appear as plausible as truth, and truth may be made to serve false purposes, by clever rationalization. Especially is this the case when strong emotion provides the urge for rationalization. When we feel deeply about a matter, when our thinking is powerfully affected by love, hate, fear, greed, and other passions, it is hard to believe anything that goes against these emotions and correspondingly easy to believe what our emotions incline us to believe. Then we are in a perfect state of mind for appropriate rationalization of our emotional impulses.

In political affairs this propensity to emotional rationalization is exceptionally strong. Men seldom engage in any sort of political struggle without sharp emotional reactions. The next step is to rationalize these emotions and transform them into noble causes and impassioned creeds. From such processes have emerged flaming political doctrines which have

swayed mankind like religious dogmas. We are now going to examine some of the more important and influential doctrines of political faith. For the sake of simplicity we shall classify these as doctrines about state functions, doctrines about state authority, and doctrines about state forms.

Doctrines about State Functions

Individualism vs. collectivism. How far should the state go in suppressing individual freedom? How much or how little should it regulate human affairs? What is the proper business of the state, and what should properly be left to other institutions? From the time men first began to reason about political authority these questions have received different answers. Some men have strongly believed that the functions of government should be kept at a minimum, while others have just as firmly believed that individual freedom should be kept at a minimum. These opposing beliefs, and all between these extremes, have been based on both practical and theoretical considerations. On the theoretical side they have given rise to various doctrines which have played a prominent part in great political discussions. In examining these doctrines we shall proceed from the most extremely individualistic to the most extremely collectivistic.

Anarchism. The most extreme of all individualistic doctrines is anarchism. The anarchist would abolish the state altogether, and have no coercive authority at all in the social system. He believes that government by compulsion is incurably bad, declaring that most of the inequalities, injustices, and immoralities of social life result from the mistakes and abuses of government. No set of rulers, according to the doctrine of anarchism, can be sufficiently wise and disinterested to use their power for the good of all. The democratic state is said to be no better in this respect than the autocratic state. The state, in whatever form, is accused of protecting the privileged classes in the exploitation of the masses, of perpetuating poverty, of driving men to crime, and of preventing the continuously needed readjustment of social and economic relations which a good society requires. It is a relic of barbarism, and stands in the way of advancing civilization.

Anarchism holds that human nature is intrinsically good. All it needs is a chance. Release men from coercion and restraint, says the anarchist, and they will voluntarily coöperate for the common welfare. Enlightened self-interest would compel them to do so, even if they had no better motive. Anarchists propose, therefore, a free society in which there will be no political authority. But they do not advocate a society without organization. They believe in organization, but insist that it should be purely

voluntary organization. Men should be given the opportunity to combine in groups and associations according to their interests and needs. If they do not wish to join, let them stay out and be free individuals. If they do join, but refuse to conform, let them be expelled from the group. Anarchists believe that the advantages of a free society would be so obvious and so great that very few would refuse to join or refuse to conform. With all men voluntarily entering and conforming, they think that common affairs needing regulation could be managed better than by the coercive state.

The anarchist dream has never been realized, and most of us do not see how it could be. Nevertheless the doctrine of anarchism has been a powerful influence upon actual political behavior. Philosophical anarchists do not feel called upon to do anything to further the coming of a free society, because they believe that it is bound to come eventually as an end result of natural social evolution. But revolutionary anarchists think that the free society will never have a chance to develop if existing governments are not overthrown. They advocate violent revolution, and have frequently resorted to bombings and assassinations. There have never been enough anarchists in any country to overthrow the government, but anarchists have often allied themselves with other revolutionary elements and wielded influence out of proportion to their actual numbers.

Laissez faire. First cousin to anarchism is the doctrine of *laissez faire.* This particular brand of individualistic doctrine had its origin in the reaction against the despotic government which preceded the French Revolution. By oppressive taxation, government monopolies, concessions to court favorites, and meddlesome regulation of business, the Bourbon monarchy had destroyed the prosperity of the French nation. A school of thinkers called Physiocrats, in protest against these policies, raised the cry of *laissez faire, laissez passer,* meaning, "Let things alone; let them go." By reasoned argument the Physiocrats strove to show that real prosperity could not be achieved without free enterprise. They contended that nature has endowed every person with qualities and abilities which he better than anyone else can use for his own good. He knows his own wants, needs, and capacities; if unhampered by external interference, he will achieve for himself the best that a man of his natural qualities can. This will work for the best interests of society, too (said the *laissez-faire theorists*), because every man will find his natural level, and all human enterprises will be conducted by those best qualified to manage them. Thus there will be more prosperity for society as a whole, and more prosperity for more individuals, than can be attained under a system of artificially regulated economic life.

It was argued, therefore, not that the state should be abolished, but

that its functions and activities should be reduced to the lowest degree practicable. "That government is best which governs least," wrote Thomas Paine in *The Rights of Man*, and he echoed the sentiments of every devoted believer in *laissez faire*. It was conceded that some government was necessary—enough to protect against foreign attacks, to insure law and order in the social system, to administer justice, and to carry on certain activities which were too costly or too difficult for private enterprise; but not any more than that.

The doctrine of *laissez faire* had a tremendous influence in the eighteenth and nineteenth centuries. In Western Europe and in the United States it profoundly shaped constitutional developments and governmental policies for a hundred and fifty years or more. Constitutions were framed to limit the powers of government to the advantage of free enterprise, and regulatory policies were designed to the same end. The doctrine was never literally followed in any country. There was always more governmental interference in private affairs, even in the United States, than strict *laissez-faire* theorists approved, but the general trend was in the direction of *laissez faire*.

Of late years this trend has been reversed. Experience has revealed many fallacies in the *laissez-faire* theory. The assumption that nature endows every person with intelligence and ability to promote his own best interests is now seriously questioned. And the further asumption that under free enterprise everyone will be able to use his natural abilities to the best advantage of himself and society has been shown to be quite unfounded. In the complex industrial society which has grown up in the machine age we can see very clearly that no person can be sufficient unto himself, and that many things must be controlled and regulated by society as a whole in order to secure justice and provide opportunity for men to make use of their natural abilities. Moreover, it has been found impracticable to draw a hard and fast line between the activities which should be undertaken by the state and those which should not. For example: The doctrine of *laissez faire* concedes that it is proper for the state to do whatever is necessary for the protection of person and property. Does this concession mean that the state may properly act to prevent and punish burglary, but not to prevent and punish the collection of extortionate fees and dues by labor unions? Does *laissez faire* mean that the state may act against one kind of theft but not another? There is no satisfactory answer to such questions, and there are many such questions to be answered in modern political society. Consequently the principle of *laissez faire*, the acme of simplicity in theory, has been found more confusing than helpful in actual everyday government.

Liberalism. The liberal, with regard to state functions, occupies a

position midway between individualism and collectivism. He is an individualist in some respects and a collectivist in others. He believes that society exists for the good of the individual, and not the individual for the good of society. But he also believes that society exists for the good of all individuals, and not for the good of a few specially fortunate or favored ones. He believes that the individual should be as free as possible to live his own life and develop his own capacities, but not that he should be free to live and behave so as to prevent or destroy the kind of society that is best for all. It is the duty of society, according to the liberal view, to promote the good life for all. If this good life requires collective control and regulation, the liberal is willing that government should exercise such functions of control and regulation as may be necessary.

This explains why the liberal attitude so often seems to be self-contradictory. Liberals will be found standing for freedom of speech and of press, for religious liberty, for private rights in various matters of property and business activity, strongly opposing socialism and communism; and at the same time favoring and urging extensive governmental action to curb monopolies, regulate business, promote social and economic betterment, and even in many instances to displace private enterprise with publicly owned and operated enterprises. Such liberals are not necessarily inconsistent; they are simply following the liberal creed that collective and individual interests must be harmonized so as to realize a good life for the individual in a society managed for the good of all.

The chief difficulty in the liberal position is its uncertainty. It is impossible to lay down a clear and comprehensive rule determining under all conditions and circumstances whether individual freedom or collective action should be preferred. Nor is it possible always in a specific situation to predict in advance which policy will bring the best results. Liberalism necessarily means a great deal of trial and error. Inevitably, too, this will be governmental trial and error; for liberalism accords to the state the ultimate power of decision as to the scope of its collective functions.

Socialism. The principle of collectivism has found its widest expression in the doctrine of socialism. There are so many varieties of socialism that it would take a bulky volume to explain them all. There is one concept, however, that all socialists hold in common. They believe in collective ownership and operation of all of the means of producing and distributing economic goods. Outside of the economic sphere many socialists would allow a great deal of individual freedom, and some would even permit private property in consumption goods, that is, goods held for use by the owner himself and not used in the production or distribution of other goods.

Socialists differ widely as to the way in which collective ownership and operation should be carried on. State socialists believe that the political state should be the chief agency of society for this purpose. Guild socialists believe that the state should be relegated to a minor rôle, and that self-regulating organizations (guilds) of producers and consumers should own and operate the means of production and distribution, the state being merely an arbiter of conflicts and an adjuster of relations between guilds. Syndicalists believe that the state should be entirely removed from the picture. They would build up an elaborate organization of labor unions (syndicates) which would not only carry on all production and distribution, but would also take over the governmental work of the state. Some socialists favor gradual progress toward socialism by winning electoral victories and putting through reform legislation. These are known as opportunists or Fabian socialists. Others favor the immediate overthrow of capitalism by force, and are known as revolutionary socialists. Some advocate socialism under democratic government, and others prefer socialism by dictatorship.

Thoroughgoing socialism on a large scale has been tried only in Russia. The present regime in Russia is state socialism under a dictatorship. There was an attempt at first to institute communism in Russia, but this was abandoned in favor of state socialism. It would be of little service here to rehearse the many theoretical arguments for and against socialism. All socialists espouse some form of economic collectivism because they believe that individual freedom in economic matters results in evils which can be cured only by collective authority and action totally supplanting individual freedom. All antisocialists oppose socialism because they believe either that individualism is good or that collectivism would be worse. From a practical standpoint the merits of socialism can be argued only from the limited experience of one country that is wholly socialist and of other countries that have adopted partially socialistic measures.

Communism. The most complete collectivism ever visioned by the mind of man is communism. Under communism individual freedom in economic matters would entirely disappear. There would be no private property of any kind, and the individual would have no right to use or consume economic goods that would not be equally enjoyed by all others. Some communists have advocated collectivism in other social relations as well. They would do away with the family and the individual home, have all children taken from their parents and reared in public nurseries, have all of the people dwell in public barracks, and have all food prepared and served in public refectories. The state would be the great vehicle of communism according to some theories, and according to others the state sooner or later would be displaced by other institutions. There

have been many voluntary experiments with communism on a limited scale, but most of these were of short duration and had little influence. The attempt to introduce communism in Russia in the early period of the Bolshevik regime failed because the social system was too vast and complex to be transformed by sweeping edicts from the top. Communism is still said to be the goal of the ruling party in Russia, but the trend does not seem to be in that direction.

Utilitarianism. Some doctrines of state functions cannot be classified as individualistic or collectivistic. They may incidentally involve individualism or collectivism, or both, but they are based on other concepts and principles. One of the most prominent of these is the doctrine of utilitarianism. This doctrine holds that the extent to which the state should interfere with individual liberty and displace private enterprise should be determined by the test of practical utility. The proper yardstick of practical utility, in utilitarian theory, is the greatest good of the greatest number. Jeremy Bentham, the father of utilitarianism, reasoned that the greatest good of the greatest number could be computed mathematically by measuring and adding up the pains and pleasures that did or might result from any particular state action or policy. The question of whether the state should assume this or that function could be easily answered, he thought, by simply applying the calculus of pain and pleasure, and thus determining the utility of the thing.

Utilitarianism has been a very attractive doctrine. In the abstract it has gained many adherents, but it has never been an easy doctrine to follow in practice. Bentham's pain-and-pleasure formula for finding the greatest good of the greatest number and thus measuring utility was both too simple and too difficult to be workable in practice. It was too simple because it assumed that pain and pleasure are definite and tangible things which can be mathematically measured, whereas we now know that they are enormously complex matters of both individual and social psychology that almost defy measurement. The pain-and-pleasure formula was too difficult because it could not be applied on a large scale without a census of pains and pleasures covering practically the whole population. Impractical though it was, the doctrine of utilitarianism has not been without influence. It appealed to many minds which could not accept the dogmas of individualism and collectivism, and it inspired, on the part of many, a conscientious search for other and more scientific criteria of state functions than merely whether they tended to be individualistic or collectivistic.

Totalitarianism. The word "totalitarianism" has come into the vocabulary of political science since the rise of the Fascist state in Italy and the Nazi state in Germany. The word is new, but the concept which it de-

scribes is very old. It was familiar to Plato and Aristotle and has enjoyed a wide circulation ever since. The central idea of totalitarianism briefly is this: That the individual apart from society is not a human being at all. (Such a being, said Aristotle, might be a beast or a god, but certainly not a man.) It is society which enables men to develop the qualities that distinguish them as human beings, and society which enables them to enjoy the status and the attributes of individualism. In short, one is an individual because he is a member of society. Hence society is the whole and the individual is the part; society represents the total reality of human existence and the individual is merely an ingredient of society. The individual can have no will and no rights against society, because he is not an individual in the human sense of the term unless he is an integral part of society. The state is the paramount medium through which society achieves self-organization and self-determination. It is a corporate being through which the totalness of society is made manifest and in which the supreme and total will of society is reposed. The will of the state is the will of every member of the body politic, regardless of any private feelings or judgments he may have, because he is an inseparable part of the entity which expresses the will of the whole.

This time-honored doctrine has been exceedingly serviceable to modern dictators. Striving to rationalize their own unbridled power, they have seized upon the idea of the "totalitarian" state. Representing themselves to be the authentically chosen and duly recognized heads of such states, they have reasoned, to their own satisfaction, that the total and absolute authority exercised by them was both legally and ethically justified. Since the foremost good, according to the totalitarian theory, is the good of the state, individual interests are necessarily subordinated to those of the state. But considerations of individualism and collectivism as such do not enter into the equation at all. The state pursues policies which will promote the good of the state. Such policies may incline toward individualism or toward collectivism, or they may be a mixture of both. It makes no difference. They are the policies of the state, and in that fact is all of the justification they need. The cardinal weakness of the totalitarian doctrine is, of course, that the totalness of the state is a fiction which does not correspond with the complex realities of social life and which can be maintained only by arbitrary force.

Doctrines about State Authority

In the last analysis the authority of the state rests on force. It always has, and probably always will. The state grew up as a power organization, and it has survived because of the need in human society for regularized

and institutionalized coercion. But the human mind has never been satisfied with this starkly realistic explanation of the basis of state authority. There has always been a strong desire to find a more sublime and admirable sanction for political authority than sheer brute force. From this desire have come many cleverly rationalized doctrines of state authority.

Divine sanction. This is one of the earliest and most persisting doctrines of state authority. Believers in the divine origin of the state naturally regarded the authority of the state as a manifestation of divine will. But many who never believed in divine origin fully accepted the idea of divine sanction. It was a conclusion easily reached by assuming that, since God is the author and regulator of the universe, all authority is from God. State authority must be from God, because it could proceed from no other source. Men might dislike state authority, feel themselves terribly wronged by it; but they must not question the wisdom and the will of God. In His all-seeing and all-knowing Providence there must be some good reason for unjust and oppressive authority which mere mortals could not understand. This idea still endures, though liberal theologies have weakened its hold in most civilized nations.

Contractual sanction. Believers in the contract theory of political origins invariably based the authority of the state on a suppositious social contract in which men had given their consent to state authority and had defined its scope and limitations. There were many, however, who believed that a definite social contract was never made but accepted the idea of contract as the basis of authority. Their reasoning was that, although no express and specific social contract was ever made, authority on a large scale could not grow up without some sort of consent and hence that state authority rested on contractual terms implied from the necessary character of social life itself. Modern research in the field of political origins has shown that such deductions are not well founded, but the implied-contract view is still very widely held.

The idea of sovereignty. Because state authority has a close connection with law, men have always sought to rationalize it on legal grounds. From this effort has come the many-sided concept of sovereignty. Jean Bodin, a sixteenth-century jurist and political philosopher, was the first to evolve the idea of sovereignty in its modern form. Bodin conceived of the state as an association of individuals and social units held together and governed by supreme power and by reason. The people, he argued, are united as a corporate entity. Since the purpose of this entity is to wield supreme power, and since reason has guided the people to form such an entity, it must be assumed that the corporate entity—the state—has a lawful competence to enjoy and exercise supreme power. This competence Bodin called sovereignty. It was not a thing that had bodily existence, but was

a legal fiction which he thought expressed and explained the peculiarity of the state as compared with other social institutions. Sovereignty was a legal capacity or quality which belonged to the state and did not belong to any other social institution.

The idea of sovereignty has been one of the most productive concepts ever introduced into political science. It has served numerous uses and has been the center of many controversies. It supplied a legalistic sanction for state authority which could be adapted to many purposes. Sovereignty belonged to the state as a body politic, but it had to be actually exercised by human beings acting in a political capacity. It was easy to think of sovereignty as being vested in a particular office, dynasty, group, organ, or populace, and thus to find a legal sanction for almost any kind of authority arrangement. It was possible to conceive of sovereignty as a manifestation of divine authority, contractual authority, military authority, and almost any other kind of authority. It was possible to conceive of sovereignty as an ever-continuing thing, and thus to find a basis for preserving the continuity of state existence through many changes of government. Thus, because of its vast utility, the idea of sovereignty became an essential ingredient in many different species of political doctrine.

Monistic sovereignty. According to the most widely accepted view, sovereignty is one and indivisible. This is known as the monistic theory. It holds that, although the powers resulting from sovereignty may be divided and distributed, the sovereignty itself is an indivisible unit. Divided supremacy would not be supremacy; hence sovereignty is indivisible. Being supreme and indivisible, sovereignty is also absolute, according to the monistic view, because there can be no superior legal authority in the state. By the same reasoning, sovereignty is held to be universal in its application throughout the state, there being no person, group, or organization that can claim immunity from supreme legal authority. As long as the state endures, sovereignty also is permanent, for it is a quality of the state and not of any particular form of government.

Monistic theorists have always had difficulty in determining the location of sovereignty. To say that it is vested in the state as a legal entity does not clear the situation a great deal. The state as a legal entity is no more tangible than sovereignty itself. But the state is more than just a legal concept; it is an actual and concrete social institution. If it enjoys the legal capacity of sovereignty, it should be possible to determine where in the state structure that capacity resides or who is its bearer. In an absolute monarchy there is no doubt that sovereignty resides in the monarch, and that he is properly termed the sovereign. The same would be true of any autocratic ruler or ruling group. But how about the situation in a constitutional government? Is a constitutional monarch, a constitutional

president, or a constitutional legislature to be regarded as sovereign? Surely not; none of these has supreme authority, because the constitution is above them all. Shall we say, then, that the constitution is sovereign? That statement is not accurate, for above the constitution is the authority which makes and changes the constitution. There can be no higher authority than this, so we have found at last the real location of sovereignty.

Sometimes the constitution-making authority is easy to ascertain and describe. In other cases it is a complex process involving the coöperation of two or more organs of government and possibly, also, of all or part of the people. In all states, however, there must be some arrangement for making supreme law under the constitution. The bearer of that kind of authority is often called a legal sovereign, and the bearer of constitution-making authority, for purposes of distinction, is called the political sovereign. Unfortunately the lawmaking power as well as the constitution-making power may be so dispersed that one holding the belief that sovereignty is indivisible can find no definite center of single sovereign authority.

Nonmonistic sovereignty. The practical difficulties of the monistic view have led many to reject it. In so doing, some theorists have abandoned the doctrine of sovereignty altogether, while others have attempted to construct theories of sovereignty more compatible with what they conceive to be the facts of state organization and procedure.

The authors of the United States Constitution assumed that sovereignty could be divided, and made an attempt to divide it between the nation and the states. The national government was to be supreme in one sphere and the states in the other. Conflict between the nation and the states over powers claimed by both was a large factor in bringing on the Civil War, which ended in the triumph of those upholding national sovereignty. Did that mean the end of divided sovereignty in the United States? Some think it did and others that it did not. The Civil War settled one point very conclusively: that the Supreme Court of the United States is the final and conclusive arbiter of all controversies over national and state powers. But to say that this vested sovereignty entirely in the national government is to overlook the fact that the Court itself does not operate on any such assumption. The Court assumes that the two categories of authority established by the Constitution were unchanged by the Civil War. When it disallows a state law, it does so on the ground that the state has overstepped the boundaries of its constitutional sphere. It has frequently invalidated national laws on the ground that they have invaded the spheres of the states. When it upholds a national law alleged to be an invasion of the state sphere, it does so not by denying the existence of the state sphere but by construing the national sphere to include the

power in question. The Court seems to think that its function is not to extinguish but to expound and apply the dual sovereignty of the Constitution. The Court is probably correct in this attitude. The Court has the supreme power to veto laws, but it has no power to enact laws, either for the nation or the states. The states have become subject to the Court's veto, but if it should assume to say that they have no authority to enact laws independently of the national government, it would be usurping the constitution-making function, of which the states themselves are a part.

Dual sovereignty, according to some principle of partitioning authority between local and central government, is a feature of all federal systems. Most of the republics of Latin America have federal governments. Switzerland and Russia are the only federal states in Europe, but in Russia the duality is more nominal than actual.

Exponents of the doctrine of pluralism entirely reject the monistic theory of sovereignty, and some of them deny that there is or can be any such thing as sovereignty at all. Their view is that society is not a unit but a plurality made up of many different social groups and institutions. The state, they say, is but one of many forms of association which occur in a social system; it is not more important and should not have more power than any other. They would resolve the social system into a number of self-created and self-regulating industrial, religious, and fraternal associations, and would use the state not as an authority over them but as a medium of adjustment between them. No pluralistic society has ever been established, and it is difficult to see how such a thing would be possible without political authority, sufficient at least to coerce the component groups into harmonious relationships.

Another challenge to sovereignty comes from those who believe that the state is the creature and not the author of law. Such thinkers contend that the development of law precedes the formation of states. Law, in their view, is an outgrowth of community feelings, attitudes, and usages, and is the primal regulative force of human society. At some time in the past, communal development reached the point where formal organization of regulative activity was needed, and law shaped itself to this end and thus created the state. Sovereignty does not, therefore, mean the legal supremacy of the state, but the supremacy of law over the state and the whole social system. This doctrine obviously encounters the difficulty that the only law which can be peremptorily enforced within a state is the law of the state, and that the only law by which the state can be bound is that to which it gives its own consent. Internationalists believe that there is a body of law which is binding on all states, and that eventually there will be an international community and an international authority which will

limit the sovereignty of national states. Such a body of law may exist, but it is very poorly observed; and the coming of an international authority seems highly remote.

Doctrines about State Forms

Debate over the relative merits of different forms of state organization and control has been going on since the earliest days of political theory. Four principal forms—monarchy, aristocracy, democracy, and dictatorship—have been perennial subjects of discussion and rationalization.

Monarchy. A monarchy is a state with an hereditary head. The monarch may have absolute authority, constitutional authority, or none but purely formal and perfunctory authority. None the less, the fact that the headship of the state is hereditary, that a royal family exists, and that the outward aspects of the political system, if not the inner realities, converge about the throne, produces a type for which unique advantages are claimed. It is argued, in the first place, that hereditary succession tends to counteract the scramble to mount to the highest office when a vacancy occurs. Not that it prevents struggles over succession, but reduces their frequency and violence, and tends to stabilize and tranquilize the political system. The hereditary monarch is also said to provide an impressive symbol of national unity and continuity, and to furnish a central figure for a pageantry that is highly useful in inspiring loyalty to the state. The monarchical form is further said to make it possible to have a chief of state above party and factional strife who represents the elements of tradition and social prestige. These merits are claimed even though the monarch be only a figurehead. Additional virtues are often avowed when the monarch rules as well as reigns. The monarchical system is said to be one of the simplest ways of organizing political power, one most likely to create respect for authority, one capable of securing vigorous and unified administration, and one especially adapted to the effective management of foreign relations.

Antimonarchical doctrines are equally sweeping and positive. When the monarch is a power as well as a symbol, it is said that the hereditary principle too often places power in the hands of a person unfitted by education and experience, if not by inherent deficiencies of mind and character, to employ it wisely. It is contended that royalty always becomes the basis of class distinctions and differences which are harmful to the solidarity of the state. The monarchy is also said to be a constant focus of intrigues and machinations, both domestic and foreign, which are dangerous to the stability and security of the state. All the virtues claimed for the monarchical

form are denied or heavily discounted, and the successes achieved under it are attributed to other causes. It is even declared that monarchy is a primitive form of government, suitable only to peoples that have not attained a high degree of political intelligence.

Aristocracy. The doctrine of aristocracy advocates an oligarchical government in the hands of persons or classes who are assumed to be best fitted to govern. There are many ideas of what constitutes the best sort of aristocracy. One of the oldest of these is that an aristocracy made up of persons of property and wealth will govern well because they have the largest stake in society. Another ancient idea is that a military aristocracy is best fitted to rule because of its unusual patriotism and devotion to the state. Still another time-honored idea is that an aristocracy of blood on an hereditary basis is best because such persons will be the heirs of a noble tradition and have a keen sense of propriety and duty. Aristocracies based on eminence in religion or scholarship have also had their advocates. It is contended that an aristocratic state not only is likely to be governed by those of the greatest virtue and ability, but also by those having the least incentive to abuse their power. Being the ones who would suffer most from the tyranny of a monarch or the excesses of mob rule, they will be naturally disposed to govern moderately and well.

The chief weakness of the aristocratic state is the aristocrats. No way has ever been found to insure the selection of an aristocracy that is really best fitted to govern or to prevent the degeneration of the select ruling class to lower levels of ability and virtue than those with which it began. Hence there has never been any assurance that what began as an aristocracy would not end as a selfish and tyrannical oligarchy. Nor has there been any certainty that what appeared at the start to be a true aristocracy was not in reality something else. A pseudo aristocracy is one of the worst forms of government, because, while capable of all of the abuses of a monarchy, it so diffuses responsibility that the blame for misrule cannot be attached to any definite person.

Democracy. Doctrines about democracy have been in controversy ever since the time of the Greek city states. Democracy is a form of government in which supreme power is placed in the hands of the citizenry as a whole. Constitutional arrangements provide that all citizens who meet certain requirements of age, sex, residence, and the like may in some way participate in the exercise of political power. In a direct democracy the qualified citizens control the fundamental processes of government by direct participation in popular assemblies or elections. In a representative democracy they act through the medium of selected representatives in legislative, executive, and judicial agencies of government. All modern democracies are of the representative type, for direct democracy is possible

only in small communities. There are some instances of direct democracy in the local subdivisions of modern democratic states.

Many arguments have been advanced in favor of democracy. Four of these are worthy of particular note. First, there is the theory of natural rights. This theory asserts that all men are born equal—not equal in physique, mentality, position, or wealth, but equal in the basic human rights of life, liberty, and pursuit of happiness. These natural rights, the theory continues, are inherent attributes of human existence, and hence are inalienable without the consent of their owners. Government by the consent of the governed—democratic government—is the only kind which gives every man a chance to consent or refuse to consent to the alienation of his natural rights, and is, therefore, the only just and equitable kind of government.

Second, let us note the theory of popular sovereignty. This theory holds that sovereignty under all systems of government is in the last analysis the product of popular will. The monarch, the dictator, the ruling aristocracy, or any other state organs or functionaries, if they are bearers of sovereignty, are such because of the support or acquiescence of the people. Final power is in the people, and they can overthrow any sovereign authority. Hence real sovereignty belongs only to the people. Democratic government recognizes this truth, so it is said; and makes the exercise of sovereign power dependent upon the definite expression of popular will.

A third supporting girder in the philosophy of democracy is the doctrine of popular capacity for self-government. It is claimed that the common, average judgment of the community is the best guide in public affairs. This is not to say that the people will always act intelligently and disinterestedly, but simply that on the average the final reaction of the people on any public question will be less foolish and less selfish than any other judgment that can be had. Lincoln said, "You can fool all of the people some of the time and some of the people all of the time, but you can't fool all of the people all of the time." Hence the judgment of the whole people is not often likely to be very far wrong. The people are more capable of deciding how their affairs should be run than any ruler or body of rulers who might hold sway over them. Democratic government compels rulers to follow public opinion, and therefore it is the best form of government.

A fourth argument in the case for democracy is that democratic government, dependent on popular will and following public opinion, is more likely to realize the greatest good of the greatest number than any other form of government. The interests of all of the people must be consulted by the democratic state, so it is said; and public policies cannot be adopted and carried through without the approval of a major part of the people.

No public policy can be equally beneficial to all persons, but under democratic government policies beneficial to the few and disadvantageous to the many are less prevalent than under any other system.

These prodemocratic arguments are vigorously disputed by opponents of democracy. Their case is based on four fundamental propositions: (1) that the average level of intelligence is too low for the great mass of people, or even a majority of them, to understand most public questions, to say nothing of acting wisely on them; (2) that the increasingly technical character of modern public questions makes it dangerous to entrust the decision of great issues to the uninformed opinion of the masses: (3) that the masses of people, regardless of education and intelligence, are so easily swayed by herd impulses and mass emotions that they are readily deceived by demagogues and professional politicians; (4) that democracy means mediocrity, because the average man prefers persons of his own kind in public office and will more often vote for a mediocre person than for one of outstandingly superior intellect and ability. Holding these contentions to be true, the opponent of democracy claims that democratic government is prone to be stupid, vacillating, corrupt, and inefficient.

Dictatorship. This is one of the oldest governmental forms. It has been known since the days of the Greek and Roman republics. Dictatorships usually come into being in response to conditions seeming to require a more dynamic administration of public affairs than other forms can provide. The dictator may come into power by a military stroke or by popular vote. Sometimes the constitution itself provides for the establishment of a dictatorship under extraordinary conditions. The position of dictator is not hereditary, and usually the duration of the dictatorship is not long. Sometimes the dictator makes no changes in the outward forms and processes of government, merely compelling the old machine to function in compliance with his personal will.

In general, dictatorship has been regarded as a passing phase and not as a permanent form of government. Once in a while, however, the world has passed through a period in which dictatorship has not only had a wide acceptance but has been espoused as a permanent innovation greatly superior to all other forms of government. We are passing through such a period at the present time. The arguments usually advanced in favor of dictatorship are substantially as follows: (1) that a divided will, accompanied by deliberative procedures, is fatal to the unity and efficiency of the state; (2) that the only way to have an undivided will and a strongly unified state is by one-man power; (3) that the only way to have one-man power possessing the confidence and support of the body politic, and hence capable of serving the state as one-man power actually should, is to place supreme authority in the hands of a dictator who has risen to the

top by virtue of his outstanding genius as a leader and ruler of men and who has thereby won the confidence and support of the many; (4) that a dictator, because of his native genius for government and the unusual knowledge and experience gained by his climb to power, is better able to make decisions for the good of the whole than any parliament, council, or monarch; (5) that a dictator, by reason of his freedom of action, can proceed more intelligently, quickly, and vigorously than any other sort of ruler or ruling authority. In modern Germany and Italy these arguments, together with others of a nationalistic character, have been used for the establishment of constitutional systems embodying dictatorship as a permanent institution.

Experience has shown that dictatorships seldom survive the downfall or death of a dictator. Even if all of the arguments favoring dictatorship were sound, the problem of succession would remain to be solved. Succession by force, which has been the rule in countries habituated to dictatorship, means a continuing recurrence of civil war, which is ruinous to the prosperity of any state. Succession by other means has never worked well. The Nazi and Fascist schemes provide for succession by party designation, the totalitarian political party having the right to designate the new dictator. This scheme has yet to be tried out. Stalin's succession to Lenin in Russia was accomplished by getting control of the machinery of the Communist Party, but Stalin has never claimed to be the head of the state. He succeeded to the headship of the party but not to the headship of the state. As to practical results, the distinction was not important; but it was very important as indicating the actual status of the dictator. In Russia he did not until 1941 hold any executive position in the government and his dictatorial powers were of an extraconstitutional nature. In Germany and Italy the dictatorship has been constitutionally incorporated into and made the central cog of the governmental machinery. This might make a vast difference in the ease with which succession can be accomplished.

There are counterarguments to all of the arguments for one-man power. It is denied that one-man power is essential to the unity and efficiency of the state. Only the appearance of unity and not real unity is said to be accomplished by one-man power. Dissent goes on beneath the surface and is far more dangerous, it is asserted, than if it were given a chance to express itself and secure recognition. There is more real unity in compromise, according to this view, than in forced compliance. It is also denied that dictatorship is the best way to establish one-man power when, as in grave emergencies, it may be needed. A better way is to provide regular constitutional modes of granting and withdrawing absolute powers as need requires. Under these circumstances, it is said, the holder of supreme au-

thority will be sensitive to his great responsibilities and will be ultimately subject to control.

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PART II: AMERICAN POLITICAL FUNDAMENTALS

CHAPTER 7

AMERICAN POLITICAL ORIGINS

The Era of Transplantation

When the renowned English statesman, Gladstone, praised the Constitution of the United States as the greatest instrument of government "struck off at a given time by the brain and purpose of man," he probably did not mean to imply that our Constitution was artificially "cooked up" in the minds of its authors and had no connection with the previous political life of the American people. Yet that is the interpretation given to Gladstone's famous remark by multitudes of approving Americans, who like to think of the Constitution as an astounding miracle wrought out of nothing and achieved by means of divine genius and inspiration. The student who wishes to understand the real nature of the American system of government must reject this mystic conception of the origin of the Constitution. The evidence of history does not support it, but, on the contrary, proves most emphatically that the governmental system of the United States did not begin with the Constitution, was not wholly renovated by the Constitution, and has not been entirely derived from the Constitution. The true story of the American constitutional system is a fascinating epic of transplantation, variation, and adaptation.

The founding of the colonies. The thirteen English colonies in North America were founded and developed in consequence of impulses and motives as varied and contradictory as life itself. Some (Virginia and New York, for instance) were primarily commercial enterprises, and were long conducted as such. Others (for example, Delaware and the Carolinas) were initially by-products of the spirit of romance and adventure which swept over Europe after the discoveries of Columbus and other great navigators. A few (notably Pennsylvania and Maryland) were founded to secure religious freedom for religious groups subject to persecution in the Old World. And some, of which Georgia was a good example, were projects for the formation of an ideal society. The human beings who came over in the immense migrations that peopled these colonies were of every type, class, and condition represented in the mother countries—fanatical religionists, persecuted sectarians, mis-

sionaries, fugitives from justice, deported criminals, indentured laborers, bankrupt debtors, merchants, teachers, doctors, lawyers, skilled workmen, and miscellaneous adventurers.

These English colonists carried with them to the distant shores of the new continent not only household goods, implements, supplies, plants, seeds, livestock, and other material possessions, but also a large and varied stock of social and political ideas. In the new environment these ideas either took root or failed to do so, just as did the seeds of European grains and vegetables when planted in the soil of the New World. When they did take root, they reproduced themselves, but always with variations. The new environment imparted new and different qualities to transplanted ideas, and resulted in different social and political institutions even in cases where the original English model was most slavishly copied. In many respects there were striking resemblances between English and colonial institutions. They were clearly of the same family. But there were always differences which made it equally clear that they were not identical species.

This process of differential development went forward in a very marked way in the growth of political institutions in the colonies. The first governmental institutions in the colonies were expedients to meet local conditions. According to English legal concepts at the time, all of the land in the colonies was the property of the Crown and was under the Common Law of England, which prevailed everywhere that the King's authority prevailed. The King could govern the colony and utilize its land himself or could grant to others, on such terms as he saw fit, the right to hold land and carry on government. Royal grants were made to numerous commercial companies, such as the Virginia Company and the Massachusetts Bay Company; to private proprietors, such as William Penn and Lord Calvert; and to self-organized groups of settlers who had "squatted" in territory outside of the organized dominions of the King. From these, by slow stages, the colonial systems of government emerged.

The commercial companies were organized as corporations with a charter from the King. The charter described the territory which the company was privileged to exploit, defined the purposes and powers of the company, and set up a scheme of organization and by-laws by which it was to be managed. As a general rule, most of the stockholders of the company remained in England, and all important phases of the corporate business were supposed to be carried on there. But the distance from the homeland made it necessary to delegate to the agents who went out to the colony a large amount of discretion in local affairs. The coming of large numbers of settlers made it necessary to have some sort

of government in the colony. The resident stockholders and agents of the corporation usually attempted to supply what was not provided for in the charter. In this way, legislative assemblies, courts, and executive offices were gradually established in all of the corporate colonies. These arrangements at once became a prolific source of controversy. The company's powers were not wholly clear, and those of the resident agents and stockholders were even less clear. There were disputes between the settlers and the local representatives of the company, between the local representatives and the company officials in England, between the company and the King. The upshot was that sooner or later all of the corporate charters were revoked (on the ground that they had been violated) and replaced by a "plantation" or commonwealth under the direct administration of the Crown.

Much the same development took place in the proprietary colonies. The lord proprietor was given a grant of land by the King, with a patent which conferred powers similar to those bestowed upon the commercial corporations by their charters. Bickerings and violations similar to those which occurred in the corporate colonies led, in all but three instances, to the revocation of the patent and the establishment of colonial administration directly under the Crown. Pennsylvania, Maryland, and Delaware were not removed from the hands of the proprietor, but his powers were shorn to such an extent that they were for all practical purposes royal colonies.

Time and again during the colonizing period settlers pushed out into the wilderness where no corporation or proprietor had jurisdiction and where the Crown had established no organized authority. Such settlements at first were left to their own devices in matters of government. Most of them later were incorporated with one of the royal colonies, but two (Connecticut and Rhode Island) received charters of government from the Crown. These were not commercial charters but political charters which recognized these colonies as bodies political and corporate and gave them generous powers of local self-government. Both Connecticut and Rhode Island retained these charters as state constitutions and were governed under them after the Revolution and the formation of the United States.

Systems of government in the late colonial era. Just prior to the American Revolution there were two charter colonies, three proprietary colonies, and eight colonies directly under royal control. The charter colonies, though under some supervision from the mother country, were largely self-governing. The qualified voters of the colony elected a legislative assembly. This body chose the governor and the governor's council, for a term of one year. The courts were also under the control

of the assembly, although appeals could be taken from the colony courts to higher judiciary in England. The assembly made laws for the government of the colony, but these must be in keeping with the basic laws of England. It voted taxes and controlled the affairs of local government as far as it deemed necessary.

In the proprietary and royal colonies there was much less freedom from the control of the home government. In each there was a governor appointed by the Crown or by the proprietor with the approval of the Crown. The governor was a little king in the colony. He could appoint and remove most of the civil officials of the colony, including judges, county and city officers, and clergy of the established church. He was commander-in-chief of the military and naval forces of the colony, head of the established church (if there was one), head of the high court of equity, and master of the hand-picked governor's council which also served as the upper house of the legislature. He could prorogue, adjourn, and dissolve the elected assembly, and had an absolute veto over all legislative enactments. The assembly was elected by the qualified voters. It had authority to enact laws and vote taxes, subject to the approval of the governor. It was often in conflict with the governor and sometimes was able to exact concessions from him by refusing to pass laws or vote taxes which he desired. Since these colonies had, as a rule, no charter or other fundamental instrument of government, the governor's discretion in the exercise of his large powers was limited only by the instructions received from the home government and the checks imposed on him by the assembly.

Local government was fully organized in most of the colonies. Nearly all were divided into counties or equivalent units, and there were towns, parishes, "hundreds" or other county subdivisions everywhere. There were also a number of incorporated boroughs or municipalities. County officials, save in the charter colonies, were mostly under the control of the governor and the same was generally true of the mayor, recorder, and other chief officials of the cities. Officials of the rural subdivisions of the counties were locally elected as a rule. In the northern colonies, especially in New England, the town (the basic county subdivision) was a vital and important unit of government, but in the more sparsely populated southern colonies the county was the chief unit of local government.

One characteristic was common to the governmental systems of all of the colonies. They bore a distinctly aristocratic stamp. The right to vote was restricted to fairly substantial property owners or taxpayers, and the right to hold office was even further limited by property or tax-paying qualifications. Democratic ideals were often professed, but they

had not matured into democratic practice. The Whig doctrine that no one was qualified to take part in public affairs unless he had a material stake in society was generally accepted and approved.

The Struggle for Self-government

Causes of the Revolution. Two factors in the American Revolution which have not been sufficiently appreciated were time and distance. The colonies were three thousand miles away from the homeland in distance and upwards of three months in time. Even if there had been a more flexible system of colonial government, the slowness and irregularity of communication would have caused difficulty in adjusting the unavoidable differences between the colonies and the mother country. Neither could keep in close touch with the other, and on both sides of the ocean there was little understanding, even among those whose business it was to be informed, of the true significance of what was taking place across the water. Between 1600 and 1750 there had grown up on the western side of the Atlantic an American England that was radically different in many respects from the England of the British Isles. Very few people in the homeland had more than the vaguest inkling of this fact. During the same period, equally profound changes had occurred in England itself. It was no longer the England of Elizabeth and Shakespeare, or of Locke, Milton, Cromwell, and the Stuarts. It had become the really new England of the Georges. Very few in the colonies were capable of grasping this important truth. An England which was not the England of their forebears was beyond the comprehension of colonial minds.

The awkward, inflexible, and sometimes highly irrational system of colonial control undoubtedly did much to widen the breach. There was no central body or over-all authority in charge of colonial affairs. Nor was there any central authority or supervision in America. Each colony was separately responsible to the home government, and separately subject to the regulatory attentions of the Crown, Parliament, the Board of Trade, the Privy Council, the courts, and various administrative departments. Problems which were of long duration and grievances which time had festered before they reached the home government could not be promptly and intelligently faced. There was so much red tape, so much division of power and responsibility, so much delay and deviousness that the colonists were often bound to feel that they had been treated with what modern slang calls the "runaround." Even when they got what they wanted (which was often the case), they were deeply irritated by the procedure necessary to get it.

The quarrel which finally culminated in the American Revolution did

not originate in strictly political issues. The initial bone of contention was economic. Powerful groups in the colonies objected to the commercial regulations and financial measures imposed on them by the home government, and they did not at first identify these with the governmental system which carried them out. The controversy over such hated measures as the Stamp Act and the various Navigation Acts eventually developed a great deal of heat, and then colonial fury began to be visited on the officials who enforced these laws and their methods of enforcement. The royal governor, endowed with vast and arbitrary powers, became the very symbol of tyranny. Customs officials armed with writs of assistance, tax collectors with their meddlesome officiousness, judges who ruled against colonial defendants, and the red-coated soldiers stationed in various centers of disorder and disturbance were denounced as tools of British despotism. Convinced that the laws themselves were grossly unjust and a denial of their rights as English citizens, the objecting colonists were soon equally persuaded that they would never be able to achieve equal rights with other Englishmen so long as they were governed by officials not of their own choosing. Independence from England was not their demand, but self-government and self-taxation within the British Empire.

The organization of resistance. Not all of the people of the colonies by any means entertained these views or took an active part in the agitation against the British authorities. The official class, those directly or indirectly connected with the government, were generally pro-British. So, too, were the clergy of the Church of England, many of the great landed proprietors, and large numbers in business and professional life. The working people, small farmers, and others of the lower classes, being largely nonvoters anyhow and having apparently little at stake in the affair, were disposed to be more or less indifferent. Opposition to the British government centered chiefly in the commercial, mercantile, and shipping interests and the lawyers, doctors, and other professional people whose business was mainly drawn from those sources. They were the people who felt most directly the weight of the British tax and trade laws, and who first raised their voices in protest. These radical elements, calling themselves American Whigs, took the initiative in organizing and directing the crusade which led to the American Revolution.

Adept in propaganda, adroit and experienced in political manipulation, skilled in organization, proficient in business and public affairs, educated, intelligent, resourceful, and determined, these irreconcilables built up the first nation-wide political organization in American history. To further their program of protest and resistance, they set up in each colony and local community a network of interlocking committees,

known as committees of correspondence. Through these committees radical leaders and groups in all of the colonies communicated and kept in touch with one another, concerted their efforts, and coördinated their strategy. The committees of correspondence were generally unofficial bodies, privately hand-picked like the committees of our modern political parties. But they worked hand in glove with radical members of county and town boards and legislative assemblies. And when the radicals had a majority in one of these official bodies, it was often difficult to distinguish the official governing body from the unofficial committee of correspondence. Largely through the effective work of this political machine—for it was that in reality—the radicals won to their side a considerable part of the passive element of the population.

The First Continental Congress. By 1774 the committees of correspondence had whipped up so much feeling and had generated so much resistance that the British government began to consider stern countermeasures. As a means of consolidating their strength and organizing more effective plans of resistance, the committees of correspondence then contrived to bring about the holding of general congresses or conventions of radicals in several of the colonies, and to get together at Philadelphia an assembly of radical spokesmen from all of the colonies. The gathering at Philadelphia is known to history as the First Continental Congress. It was not an official body at all, but was made up of delegates selected in various ways (principally by the committees of correspondence) in each of the colonies, who met in order to consult and work out plans for a common course of action. For some weeks the First Continental Congress debated and resolved, but before it adjourned it did one extremely important thing, namely, adopted a resolution calling for the choice of delegates to a second gathering of the same kind, to be held, likewise in Philadelphia, in May, 1775.

The Second Continental Congress. By the time this Second Continental Congress met, the colonies were aflame with revolt. The skirmishes at Lexington and Concord had been fought, and Bunker Hill was just in the offing. The First Continental Congress had not foreseen this development or planned affairs in that way. The first clash had come because the steps taken by the British government to suppress the insurgent movement at Boston were met by armed resistance on the part of the Massachusetts Minute Men. The issue had been forced by events over which the radicals had no control, and now they either had to fight or quit the game. They chose to fight, but, if there had been no Second Continental Congress at Philadelphia in May, 1775, they might have had no choice at all. Had there been no Second Continental Congress to step into the breach, united resistance would have been so hard to or-

ganize that the British might well have crushed the revolution before it really got under way.

The Second Continental Congress had no legal authority to be or do anything more than its predecessor. It was called for the same purposes and by the same groups of people. However, it found itself confronting an emergency which required immediate action. The revolting colonists had no central government, no means of raising and equipping armies, no means of securing money, no means of dealing with foreign countries. The Second Continental Congress usurped sovereign powers and supplied these wants. It organized a national army and appointed Washington commander in chief; it borrowed money, issued paper currency, carried on diplomatic negotiations, made an alliance with France, directed the prosecution of the war, and to some extent coördinated the activities of the states. How well it performed these tremendous tasks has been the subject of acrimonious debate among historians ever since, but it performed them well enough, despite all shortcomings, to win the independence of the United States.

When it became evident, after a year of warfare, that the uprising must end either in complete independence or complete subjugation, the Second Continental Congress assumed the further responsibility of severing the last ties with the mother country. On May 10, 1776, it urged all of the colonies to frame and adopt permanent state constitutions to replace the provisional regimes which had sprung up at the outbreak of the struggle. On July 4, 1776, it issued to the world the renowned Declaration of Independence, which proclaimed the existence of the United States of America as a free and independent political community. On July 12, 1776, it began the consideration of a draft proposal for the first constitution of the United States. This draft remained in the hands of the Congress until November 15, 1777, when it was referred to the states for ratification. The final ratification took place on March 1, 1781, when, accompanied by the pealing of bells and the booming of cannon, the Articles of Confederation went into effect.

Independent Government

The first state governments. All of the colonies, except Connecticut and Rhode Island, followed the recommendation of the Congress and adopted constitutions during the revolutionary period. They regarded themselves as independent, sovereign states and designed their constitutions accordingly. Most of these new constitutions were drawn up and put into effect by the rump assemblies of the several colonies, which had taken over the reins when the royal governors were driven out. They

were not submitted to popular vote, and did not represent the political ideas of even the general voting population of the state. On the contrary, they were expressions primarily of the political ideas prevalent among the insurgent leaders who were carrying on temporarily as a result of the overthrow of the regular colonial governments.

Perhaps the most striking difference between these new state governments and the old colonial systems was the shift of the center of gravity from the governor to the legislature. Prior to the Revolution the powers of government had been divided between the home government and the colonial authorities, and the power of the colonial authorities had been divided between the assembly and the governor, the latter having the lion's share. Under the new state constitutions, the legislature took over almost everything. It was made the heir not only of all of the powers of the home government but also of most of the functions formerly carried on through the office of governor. That office was generally retained, but was reduced to a mere shadow of its former self. The governor was elected by the legislature. His veto power was taken away entirely or made subject to legislative reversal. His appointing power was transferred to the legislature or to a council of appointment controlled by the legislature. The judges were made dependent on the legislature rather than the governor. Control over local government went from the governor to the legislature. The ecclesiastical powers of the governor were abolished, and his military powers were brought under legislative control. The governor still had many duties to perform, but they were largely of a routine nature, such as the signing of papers, or were essentially ceremonial.

The structure of the legislature was not materially changed. Pennsylvania and Georgia introduced the unicameral legislature, but the other states provided for a legislature of two houses—an assembly and a senate. The members of both houses were commonly elected by popular vote, but Maryland used an indirect system of election for the senate. The senate represented property and wealth, while the assembly represented the less well-to-do. Some changes were made in the right to vote, but they were not uniform. North Carolina, for example, did away with the property-owning requirement altogether as a condition of voting for the lower house of the legislature, whereas Massachusetts made hers twice what it had been under British rule. Most of the states slightly reduced the property qualifications, but retained the religious tests.

Except for the transfer of control to the legislature, little change was made in local government. County, town, and municipal government continued under the old forms and procedures. There had been very little dissatisfaction with local government during the colonial period.

The foregoing summary does not apply to Massachusetts. A constitution not greatly differing from the type described above was drawn up by the Massachusetts legislature. This was submitted to the town meetings in 1778 and rejected. Then the legislature, with the approval of the town meetings, ordered an election for a special constitutional convention. This convention drafted and put into effect in 1780 a constitution which was in some respects notably different. It made the governor directly elective by the voters, gave him the power of appointment and a limited veto power. It also provided for an independent judiciary, the judges being appointed by the governor with the approval of the governor's council to hold office during good behavior. This constitution, most of which is still in force, foreshadowed trends later to be widely followed in both state and national government in this country.

The Articles of Confederation. The experience of the United States under the Articles of Confederation was not happy, but it was tremendously instructive. The Articles were not as totally defective as some writers have represented, nor were all of the woes of the so-called "Critical Period" (1781–1789) caused by the defects of our first constitution. If the Articles had not been immediately subjected to the enormous task of taking the country through the severe economic crisis which followed the Revolution, or, if they had given the central government (even as it was constituted under the Articles) the powers necessary to cope more effectively with general economic disorders, they might have worked fairly well and survived a long time. It is certain that nothing better than the Articles of Confederation would have been acceptable to the states or the people in the period between 1776 and 1781, and, if it had not been for the lessons learned under the Articles, it is quite probable that neither the states nor the people could have been persuaded that a stronger central government was necessary.

The chief defect of the Articles of Confederation was lack of power to deal with national problems in a national way, and this prime defect was closely seconded by the strictly co-partnership basis on which the Union was founded and its governmental system constructed. Each state, according to the stipulation of the Articles, retained "its sovereignty, freedom, and independence, and every power, jurisdiction, and right not by this Confederation expressly delegated to the United States in Congress assembled." The powers "expressly delegated" were few indeed. The central government was given no power to tax; its only means of raising revenues was to make requisitions on the state legislatures in proportion to the value of all land within each state. The state legislatures were not bound to honor these requests and could not be compelled to levy the taxes necessary to meet them. The central gov-

ernment was given no power to regulate commerce among the states or with foreign nations, nor even any power to institute a uniform monetary system throughout the United States. It was given sole power to conduct the foreign relations of the country, but this was largely vitiated by the fact that it had no means of obliging the states to live up to its agreements with foreign countries. It had no power to provide for the national defense by creating a national army and navy; all it could do was "to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State."

The phrase "the United States in Congress assembled" aptly expressed the idea of equal co-partnership between the states in the governmental system of the Confederation. Each state was entitled to send from two to seven delegates to the Congress. These delegates were chosen by the state legislatures, which could recall them at any time. No delegate could serve more than three years in any term of six. Each state had one vote in the Congress, this being cast by the state delegation as a unit. In other words, a majority of the delegates from each state could cast the vote of their state. In the event of a tie in the state delegation, the vote of that state could not be cast at all. The Congress was required to meet annually, and on matters of great consequence the votes of at least nine states (more than two-thirds) were required to pass a measure.

No executive or judicial machinery was provided for in the Articles. The Congress was required to create a Committee of the States, consisting of one delegate from each state. This committee was to sit when the Congress was not in session and carry on such business as might be confided to it by the Congress, but no policy-making powers could be given to it. The Congress established five administrative departments—Foreign Affairs, War, Navy, Treasury, and Post Office. These were supervised at first by committees of the Congress; later by boards created by the Congress, or by secretaries appointed by the Congress. No national courts were established by the Articles; but the Congress was given power to set up temporary commissions to settle disputes between the states and to create a court of appeals to decide cases on appeal from the state courts on questions of piracy and felony on the high seas and the seizure of ships and goods in time of war.

The movement for constitutional revision. A prolonged war is usually followed by severe and sometimes equally prolonged economic troubles. The period following the American Revolution was no exception to this general rule. Business slumped, debts became uncollectible, specie money disappeared, paper money became valueless, property rights were jeop-

ardized, sedition and violence broke out, and the threat of foreign intervention loomed on the horizon. Nowhere was there a power strong enough to cope with the situation. The states could not keep their own internal affairs in order, and the central government, a mere creature of the states, was well nigh powerless. The whole country seemed out of joint and the future looked dark indeed.

Something had to be done. Everybody had ideas of what it should be, but none seemed to fit the case. Ruefully, men recalled the strong, vigorous government of colonial times, especially men of wealth and property who saw their fortunes melting away like snow. There were whispers of a military coup, of setting up a dictatorship, of establishing a monarchy, even of a restoration of British rule. The feeble governments of the day, and particularly the government of the Union, shrank enormously in public esteem. It was universally agreed that something should be done to strengthen the Articles of Confederation. What? How? Nobody knew the answers. All efforts to amend the Articles of Confederation had failed. All thirteen states had to ratify a proposed amendment, and one cantankerous state was sure to hold out on any important change.

Something had to be done; many attempts were made and came to naught. The most widely supported projects of reform invariably blew up when just within sight of success. At last a way opened. A quarrel between Maryland and Virginia over the regulation of commerce on the Potomac River and Chesapeake Bay had resulted in the appointment of a joint commission to iron out the differences between the two states. The commission was to hold its sessions at Alexandria, Virginia, in 1785. George Washington, who was much interested in the outcome of this controversy as well as in larger matters, invited the commissioners to accept the hospitality of his estate at nearby Mt. Vernon, which they did. The conference resulted in a compact for the settlement of the issues between Maryland and Virginia. In the course of the sessions there naturally had been much talk of the general state of the Union, and the commissioners were of the opinion that much good might be accomplished by a general conference of the states on the subject of commercial regulations. They agreed to return to their respective states and urge their legislatures to invite all of the states to send delegates to a conference on commercial relations, to be held in Annapolis, Maryland the following year. The suggested invitation was issued, but only five states responded, and only twelve delegates showed up at the Annapolis meeting. Obviously nothing could be done at that meeting. Among those present as delegates, however, were James Madison, Alexander Hamilton, Edmund Randolph, and other leaders who were determined

to miss no opportunity to bring about a change of government. Deliberately sidestepping the question immediately before them, they adopted a resolution calling on the Congress to summon a convention of delegates from all of the states, to meet at Philadelphia in May, 1787, for the purpose of framing and proposing amendments which might render the Articles of Confederation adequate to the exigencies of the Union. Harried to desperation, the Congress complied, and issued the call, thus paving the way for the framing and adoption of the second constitution of the United States.

The Light of Experience

The work of the Philadelphia Convention of 1787 is best understood in the light of the many years of American political experience which lay behind it. To overlook the century and a half of political trial and error which preceded the Revolution, the six years of wartime government, and the six years of the Articles of Confederation, is to miss the sources of many of the ideas and principles of government which were incorporated in the second constitution of the United States. Although there was a certain amount of theorizing in the deliberations of the Philadelphia Convention and a number of visionary proposals were advanced, the final draft of the Constitution gave evidence of an extraordinary appreciation of the practical significance of the lessons to be found in American political experience. Before proceeding with the story of the Philadelphia Convention, let us briefly review some of the more important of these lessons.

Federalism. The government of England was unitary, but this unitary principle was not extended to the colonies. Each colony was separately organized and governed, but the home government from the very first looked after matters common to all of the colonies, such as defense, the regulation of commerce, foreign relations, monetary matters, and appellate justice. Thus, long before the Revolution, the people of the American colonies had become familiar with the federal concept in a concrete form. They were used to the territorial division of powers between a common central government and mutually separate and independent colonies. Moreover, they had been obliged to wrestle with some of the difficult situations incidental to such a division of powers, and had given much attention to various plans of intercolonial union which were advanced as remedies for some of these difficulties.

During the Revolution the Second Continental Congress acted as a provisional central government. Nearly every problem which could arise in the operation of a federal plan emerged in some form during

this period. Most of these problems were not solved—under the circumstances, they could not have been—but the people became increasingly familiar, nevertheless, with the problems themselves and with the reasons why they could not be solved. The Articles of Confederation were an attempt—only a halfway attempt, but sincere as far as it went—to provide an adequate central government and yet leave the states the utmost freedom and sovereignty. This attempt did not work, and the reasons for its failure were so obvious no one could miss seeing them.

The framers of the Constitution did not have to rely on ancient history for wisdom about federal government. Far more practical wisdom was to be found in the recent history of their own time and people. Nor did they have to seek wisdom in abstract theories about federalism, the working principles already tested in the laboratory of American experience were far more trustworthy.

Separation of powers: checks and balances. In England, during the first half-century of extensive colonial settlement in North America, there had been a gigantic struggle between the Crown and Parliament. The major powers of government were originally centered in the Crown. Parliament, gradually coming to be the spokesman of powerful religious and economic groups which were greatly dissatisfied with the kind of government carried on under royal absolutism, had challenged the right of the Crown to govern without the consent of Parliament. Civil war ensued; Parliament gained the right to impose important checks on the Crown; and finally, following the Whig Revolution of 1688, the supremacy of Parliament was duly achieved and recognized. Parliament then proceeded to gather into its own hands the full sovereignty of the nation.

Organic unity of the degree which prevailed in England before the assault on the supremacy of the Crown and after the triumph of Parliament never appeared in the government of the colonies. Legislative supremacy, somewhat similar to Parliamentary rule in England, did emerge in the two charter colonies of Connecticut and Rhode Island, but there were charter restrictions and checks from the home government which made it impossible for the entire process of government to be organized in and carried on through the legislature alone. In the other colonies there was always some degree of separation between the legislative and executive organs of government, and the courts were largely independent of legislative control and partially independent of executive control. The governor could veto acts of the colonial assembly, and that body in turn could often hamstring the governor by refusing to enact legislation at his behest. The courts could render decision in

disregard of the assembly and to some extent in disregard of the governor.

That the theoretical writings of Locke and Montesquieu regarding the principle of separation of powers should have made a powerful impression in America is easily understood. Americans had been familiar with governmental institutions embodying some aspects of that principle for several generations.

Government limited by law. The concept that there is a higher law than that emanating from the government of the day was as much a product of American experience as of abstract political theory. Government in the colonies had always been subject to a higher law—the Common Law of England, acts of Parliament, orders of the Crown, and the like. Appeal to a law higher than colonial law was a common experience. This situation made fertile soil for the philosophy that there must be a law higher than any goverment-made law—a law grounded in natural reason and natural justice. Americans could readily have faith in the reality of such a law, because in the isolation of the New World, where the regulatory power of the home government was of necessity spasmodic and irregular, it had often been needful to fall back on general principles. When unprecedented conditions arose, as they often did, and there was no known English law and no king or parliament on hand to solve the problem for them, recourse to natural reason and justice in keeping with the Common Law had surmounted many difficulties.

Having this predisposing experience behind them, it was to be expected that the people of the colonies would readily embrace the natural-law and social-contact theories which dominated the Puritan Revolution in England. To them, the existence of such a higher law was a self-evident truth. And it seemed equally clear that under this law every man had certain inherent and inalienable rights of which he could not be deprived without his own consent; and that governments were formed, on the basis of a contract between the subjects and their rulers, to fulfill the higher law. Hence, any government which did not respect and obey the higher law had violated the most sacred principle of its own being and was not entitled to the allegiance of its subjects.

Written constitutions. The sources of the higher law were right reason and just principles, inscribed in the minds and hearts of all men as intelligent beings in a rational universe. Nowhere was the higher law written down as a formal code. However, the political experience of the American colonists was peculiarly adapted to foster the belief that some parts of the higher law could and should be reduced to written form. The earliest political institutions in the colonies were set up either by

royal charters or patents or by mutual covenants between the settlers themselves (for example, the Mayflower Compact and the Fundamental Orders of Connecticut). These documents dealt with fundamental powers, rights, and duties, and came to be regarded as especially sacred. The revocations of the colonial charters were regarded as a blow to colonial liberties, and Connecticut and Rhode Island, the two colonies which retained their charters, were thought to be especially fortunate in having those definite bulwarks against the invasion of their fundamental rights.

Accustomed to fundamental law in written form and coming to believe, through experience, that basic rights could be more successfully defended and preserved when explicitly expressed and guaranteed in a written instrument, the American colonists developed a confidence in written constitutions and a devotion to them which were enormous factors in the successful transition from the first to the second constitution of the United States.

Governmental devices. Prototypes of most of the governmental devices and mechanisms with which the Constitution has made us familiar are to be found in the governmental mechanisms of the colonial period and the first twelve years of independence. The framers of the Constitution had little need to invent new contrivances; it was better, and also easier, to borrow from previous experience and to adapt, according to need, apparatus which had been well tested. The Constitution was not a new machine made of old parts, but of new parts made after old and well-understood patterns.

The office of governor, as known both in colonial times and in the early years of independence, furnished about all that was needed in designing the office of President of the United States. There had been powerful governors, powerless governors, and governors in between. The powers given to the President, and also the powers not given, were all exemplified in previous practice relating to the governorship. Indeed, it was first proposed that the chief executive of the United States should be given the title of governor, but on second thought the title of President was adopted. The latter title had been substituted for that of governor in Pennsylvania, and had the advantage of not carrying the odium which had become associated with the governorship in colonial days.

The model for Congress obviously was the colonial and state legislature. The legislative pattern was one of much variety, including unicameral and bicameral legislatures, equal representation and proportionate representation in one or both houses, direct and indirect election, all-powerful legislatures and legislatures of narrowly limited powers.

Nearly everything that went into the make-up of Congress, and a great deal that did not, was exemplified in the legislative institutions of the colonies and their successors, the states.

The Constitution created a Supreme Court and authorized Congress to establish inferior federal courts. Supreme courts, so called, had existed in colonial times and were found in a number of the states. Varying systems of inferior courts were also prevalent. The federal judicial system obviously owes many of its present characteristics to these models.

The Making and Adoption of the Constitution

The Philadelphia Convention. The story of the Philadelphia Convention of 1787 had become one of the great sagas of American history. Twelve states responded to the call and appointed delegates to the Convention. Rhode Island refused to participate. Seventy-three delegates were appointed, fifty-five actually attended, forty-two were present at the close of the Convention, and thirty-nine signed the Constitution. The delegates were chosen by the state legislatures or by the governors with the approval of their legislatures. Each state delegation received instructions from its legislature, defining its powers and purposes. Most of the instructions stated that the delegates were authorized to propose such amendments to the Articles of Confederation as would, when approved by Congress and the state legislatures, render them more adequate to the needs of the Union. Each state was entitled to one vote in the Convention, to be cast by a majority of the state delegation.

The Convention elected Washington, who was a delegate from Virginia, as its chairman, and selected other necessary officers. One of its first acts was to adopt a rule of secrecy which excluded all outsiders from its sessions and pledged every member to disclose none of its proceedings. Guards were stationed at the doors to keep unauthorized persons from entering. A number of plans were put forward, the most important being the Virginia Plan and the New Jersey Plan. The Virginia Plan, sometimes called the large-state plan, was offered by the Virginia delegation headed by Governor Edmund Randolph. The New Jersey Plan was presented by William Paterson on behalf of the New Jersey delegates; it is often referred to as the small-state plan. The Virginia proposal looked toward a strong national government with ample power to legislate in fields in which the states were incompetent and to enforce its laws by direct action on individuals. It proposed a two-house legislature in which representation would be according to population or financial contributions to the central government; it also proposed a national executive and a national judiciary. The New Jersey Plan proposed to

retain the one-house legislature and the equal representation of the states; but would add a national chief executive chosen by Congress and a national judiciary. It also proposed to enlarge the powers of the central government over commercial and financial matters.

The first critical issue in the Convention arose from the controversy over these two major plans. Both represented a shift in the direction of greater centralization, but the Virginia Plan went much farther than many were ready to go and farther than some thought the Convention had legal authority to go. The Convention was fully authorized to propose amendments to the Articles of Confederation, but the Virginia Plan in reality amounted to nothing short of a proposal to replace the Articles with a totally new and different constitution. If that was what the Convention wanted to do, the only legally correct procedure, many argued, was for the delegates to return to their respective states and ask for the necessary increase of authority. The friends of the Virginia Plan argued that such a step would be fatal; the necessary authority would never be given, and the delegates would return to Philadelphia—if they returned at all—with powers too limited to be of any practical use. Moreover, the Convention was not making a constitution, but was merely framing proposals for submission to the states. There could be no harm, it was urged, in submitting whatever plan the Convention thought best. The states, if they did not like it, could reject it and call a new convention. These arguments finally prevailed, and the Convention took the Virginia Plan as the basis for its further deliberations.

In working out the details of the new plan the Convention ran into many troublesome snags. The question of representation in Congress was settled, after a long debate, by giving the states proportionate representation in one house and equal representation in the other. The question of whether slaves and Indians should be counted in fixing the ratio of representation and of whether direct national taxes should be levied in the states in proportion to population or wealth, was compromised by an arrangement to apportion both representation and taxes according to population but to count only three-fifths of the Indians not taxed and three-fifths of the slaves. The question of whether the President should be elected directly by the people, or by the state legislatures, or by Congress, was compromised by the electoral-college plan which gave each state a number of presidential electors equal to the number of its senators and representatives in Congress and allowed the legislature of each state to determine how its electors should be chosen. Innumerable other difficulties were surmounted by similar processes of compromise and adjustment. The draft proposal was finally completed and signed on September 17, 1787.

The struggle for ratification. The resolution of Congress inviting the states to send delegates to the Philadelphia Convention, and likewise the instructions received by most of the state delegations, had expressly stated that measures proposed by it would not take effect until approved by Congress and the state legislatures. Mindful of the five years required to secure the ratification of the Articles of Confederation, the Convention sought a quicker and possibly easier mode of ratification for the Constitution. It sent the proposed Constitution to Congress accompanied by a resolution suggesting that it be returned to the state legislatures, that the legislature in each state authorize the election of a special ratifying convention, and that, when nine states had so ratified, the Constitution should go into effect. It was impossible to reject this proposal without denying the people a right to vote on the question of adopting the new Constitution, a responsibility which neither Congress nor the state legislatures wanted to assume. The Convention's scheme of ratification was accordingly adopted.

The campaign for the election of delegates to the state ratifying conventions and the proceedings of these conventions constitute a memorable page in American history. Several states ratified very promptly and two (North Carolina and Rhode Island) held out until after the Constitution went into effect. The really pivotal states were Virginia, Pennsylvania, New York, and Massachusetts. The failure of any one of these states to ratify would have been an almost fatal blow to the success of the new regime. There was great opposition to the Constitution in all of these states, and in three of them there were hostile majorities in the ratifying conventions when they first assembled. The methods by which these hostile conventions were won over were a masterly combination of oratorical persuasion, political pamphleteering, and "practical politics." The ninth ratification (New Hampshire) occurred on June 21, 1788. New York and Virginia still held out, but were brought within the fold a few weeks later. Congress then ordered the necessary elections for President and members of the Senate and House of Representatives to be held, and declared that the Constitution should go into effect on March 4, 1789.

The Growth of the Constitution

Amendments. None of the framers of the Constitution thought their work would be permanent. Most of them did not expect the Constitution to last much longer than the Articles of Confederation, but felt that it had qualities which would help the country around the difficult corner just ahead. Remembering how difficult it had been to amend the Ar-

ticles, and expecting that there would be considerable need to amend the Constitution, they provided in the latter document that amendments might be proposed by Congress (by a two-thirds majority in both houses) or by a convention called by Congress on the application of the legislatures of two-thirds of the states. Such proposals might be ratified by the legislatures of three-fourths of the states or by ratifying conventions in three-fourths of the states, as Congress might determine. Twenty-one amendments have been adopted. All but the Twenty-first were proposed by Congress and ratified by the necessary number of state legislatures. The Twenty-First (repealing Prohibition) was proposed by Congress and ratified by state conventions elected on the authorization of Congress, this procedure being followed in order to give the people a chance to vote on the question of Prohibition.

Some of the amendments have been much more important than others. The first ten amendments, often called the Bill of Rights, may be considered as one. They were adopted at the same time, and as part of the same political movement. When the Constitution was under debate in the state ratifying conventions, the objection was often raised (just as it had been on the floor of the Philadelphia Convention) that the proposed central government might use its enlarged powers to invade private rights. The friends of the Constitution always replied that this would be impossible, because the federal government would be a government of delegated powers only and no powers dangerous to private rights had been delegated to it. This reply did not quiet the fears of the objectors. Therefore, in order to win support, promises were made and resolutions adopted in many of the ratifying conventions to the effect that amendments suitably protecting private rights would be proposed and adopted just as soon as the Constitution went into effect. In keeping with these pledges, twelve amendments were presented for consideration in the first session of Congress in 1789. Ten of these were approved, sent to the state legislatures for ratification, and in 1791 duly approved by the legislatures of three-fourths of the states. It was understood at the time, and has been the rule ever since, that these first ten amendments are not a general guarantee of private rights but apply only to the federal government. Present-day opinion is that they have been enormously useful in doing precisely what the friends of the Constitution in 1788 thought would never be necessary—preventing abuses of power by the federal government. While it was true that no power to encroach on private rights had been explicitly given to the federal government, a good many of its granted powers were couched in broad and ambiguous terms which, as experience has shown, could be interpreted and applied in derogation of private rights.

The Eleventh Amendment (1798) was occasioned by a decision of the Supreme Court holding that a private citizen of one state might sue another state in the federal courts. The language of the Constitution was open to that interpretation, and the Eleventh Amendment specifically forbids the federal courts to make such a construction.

The Twelfth Amendment (1804) was adopted in order to prevent another tie vote in the electoral college such as occurred in 1800. The original provision of the Constitution was that the electors, chosen as the state legislatures might determine, should meet in their respective states and cast their votes for two persons, not designating which for President and which for Vice President. The person receiving the highest number of votes, if a majority of the number of electors, became President, and the person with the next highest number after the choice of a President, became Vice President. When organized political parties took the field, all electors of the same party cast their votes for the same two persons, one being the party's nominee for President and the other its nominee for Vice President. In 1800 this resulted in a tie between Jefferson, the Anti-Federalist nominee for President, and Burr, the same party's nominee for Vice President. The election then went to the House of Representatives, where some very shocking maneuvers took place. The Twelfth Amendment provided that the electors should cast their votes for two persons in distinct ballots, one for President and the other for Vice President. This change not only prevented a tie vote between presidential and vice-presidential nominees; it also marked the complete abandonment of nonpartisanship in presidential politics and the freezing of the party system into the American constitutional structure.

The Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments are usually known as the Civil War Amendments. The Thirteenth abolished and forever prohibited slavery. The Fourteenth established and guaranteed the basic rights of all persons in the United States against infringement by the states. The Fifteenth forbade the states to deny anyone the right to vote on account of race, color, or previous condition of servitude. All of these amendments were important, but the Fourteenth, by virtue of the broad interpretation which the Supreme Court has given it, has become our second bill of rights. It protects, against invasion by the states, virtually all of the great rights and liberties which the first ten amendments forbade the federal government to lay unjust hands upon.

The Sixteenth Amendment (1913) clarified an ambiguity in the Constitution with respect to the power of Congress to levy income taxes. The Seventeenth Amendment (1913) provided for the election of United States senators by direct vote of the people rather than by the state legis-

latures. The Eighteenth Amendment (1919) prohibited the manufacture, sale, transportation, importation, and exportation of intoxicating liquors. The Nineteenth Amendment (1920) insured woman suffrage by forbidding the states to deny the right to vote to any citizen of the United States on account of sex. The Twentieth Amendment (1933) changed the date of the beginning of the term of office of President and Vice President from March 4 to January 20, and of senators and representatives from March 4 to January 3, thus doing away with the necessity of having a long and a short session of Congress in each biennium. The Twenty-First Amendment (1933) repealed the Eighteenth Amendment. It cannot be said that any of the amendments mentioned in this paragraph fundamentally altered the workings of the American system of government. Some of them did, however, cause major repercussions in the political, social, and economic life of the nation.

Judicial interpretation. Although the Constitution has been rather freely amended, its principal growth has come in other ways. One of the most important of these has been judicial interpretation. In settling lawsuits involving points of constitutional law, the courts necessarily have to decide what they think the Constitution means. The judicial interpretation, in most countries, is not the final and controlling one, but in the United States it is. Our courts were early conceded to have the right to declare null and void any legislative act in conflict with the Constitution. Thus it has come about that the Supreme Court of the United States, being the tribunal of final appeal on constitutional questions, is constantly handing down decisions, binding on all other branches of our government, which determine what the Constitution means in relation to all sorts of legislative enactments and administrative proceedings. Since these decisions can seldom be made without at the same time determining the nature and scope of powers granted, withheld, or forbidden by the Constitution, it is obvious that the Constitution in action is what the Supreme Court says it is.

The Supreme Court has often been accused of making the Constitution mean whatever a majority of the judges want it to mean. The Court certainly could render decisions on that basis if it wanted to, but it has very seldom done so. The Court's freedom in interpreting the Constitution comes not so much from its own arbitrary will as from the fact that the language of some of the most important provisions of the Constitution is not precise and unequivocal. When the Constitution says, for example, that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," it leaves a great many questions unanswered. It does not say what is and is not commerce. It does not say when commerce is or is not

"with foreign nations" or "among the several states." It leaves all of those questions to be settled by interpretation.

Suppose now that Congress, assuming to regulate commerce among the several states, makes a law (as Congress has done) fixing minimum wages and maximum hours of labor for employments sending their products across state lines. This law comes before the Supreme Court and that tribunal decides (as it has) that these employments involve commerce within the meaning of the Constitution and that wage and hour restrictions are appropriate regulations of that commerce. Has the Court changed the Constitution? Not literally. The language of the Constitution remains just what it was before. Has the Court changed the meaning of the language? That depends on whether the language ever had an absolutely fixed and certain meaning. No one can prove that the commerce clause ever did. It was ambiguous in 1787 and it is still ambiguous today. It meant different things to the men of 1787, though not the same different things that it means to the men of today. Must its application be confined to the different things that it meant to the men of 1787—never extended to any of the things it means to the present generation? The Constitution itself does not say so, the men of 1787 did not say so, and, if such a thing was intended, it would mean that the Constitution was intended to become obsolete with every passing generation.

The Supreme Court has chosen to base its decisions on the assumption, not that the Constitution was intended to endure forever (which would be historically untrue), but was intended, for all of the time that it should endure, to have meaning and vitality. The Court, accordingly, has rather consistently interpreted the ambiguous terms of the Constitution in the light of present rather than past understanding. In so doing, the Court has kept the Constitution alive and currently applicable to the problems of succeeding generations. It has not expanded the Constitution; it has merely cut away the bindings and enabled it to grow. By judicial interpretation the Constitution has grown prodigiously. To trace that growth and fully understand what the Constitution means today, one must be familiar with the contents of more than three hundred volumes of United States Supreme Court Reports.

Statutory growth. Although Congress does not have power to alter the Constitution directly, the actual working of the Constitution has been greatly modified by many of the statutory enactments passed by Congress. On some points the Constitution goes into much detail; on others it is bafflingly reticent or silent altogether. It goes into much detail about the office of chief executive, but merely mentions the executive departments under the President. It does not, in fact, specify that they shall be

under the President. Congress has established the ten executive departments and placed them under the President. Had Congress done otherwise, as it might well have done, the whole character of the federal government might have been different from what it has become. There might have been no centralized bureaucracy, no Cabinet, and the President might not have acquired the vast political power which has accrued to his office. In setting up the administrative machinery, Congress has created many boards, commissions, corporations, and other agencies, some of which are largely independent of direct control either by Congress or the President. Agencies such as the Interstate Commerce Commission, the Federal Reserve Board, and the Reconstruction Finance Corporation have had an immense influence in shaping the character of our government. Congress has created the federal judicial system under the Supreme Court, has determined the number of members of the Supreme and lower federal courts, and has regulated the jurisdiction of these tribunals. Were it not for these basic statutes, the judicial branch of the federal government would be different and the federal judicial power might not have been exercised in the manner that it has.

Congress has enacted innumerable laws authorizing the federal government to regulate various aspects of our social and economic life. By such means, radio broadcasting has been taken under federal control, railway rates and services have been regulated, monopolistic combinations have been forbidden, agriculture has been subsidized and supervised, collective bargaining with organized labor has been made obligatory, minimum wages and maximum hours have been established, the food and drug industries have been subjected to rigid inspection, and scores of other things have been done which have profoundly affected the impact of the Constitution on the everyday social and economic life of the nation. Many of these enactments have changed the real character of the American political system far more than most of the amendments of the Constitution.

Custom and usage. Customs and usages are sometimes potent influences for change. They have been so in the growth of the Constitution of the United States. The party system, which has been chiefly the outcome of customs and usages, has materially modified the constitutional system of electing the President, rendering the electoral-college method virtually obsolete. The party system has also greatly changed the relation between Congress and the President. The custom of "senatorial courtesy" has practically reversed the appointing process for a large number of federal positions, so that in reality the senators nominate and the President confirms. Usage, not law, has established the rule that the Vice President, upon the death of the President, shall become President instead of

merely performing the duties of the President as the Constitution states. Many other examples of important constitutional changes wrought by custom and usage could be cited without difficulty.

The growth of state and local government. State constitutions have undergone a transformation just as great as that of the national Constitution. The first state constitutions, with the single exception of Massachusetts, did not last long. The example of the Constitution of the United States was constantly before the people of the states, and there was a strong inclination to change state government to follow the national pattern. Moreover, the great democratic movement—which began with the election of Thomas Jefferson and later swept Andrew Jackson triumphantly into the White House—resulted in a universal demand for liberal changes in state government. New constitutions were adopted, and then still newer constitutions. Some of the states are now being governed under a third or fourth constitution. The amending process was made so easy in most of the states that there was little difficulty in altering the state constitution to conform with every new political fad. Constitutional conventions are also fairly easy to assemble in a great many of the states, and, as a result, seldom a decade passes without the emergence of one or more totally new state constitutions. Custom, statutes, and judicial interpretation have also been active factors in the transformation of state government.

Changes in local government, especially in city government, have been even more frequent and sweeping than instate government. For a great many years the state legislatures reserved to themselves the power to determine the form and functions of city government. Around 1870 there began a widespread movement to secure for cities a greater degree of freedom in deciding their own forms of government and in managing their own local affairs. The fruits of this movement were provisions in state constitutions granting home rule to cities or municipalities; codes enacted by the state legislature giving cities large powers of self-government. Taking advantage of this greater freedom, American cities have experimented with many new and interesting forms of government. Rural local government is still largely in the custody of the state legislatures, but the legislatures have modified the original forms in a good many ways. A vigorous movement for county home rule has already been launched in several states.

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CHAPTER 8

THE AMERICAN FEDERAL SYSTEM

The Federal Division of Powers

The Constitution was intended to establish a federal plan of government. It clearly sets forth the main outlines of such a system. Powers which the framers thought should be nationally exercised were delegated to the central government; powers which they thought the states should not exercise were forbidden to the states; powers which they thought should not be exercised at all were forbidden to both; all other powers were reserved to the states respectively or to the people.

It was not difficult to agree upon this general scheme of dividing power between the federal and state governments. It was simple. It did not go into great detail. Moreover, it was couched in terms which invited interpretation according to the point of view, or even the political bias, of the reader. These qualities were of much help in getting the Constitution adopted, but, unfortunately, they left unanswered a number of thorny questions which have provided storm and controversy for succeeding generations. Most of these questions were left unsettled because it was impossible for the framers of the Constitution, the members of the ratifying conventions, and the voting population of 1787 to solve the problem of state sovereignty. The Constitution divided powers between the states and the nation according to a formula which evaded that issue, but evaded it in such a way as to leave room for both the state rights and the nationalist people to believe that their concerns had not been sacrificed. The trouble came when the Constitution had to be applied to concrete situations, for both were sure, in such situations, that the Constitution was on their own side.

Delegated powers. Two kinds of power are clearly delegated to the national government by the Constitution—those expressly delegated and enumerated in the instrument itself and those implied by reason of express statements in the Constitution. The expressly delegated powers include the grant of all legislative powers to Congress (Article I, Section 1), the special enumeration of subjects on which Congress may legislate (Article I, Section 8), the vesting of the executive power in the President, the detailed description of his special powers (Article II), the be-

stowal of the judicial power on the Supreme Court and inferior federal courts, and the enumeration of the cases to which the federal judicial power shall extend (Article III). The implied powers are based on the elastic clause (Article I, Section 8), which says that Congress shall have power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." This language obviously says that all powers necessary to carry out any power expressly granted are by implication delegated to the national government.

The major issues which have arisen in the interpretation and application of the delegated powers are: (1) whether the delegated powers are exclusive in character and may not be shared to any extent by the states; (2) whether the powers impliedly delegated embrace only those absolutely indispensable for carrying out the express powers or also those useful and expedient though not absolutely necessary.

Exclusive and concurrent powers. The language of the Constitution in several places seems to indicate that it was not intended that all of the delegated powers should belong exclusively to the central government. The power to coin money is expressly granted to the United States and expressly denied to the states. That this power was exclusively delegated no one could doubt. The power to tax, on the other hand, though expressly granted to the United States, is not denied to the states. Did the grant to the United States, of its own force, operate as denial of the taxing power to the states? If it did, the states would be virtually forced out of existence for lack of the means to carry on their governments. Nothing of the sort was intended or even remotely implied, and for that reason it is certain that the taxing power was expected to be not an exclusive but a concurrent power. But what about the power to establish post offices and post roads, which is also expressly granted to the national government and not denied to the states? What about the power to regulate interstate and foreign commerce, the power to grant patents and copyrights, the power to establish a uniform rule of naturalization, and certain other powers—likewise expressly delegated but not denied? Was there any criterion by which these could be classified as exclusive or concurrent?

The Supreme Court of the United States, confronted in 1819 with the question of whether the grant of power to Congress to make uniform laws on the subject of bankruptcy legislation (Congress not having exercised its power) excluded state action in the same field, said: "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress

the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it." [1] Conversely, the Court has ruled in many subsequent cases that when the terms of the grant or the nature of the power are not incompatible with its exercise by the states, the mere grant to Congress does not of itself imply a prohibition on the states to exercise the same power.[2] Under those circumstances, state action is barred only when Congress has fully occupied the field or has proceeded in some other way to render action by the states incompatible with the proper exercise of the power delegated to Congress.

These simple criteria have provided an adequate formula for the solution of the problem of exclusive and concurrent powers. But it is not a formula which magically answers every question in advance. Not until all of the facts of a situation are known and measured can it be determined whether the formula will favor the exclusive power of Congress or the concurrent power of the states. Every year brings new questions and new answers, for every year brings new federal and state laws designed to operate in areas where power has been delegated to the federal government but not expressly withheld from the states. The Supreme Court has been able to settle some of these questions permanently. For example, it has decided that the states may not under any circumstances regulate naturalization or grant patents and copyrights, for the nature of these powers requires uniformity throughout the United States. But it has found no final answer for questions raised by such delegations as the power to tax and the power to regulate interstate and foreign commerce. The terms of the grant do not make these powers exclusive and their nature is such that diversity, rather than uniformity, is at times not only admissible but highly desirable. With respect to these and some other delegated powers, therefore, the question of whether they are exclusive or concurrent can be answered only by saying that they are sometimes the former and sometimes the latter, depending on the circumstances of the particular case as viewed and determined by the Supreme Court of the United States.

Express and implied powers. The problem of implied powers has been a storm center in American politics. There was no question of the existence of implied powers; the evidence of that was plainly to be found in the language of the Constitution itself. The question not clearly answered by the language of the Constitution was whether the implied powers should be liberally or strictly construed. Broad construction would enlarge the powers of the central government at the expense of

[1] *Sturges v. Crowninshield*, 4 Wheaton 122 (1819).

[2] Cf. *Gibbons v. Ogden*, 9 Wheaton 1 (1824); *Cooley v. Board of Port Wardens*, 12 Howard 299 (1851); *Bowman v. Chicago Ry. Co.*, 125 U.S. 465 (1887).

the states. Strict construction would have the opposite effect. The Constitution said that the implied powers should include powers "necessary and proper" for carrying into execution the express powers. What did "necessary and proper" mean? When that question first came before the Supreme Court in 1819, Chief Justice Marshall, writing the opinion of the Court, very forcefully and eloquently upheld the broad-construction view.

If any one proposition could command the universal assent of mankind [he declared], we might expect that it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts. . . . It is not denied that the powers given to the government [of the nation] imply the ordinary means of execution. . . . But it is denied that the government has its choice of means, or, that it may employ the most convenient means. . . .

But the argument on which most reliance is placed, is drawn from the peculiar language of this [elastic] clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but only such as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, only that which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as implying any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. . . .

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which

the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[3]

The Supreme Court under Marshall adhered to the liberal construction of the Constitution, and, except for brief interludes and particular departures, the Court has followed that view ever since. The strict-constructionists, champions of state rights, were not convinced or silenced. They built a great political party which came into power under Jefferson and remained in power most of the time until the Civil War. But on finding themselves in power, they also found themselves wanting to use the national government for many purposes which the strict-construction principle would not allow. The Supreme Court, even though it came to be made up mostly of strict-construction men, did not place serious impediments in their way. On one issue only was there no retreat from strict-constructionism—the issue of slavery. The growing magnitude of the nonslavery sections of the country made it perfectly obvious that they would eventually dominate the national government and would use that government, if it had the power, to abolish slavery. Hence the insistence, on the part of the slave states, upon an absolutely strict construction of any powers of the federal government which might touch the institution of slavery. Hence, also, their insistence upon the right to secede from the Union, when they came to believe that the national government was going to take steps against slavery in direct disregard, as they thought, of its legitimate constitutional authority.

The Civil War settled the slavery issue forever, but did not quite so conclusively settle the question of broad construction as opposed to strict construction. It was universally recognized, after the Civil War, that the right of secession did not exist and that the Supreme Court of the United States was the final arbiter on all questions of disputed powers. But it was not decided, and never has been decided, that the Supreme Court is bound to follow the liberal- rather than the strict-construction view. On the whole the Court has leaned decidedly to the liberal side, but there have been times, even in recent years, when it has very definitely inclined to strict-constructionism. For we must remember that it is the duty of the Court to recognize that the Constitution not only delegates powers to the national government but also

[3] *McCulloch v. Maryland*, 4 Wheaton 316 (1819).

reserves powers to the states, and, further, to recognize that, so long as these reserved powers exist, the delegated powers, even by the most liberal interpretation, cannot be entirely unlimited.

Reserved powers. The powers reserved to the states are not particularly specified in the Constitution. It was obviously the intent of the authors of the Constitution that the reserved powers should include all powers not delegated to the United States, but no language to that effect was incorporated in the draft adopted by the Philadelphia Convention. When this problem came before the state ratifying conventions, the fear that the new central government would absorb most of the important powers of the states was the chief bulwark of the opponents of ratification. There was a demand that it be written in the bond that the powers of the states should be unimpaired except for the delegated powers. Several states ratified on the understanding that an amendment of such purport would be immediately proposed and adopted. These expectations were fulfilled by the Tenth Amendment, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Here was explicit recognition that the reserved powers are on a par with the delegated powers, and must be so construed. "While the states," quoting the Supreme Court, "are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.'"[4] The Supreme Court has said this not once, but dozens of times. As a principle, it is clearly and firmly established. But it is one of those principles, unfortunately, which are much easier to state in the abstract than to apply in actual life.

The national government was to be supreme in the sphere of delegated powers and the states equally supreme in that of reserved powers. When the boundaries of the two spheres were clearly marked and did not overlap, no trouble could arise. In the daily affairs of mankind, however, trouble almost invariably arises when attempts are made to set boundaries for imaginary spheres of political power and make political practice conform with them. Everybody understood that the states were supreme in their sphere, but when it came to a question of whether, for example, the federal government might use its postal power to go into the money-order business or the express business, it was not easy to determine that the reserved powers of the states would or would not be invaded. How broad was the postal power? Could it, by any reasonable

[4] *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

interpretation, include power to carry on activities not directly essential to the transmission of mail? How broad were the reserved powers of the states with respect to the regulation of the money-order business or the express business? Were they so broad as to be exclusive as to business not passing state boundaries? The general principle of dual sovereignty gave no answer to such questions, and the Supreme Court itself could find no guiding rule. In 1827, near the end of his lustrous career, we find Chief Justice Marshall saying that national and state powers "though quite distinguishable when they do not approach each other, may yet, like the intervening colors between black and white, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." [5]

The dual-sovereignty problem. Marshall was too hopeful. It proved impossible to settle all of the issues as the cases arose. The implied powers could not be construed broadly enough to resolve all conflicts, and there were some points on which determined resistance to the liberal interpretation of delegated powers developed. The slave states would not concede the right of the national government to interfere with slavery by any interpretation of any delegated power. Jurisdiction over slavery, according to their view, had been totally reserved to the states. Federal action or legislation on that subject was not only unconstitutional, but a violation, they asserted, of the compact by which the states were bound together as a federal union. Eleven of the slave states were so firmly convinced of the correctness of this view that they claimed, and attempted to assert, the right to secede from the United States and set up a new union in which their reserved powers would be adequately protected. This, of course, precipitated the great Civil War, which the people of the South to this day insist was not truly a civil war but a war between states.

In one respect the Southern conception of the nature of the war certainly is right. It was not an ordinary civil uprising against the government in power; not a struggle between factions or classes for the control of the state. On the contrary, it was primarily a contest between the member states of a federal union over the question of divided powers. Strangely enough, however, the victory of the North did not result in a conclusive settlement of that question at all. The South was defeated and, like the loser in a civil war, compelled to bow to the authority of the victor. But not a thing was done to abrogate generally the reserved powers of the states. The power of the states to legalize slavery was cut

[5] *Brown v. Maryland*, 12 Wheaton 441 (1827).

off by the Thirteenth Amendment, and their power to discriminate in certain ways against freedmen was terminated by the Fourteenth and Fifteenth Amendments; but all other reserved powers were left intact. There was, indeed, no explicit denial of the asserted right of secession, which had been the immediate cause of the war. The states still could claim to be sovereign and supreme in their own sphere, though it was tacitly conceded that all controversies over disputed powers must yield to the final arbitrament of the Supreme Court of the United States. The problem of dual sovereignty, except in the areas covered by the three amendments mentioned above, was merely transferred from the political to the judicial arena.

Whether a power belongs to the federal government or to the states is now exclusively a matter of judicial interpretation. It is often said that the Civil War established the supremacy of the nation over the states, but that is not accurate. It established the right of the Supreme Court to say in each controversy, if and when it gets before the Court, whether the nation or the states shall be supreme. It has never been established that the nation has universal supremacy over the states, and the Court in numerous cases, even in recent years, has ruled in favor of the states. There have been times when opinion on the Court has appeared to tilt definitely to the side of federal supremacy and other times when it has seemed to lean just as plainly the other way. One of the principal grounds on which the Court in 1935 and 1936 struck down such Congressional enactments as the National Recovery Act, the Agricultural Adjustment Act, the Bituminous Coal Act, and the Municipal Bankruptcy Act was that they were unconstitutional encroachments on the reserved power of the states. Later, as New Dealers replaced Old Dealers on the Court, it became apparent that virtually all of these measures, if they could be presented anew to the Court, would be sustained. In some instances this was done. In other cases Congress reënacted the measure in modified form, and it was upheld. Congress also enacted many additional measures extending federal powers even farther than those mentioned above, and the Court held them constitutional. This led some persons to conclude that the question of state rights is dead; that the problem of dual sovereignty is no more. To put it mildly, that opinion is obviously premature. Many times in the past the Court has gone far in the direction of national supremacy and later swung back. There is no assurance that such shifts will not occur again.

But the dual-sovereignty problem would not be finally solved, even though the judicial pendulum should never swing back to a narrower interpretation of federal powers. The Supreme Court never decides, and has no power to decide, general propositions. It can decide particular

lawsuits when they come before it; nothing more. Although each decision becomes a guiding precedent for future cases, the precedent is binding only to the extent that future cases are identical with or closely similar to the precedent case. Cases arising under new laws, whether state or national, almost invariably show enough deviation from the line of established precedent to bring up new angles of the problem of dual sovereignty. Scores of such cases find their way to the Supreme Court every year. Hence, the Court, every year, dutifully hands down many piecemeal answers to as many piecemeal questions of dual sovereignty, and will go on doing so as long as our present Constitution endures. No one can fully understand the peculiarities of American government and American politics, unless he clearly grasps the fact that the full power to govern is not in this country completely and conclusively centered anywhere, but is divided in such a way that only by perennial litigation and adjudication can it be determined whether it is the federal government or the states to which the right of action belongs. No other governmental system on earth works that way.

Interstate Relations

In an early case the Supreme Court of the United States said: "For all national purposes, embraced by the federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other, their Constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." [6] Under the Articles of Confederation the states had not been firmly united even for national purposes. The Constitution undertook to establish a strong national union, at the same time leaving the states "foreign to and independent of each other" in the area of reserved powers. Thus has resulted one of the great paradoxes of American government. In many respects we are one people and one nation, but in many others we are forty-eight different countries. Each state has its own separate and peculiar system of criminal law, of property law, of commercial law, of domestic-relations law, and of many other kinds of law. These state laws, were it not for Article IV of the Constitution, would have no more force in another state than the laws of a foreign country. It was to counteract the most baneful effects of this situation that Article IV was incorporated in the Constitution. The Constitution had given the national government authority to regulate interstate commerce and certain other

[6] *Buckner v. Finley*, 2 Peters 568 (1829).

relations between the states, but state-rights sentiment was too strong to allow the national government jurisdiction over all interstate relations. Article IV attempted to get around this difficulty by laying down three rules to govern certain relations between the states. These clauses have been responsible for some of the deepest perplexities of our federal system.

Full faith and credit. "Full faith and credit," says Section 1 of Article IV, "shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings may be proved, and the effect thereof." Congress has set up a procedure of certification whereby the necessary proof may be made, and has enacted that the judicial proceedings of one state shall have the same effect in all other states as they have by law or usage in the state in which they were rendered. Questions of full faith and credit may go on appeal from state courts to the Supreme Court of the United States. This has enabled the Court in a negative way to gain some degree of control over full faith and credit; but the decisions of the Court on this subject constitute one of the most confusing and inconclusive branches of American jurisprudence.

The Court has been much troubled by the term "public acts." Does this mean that every legislative action and administrative proceeding, as well as every judicial decision, of every state must be accorded full faith and credit in every other state? The Court has made it clear that it thinks not. It has ruled that no state is bound to execute the criminal law of another state, and has indicated that there may be "public acts" of a civil nature which may be denied full faith and credit. Unfortunately, it has never been able to arrive at a precise and inclusive definition of the constitutional meaning of "public acts." Congress has added to this uncertainty by failing to include "public acts" in its legislation regarding the effect to be given in one state to the law of another state. Judicial proceedings and public records are included, but not "public acts."

On the question of whether a state actually has given judicial proceedings of another state the same effect that they would have in the home state, the decisions of the Court have not run in straight lines. In general, the Court has held that a state is bound to recognize and apply, as may be requisite, the civil statutes as well as court judgments of sister states, but there have been so many exceptions to this general rule that the most experienced lawyers are often at a loss to know what to expect. Whenever a contract made in one state or a statutory right acquired under the laws of one state comes before the courts of a sister

state for enforcement, the principle of full faith and credit is invoked. The claimant, in general, is entitled to the same treatment that he would have under the laws of the home state. But he cannot be absolutely sure of this, for his case may come within the scores of exceptions to the general rule. It may be that the sister state has provided no judicial machinery with authority to act in cases such as his, or that he is claiming a special benefit (such as an old-age pension) which the sister state is not bound to give, or that the courts of the sister state challenge the jurisdiction of the courts of the home state.

This matter of jurisdiction has been the cause of a lot of trouble, especially in determining the validity of divorces granted in another state. No two states have the same laws on this subject, but full faith and credit requires that a divorce valid in the granting state shall be held valid in all states. However, a divorce is not valid and need not be given full faith and credit, if the courts of the granting state did not have jurisdiction over the parties. When both parties to the divorce action are residents of the granting state, no trouble arises; nor when one is a nonresident, but is given notice and voluntarily appears. But when the nonresident party does not appear in answer to the complaint and is given notice only by mail or by publication, and the couple have never resided as man and wife in the divorce-granting state, the situation is doubtful. In 1943 the Supreme Court seemed to reverse the long-standing rule that divorces granted under such conditions need not necessarily be recognized by the state of the matrimonial domicile. Then, in 1945, it seemed to reverse itself again, by holding that the assertion of jurisdiction by the divorce-granting state is not conclusive on other states. The state of the matrimonial domicile, and perhaps other states, may, according to this decision, challenge the jurisdiction of the divorce-granting state, and the Supreme Court of the United States will decide finally whether the necessary jurisdiction is obtained. Since the Court did not say, and no one knows, on what bases it would decide the question of jurisdiction, it cannot be certain that a divorce granted to a resident spouse when the defending spouse, a nonresident, is notified only by mail or publication, is valid throughout the Union. This problem of jurisdiction is especially dramatic in divorce, but it arises just as frequently in other matters.

Despite the full-faith-and-credit clause, therefore, the states of the American Union continue to this day to be in some respects as independent of one another as foreign nations; and the citizen of one state, on going to another state, may be treated in certain ways just as though he were an alien.

Privileges and immunities. Clause 2 of Article IV says: "The citizens of each state shall be entitled to all privileges and immunities of the

citizens of the several states." This provision, added to the full-faith-and-credit clause, would seem to remove all disabilities of alienage when a citizen of one state goes to another state. As interpreted by the Supreme Court, however, the privileges-and-immunities clause does not go quite that far. The judicial eye has perceived a distinction between privileges and immunities which attach to citizenship as such and those which do not. It is the privileges and immunities of the *citizens* of the several states which are guaranteed to the citizens of each state. Some privileges and immunities are so fundamental, according to the Court, that they may not be denied to any citizen; he is entitled to them simply because he is a citizen. Others may be given or withheld as the state sees fit; no person may claim them merely because he is a citizen. "We feel no hesitation," said Justice Washington, explaining the meaning of the privileges and immunities clause in one of the early cases, "in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. . . . But we cannot accede to the proposition . . . that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens." [7]

Precisely what these two different categories of privileges and immunities include, the Court has told us only as cases have come before it. We know that a state does not have to extend the voting privilege to citizens of other states; it does not have to give that privilege to its own citizens, if it does not want to. Nor does a state have to accord to citizens of other states any other privileges and immunities (for example, free education, hunting and fishing privileges, or the privilege of operating motor vehicles on the public highways) which it is not obliged to give to its own citizens. It may extend these special privileges and immunities and deny them to citizens of other states or grant them on such terms as it sees fit. But no state may deny to citizens of other states the right to own property, the right to pursue a lawful occupation, the right of equal access to the courts, and various other basic privileges and immunities which it may not deny to its own citizens. Nor may it discriminate against citizens of other states in respect to these fundamental privileges and immunities.

Thus it comes about that when a citizen of one state goes to a sister state, he is partly an alien and partly not. And if he thinks he is being

[7] *Corfield v. Coryell*, 4 Wash. C.C. 371 (1825).

subjected to discrimination in the fundamental privileges and immunities of citizenship, his only recourse is to go to court, possibly even to the Supreme Court of the nation, and get a judicial pronouncement on the matter.

Interstate rendition. Clause 3 of Article IV says: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction over the crime." Independent nations, in the absence of treaty obligations, are not bound to surrender fugitives from justice. The extradition clause, quoted above, apparently was designed to impose such an obligation on the states of the American Union. Congress, although not expressly empowered to do so, has enacted legislation prescribing the procedure by which the executive authority of the demanding state may call upon the executive of the state harboring the fugitive to arrest and give him over. This law also says that "it shall be the duty" of the executive of the harboring state to cause the fugitive to be arrested, secured, and delivered up to a properly designated agent of the executive of the demanding state.

The Supreme Court has interpreted this act of Congress, and also the language of the Constitution itself, as follows:

> The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion, the words "it shall be the duty," were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with power. . . . And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it.[8]

The Court has continued through the years to remain of substantially the same opinion. The extradition of a fugitive from justice to the state having jurisdiction over the crime is, therefore, an optional duty on the part of the governor of the state to which he has fled. It is a duty which, for the most part, is readily and promptly performed. Occasionally, however, a state governor refuses to surrender a fugitive. In that event, be his reasons good, bad, or indifferent, the matter is ended. In

[8] *Kentucky v. Dennison*, 24 Howard 66 (1861).

respect to interstate rendition, the states of the American Union are as independent of each other as though they were foreign countries.

Dual Citizenship

The Constitution speaks of "citizens of the United States" and "citizens of the several states" in such a way as to make it clear that in the minds of the framers there was a distinction between national and state citizenship. Whether this was a difference of substance or merely of form, was not made clear. In its early pronouncements on the subject, though without deciding the point squarely, the Supreme Court assumed that every state citizen was also a national citizen and, vice versa, that every national citizen residing in a state of the Union was likewise a citizen of that state. In 1857, the Court, in the famous Dred Scott case, had to decide whether a state might make a Negro one of its citizens, and, if so, whether the Negro citizen became, *ipso facto*, a citizen of the United States entitled to the privileges and immunities of national citizenship under the Constitution. The Court answered that, although a state could confer its citizenship on whomsoever it pleased, it had no power to bestow any rights or privileges extending beyond its own boundaries. State citizenship, whatever it might mean, was confined to the territorial limits of the state giving it. On the converse issue, whether national citizenship included state citizenship, the Court was unable to reach a conclusive opinion. As a result, there was no united declaration affirming the proposition.

As things stood after the Dred Scott decision, it was clear that state citizenship could exist independently of national citizenship and that national citizenship did not of certainty carry state citizenship with it. There were two kinds of citizenship in the American Union, and they need not coincide at all.

Dual citizenship today. The status of the Negro was quite as much a problem after the Civil War as before. It was not certain that freedmen, though born in the United States, were citizens; and, granting that they were, if the states could refuse them state citizenship, grievous discriminations could be practiced against them. The Fourteenth Amendment, adopted in 1868, was designed to meet this situation. On the subject of citizenship, the Amendment says: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This partly closed the gap between national and state citizenship, but not entirely. National citizens, if they reside in a state, are automatically citizens of that state. But if national citizens reside in the District of Co-

lumbia, Alaska, Hawaii, or any other territory of the United States not admitted to the Union, they obviously cannot be state citizens. Moreover, national citizens cannot be state citizens unless they *reside* in the state whose citizenship they claim. The Fourteenth Amendment does not define the term "reside" or forbid the states to do so. In practice, the matter of residence requirements has been left entirely to the states, and each state has set up a prerequisite period of residence. These vary from three months to two years, the commonest being one year. When, therefore, a national citizen resident in one state moves to another state, he must wait the required time before he can become a citizen of the second state. Technically, he is still a citizen of the state he left, but this is poor consolation for the denial of citizenship in the state where he now lives. Great numbers of American citizens move from state to state each year, and all of these are for varying periods of time deprived of the special privileges of state citizenship, including the privilege of voting for presidential electors and members of the United States Senate and House of Representatives.

The Fourteenth Amendment did not forbid the states to grant state citizenship to persons who are not national citizens, even to persons not eligible to become national citizens. Whether this was forbidden by implication, we do not know, for the Supreme Court has never passed on that question. However, until the Court rules otherwise, it is a reasonable inference that, so long as the states do not deny state citizenship to duly resident national citizens, they are free to grant or withhold state citizenship on any terms they see fit.

National citizenship. The Fourteenth Amendment prescribes two modes of acquiring national citizenship—birth and naturalization. Citizens by birth are called native-born [9] citizens; all others are naturalized citizens.

Citizenship by birth. To be a native-born citizen of the United States, one must not only be born in the United States, but must, at the time of birth, be subject to the jurisdiction of the United States. This rules out certain classes of persons who might be born in the United States and yet for technical reasons not be subject to the legal jurisdiction of the United States. Children born to the diplomatic representatives of foreign governments stationed in the United States would be in this class; so would children born to members of hostile forces temporarily occupying American territory, to the members of the armed forces of friendly nations passing through American territory, and to children

[9] The term "natural-born" is frequently used. It is still a sound biological presumption that every human being is "natural-born." But not every human being is born a native of the country in which he enjoys citizenship.

born on the public vessels of foreign nations in American waters. Prior to 1924, American Indians born in tribal status in the United States not only were not native-born citizens but could become naturalized citizens only by special statute. Congress in that year enacted a law saying that "all non-citizen Indians born within the territorial limits of the United States shall be, and they are hereby, declared to be citizens of the United States." The children of such Indians doubtless would be native-born citizens.

Some of the problems relative to native-born citizenship have been conclusively settled, and others have not. Does a person born in, and under the jurisdiction of, the United States of parents not citizens and not eligible to become citizens acquire native-born citizenship? The Supreme Court has answered this question in the affirmative.[10] This means that the native-born children of Chinese, Japanese, Hindus, and other races not eligible for naturalization are nevertheless native-born citizens. Does a person born outside the United States of parents who are American citizens acquire citizenship, either by birth or by naturalization? Congress has enacted that such persons shall be deemed citizens, but has not stated whether they are to be classified as native-born or naturalized. The law says that citizenship shall not descend in this way to persons whose fathers never resided in the United States, and that, if they remain in the country of their birth, such persons must, at the age of eighteen, register with an American consulate their intention to become residents and remain citizens of the United States and, upon reaching their majority, must take an oath of allegiance to the United States. This procedure might suggest that they are naturalized citizens, but the law does not say so and it is possible to interpret the restrictive provisions as rules of expatriation rather than terms of naturalization. The Supreme Court has not passed on this question.

Do persons born under the jurisdiction of the United States in any territory under the American flag become native-born citizens? The answer to this question is no. The Supreme Court has said that some American territories, though subject to the jurisdiction of the United States, are not integrally a part of the United States in the constitutional sense and are not wholly under the Constitution. Native-born citizenship, even citizenship by naturalization, does not extend to these territories unless so ordered by act of Congress. States of the Union, the District of Columbia, and territories incorporated in the United States by treaty or by act of Congress constitute "the United States" for citizenship purposes and also for some other purposes. The native inhabitants of other American territories are citizens of their own territory

[10] *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

and "nationals" of the United States. They owe allegiance to the United States but are not citizens of this nation.

Citizenship by naturalization. The Constitution empowers Congress to make uniform laws on the subject of naturalization. Two general modes of naturalization have been provided—collective and individual. Collective naturalization occurs when by legislation or by treaty citizenship is accorded to a whole people or to a large number of people of a described classification. Upon the annexation of Texas, for example, citizenship was conferred on all Texans; by act of Congress in 1917 citizenship was extended to the people of Puerto Rico; Congress in 1926 extended the privilege of naturalization on special terms to aliens who had served in the American forces during the First World War.

Individual naturalization is a procedure whereby aliens may become citizens one by one. Under the legislation enacted by Congress only "free white persons" and aliens of "African nativity" or persons of "African descent" are eligible for individual naturalization. The required procedure comprises three basic steps: (1) the declaration of intention ("first papers"), which may not be filed until the alien has reached the age of eighteen and must be filed not less than two nor more than seven years before taking the second step; (2) the petition for citizenship ("second papers") which includes an application for admission to citizenship, accompanied by required documentary evidence of compliance with the law and fitness for citizenship; (3) the granting of citizenship ("final papers"), which includes a hearing and examination in a duly authorized state or federal court and the issuance, if the applicant successfully passes the examination, of a certificate of citizenship.

As to the loss of citizenship, whether voluntarily or by compulsion, the Constitution is silent. In the first years of our federal government there was much confusion on this subject, but in 1868 Congress enacted a law which put the question at rest. The right of American citizens to expatriate themselves was explicitly recognized, and since that time various acts which shall be regarded as constituting expatriation have been defined by law. Among other things, it is provided that any citizen expatriates himself when he becomes a naturalized citizen of a foreign nation or takes an oath of allegiance to any foreign sovereign, and that a naturalized American citizen expatriates himself by leaving the United States and residing two years in the country from which he came or five years in any other foreign country, but no American citizen (naturalized or native-born) may expatriate himself voluntarily while this country is at war. Perjury or fraud in procuring naturalization, constitute grounds for denaturalization. A naturalized citizen residing in a foreign

country may avoid expatriation if proving his residence abroad is in good faith not incompatible with the retention of United States citizenship.

One of the most vexing problems of national citizenship has to do with the citizenship of married women. The ancient rule of practically all countries was that the citizenship of the wife followed that of the husband. The United States fully adhered to this rule until 1907. When, therefore, an American woman married a foreigner, she lost her American citizenship and became a citizen of her husband's country. Conversely, when an American man married a foreign woman, the wife acquired American citizenship. Upon the termination of the marital relation by death or otherwise, the American woman did not regain and the foreign woman did not lose American citizenship. In 1907, Congress enacted that an American woman married to a foreigner might, upon the termination of the marital relationship, elect to resume her American citizenship; but that the foreign woman did not lose her American citizenship unless she formally renounced it. In 1922 Congress provided that marriage should no longer operate to give citizenship or take it away. The American woman marrying a foreigner retains her American citizenship unless she chooses to renounce it, and the foreign woman marrying an American can gain citizenship only by naturalization. A shortened process of naturalization is provided for the latter case, but to avail herself of this the woman must be eligible to naturalization. The citizenship of minor legitimate children follows that of the father, while illegitimate minor children take the citizenship of the mother, in all cases of naturalization. Citizenship by birth is not determined by the citizenship of a child's parents.

State citizenship. The states now universally require a citizen of the state also to be a citizen of the United States. The only other general requirement for state citizenship is a fixed period of residence in the state. Loss of state citizenship may occur in various ways, but most simply of all by becoming a nonresident of the state.

The importance of state citizenship is greater than is commonly supposed. Upon state citizenship depends the right to vote for both state and national officers, many rights and privileges of business organization, various rights and duties of marriage and family relations, the right to operate a motor vehicle, and innumerable special benefits, such as old-age pensions, unemployment compensation, free tuition in educational institutions, and the taking of fish and game. Indeed, it is not too much to say that a major portion of the privileges and immunities of citizenship which touch the individual most closely is incidental to state rather than national citizenship.

Private Rights

The duality of American government is just as evident in the matter of private rights as in the organization and procedure of government and the nature of citizenship. Two sovereign powers—that of the nation and that of the states—are placed over us, and against each of these powers there are constitutional guarantees of private rights. For the protection of rights against the national government one must look to one body of guarantees, and, for the same protection against state government, to another and different set of guarantees.

Guarantees against the nation. Constitutional provisions for the protection of private rights against unwarranted invasion by the national government are found mainly in Sections 9 and 10 of Article I of the Constitution, and in Amendments I-X. It was supposed, by the framers of the Constitution, that the national government would not be able to encroach on private rights to a degree that would be at all dangerous. It was to be a government of delegated and limited powers, and could not range far and wide in regions of private concern. There was a possibility, obviously, that it might abuse its delegated powers in some ways. To guard against what seemed the most likely abuses of this sort, certain limitations on federal power were explicitly stated in Section 9 of Article I. These included restrictions on the suspension of the writ of habeas corpus, a ban on bills of attainder and *ex post facto* laws, a bar against the levy of duties on exports from any state, a rule to govern the levy of direct taxes, a proviso to equalize the regulation of commerce between the states, and a prohibition of the granting of titles of nobility.

The foregoing shackles on federal authority were not sufficient to allay the general fear of overgrown central power, and so, to provide additional assurance against this danger, the first ten amendments were adopted. These, like the provisions of Section 9 of Article I, apply only against the national government. They specifically forbid the national government to deny or abridge certain basic rights, such as freedom of speech and the press, freedom of religious worship, freedom from unreasonable searches and seizures, the right of indictment by grand jury and trial by jury, the right to bear arms, the right of compensation for private property taken for public use, the right not to be deprived of life, liberty, or property without due process of law, and certain others.

In addition to these, the Thirteenth Amendment, which abolished and forever prohibited slavery, and the Fourteenth Amendment, which defined citizenship and guaranteed the civil rights of citizens, were partially, though not wholly, directed against the national government.

Guarantees against the states. The framers of the Constitution were little concerned with abuses of power on the part of the states. The powers of the states of course would be limited by the delegation of power to the central government, but it was believed that the powers reserved to the states should not be subject to any further limitation than was necessary to prevent abuses of general rather than local importance. Most of the states had incorporated extensive bills of rights in their own constitutions, and it was supposed that these would furnish adequate protection. It was agreed, however, that there were some things the states should not be allowed to do, even though they were within the zone of reserved powers and permissible under state constitutions. Prohibitions inhibiting state action in these matters were set forth in Section 10 of Article I. By these prohibitions the states are forbidden to make treaties or agreements with foreign countries or with sister states without the consent of Congress, to coin money or make anything but gold and silver coin a legal tender in payment of debts, to issue bills of credit, to pass bills of attainder, to make *ex post facto* laws, and to enact laws impairing the obligation of contracts. Only a small part of the total area of reserved powers was covered by these restrictions. The only protection against abuses of state powers not so covered was that provided by the state constitution itself.

After the Civil War three amendments were added to the Constitution, which had the effect of greatly enlarging the scope of the protection against state powers afforded by the Federal Constitution. The Thirteenth Amendment, abolishing slavery and involuntary servitude, applied to the states as well as to the national government. The Fourteenth Amendment went much farther. It not only defined citizenship and guaranteed the civil rights of citizens, but contained this epic sentence: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." At first the Supreme Court did not know just what to make of this language, but gradually it has come to the view that its purpose was to write into the Constitution a body of guarantees against state action as comprehensive as the federal bill of rights in the first ten amendments. As a result of this interpretation, it is now possible to declare that the Constitution of the United States contains sweeping guarantees of private rights against all forms of governmental action in this country. The Fifteenth Amendment placed an additional limitation on the states, by forbidding them to deny any citizen of the United States the right to vote on account of race, color, or previous condition

of servitude; and the Nineteenth Amendment added sex to grounds on which the right to vote might not be denied.

It would appear, therefore, that all private rights in the United States have been placed in the protective custody of the national government. In a large measure, this opinion is true; but there are many special rights and privileges covered by state bills of rights, which are not specifically protected by the Federal Constitution and which the Supreme Court has not yet definitely placed under the aegis of the Fourteenth Amendment.[11]

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[11] The subject of private rights is more fully discussed in Chapter 18, below.

CHAPTER 9

GOVERNMENTAL AREAS AND JURISDICTIONS

The American Tangle of Governmental Units

Shortly after the United States entered the Second World War, the people of this country began to hear of many things they had always known, but had almost forgotten. The President of the United States, the Chairman of the War Production Board, and other national leaders sharply reminded us that our country's war effort was being sabotaged, not alone by Fifth Columnists and enemy agents, but by conditions inherent in our federal system of government.

Scores of newspaper and magazine articles informed us that conflicting state laws regulating the size, weight, and width of commercial trucks were creating bottlenecks in transportation; that divergent and unduly exacting state and municipal building codes were hamstringing the war housing program; that state inspection laws discriminating against out-of-state products were resulting in unnecessary scarcities of foodstuffs and other essential materials; that the lack of uniformity in state laws licensing doctors, dentists, nurses, plumbers, electricians, and other vital occupations was seriously interfering with the proper mobilization of manpower; and that hundreds of other vagaries of state and local government were equally impairing the efficiency of the nation's all out war program. In the postwar period the same or similar difficulties arose to complicate the problems of reconversion.

Jurisdictional impediments of this kind are a characteristic feature of our federal scheme of government. They always have been. Every American has had some experience with them and has come, perhaps, to take them more or less for granted. He has been frequently made aware of their inconvenience, and has sometimes become acutely aware of their obstructiveness. He has always known, if he took the pains to total his tax payments, that they needlessly augment the cost of government. But not until the war highlighted them did most Americans realize that they could become serious obstacles to the accomplishment of vital public ends. At such a cost, local self-government comes high.

By the exercise of his emergency powers and by securing the voluntary coöperation, for the duration of the war, of hundreds of key officials in state and local government, the President was able to overcome for the

time being the worst effects of our incredible morass of governmental areas and jurisdiction. No permanent solution was attempted, nor was there much consideration of postwar aspects of the problem. It was treated primarily as an emergency matter, and there was little appreciation of the larger truth, that the acute troubles incidental to the war effort were temporary only in intensity, not in basic character. The conditions which gave rise to them are chronic; they were not brought on by the war, but were merely aggravated by it.

The problem of distributing authority. Whenever the authority of a governmental system is extended to more than one locality, the problem of distributing authority between different geographic areas inevitably arises. That problem is as old as the ancient empires of Egypt and Babylonia and as new as the latest conflict between local and central authority anywhere in the world. It is one of the great permanent problems of government.

If a political society is to be held firmly together under one general system of government, there must be a strong central authority, capable of dominating the whole and doing whatever may be needed to prevent disintegration and secure proper coördination. On the other hand, if separate local areas are not to be indiscriminately submerged in an all-engulfing central bureaucracy, there must be some way of earmarking and alloting to them such powers as are appropriate and needful for real self-government in local affairs. It is not simply a division of power between central and local authorities that is needed, but a proper balance between them.

To state this requirement in general terms is very easy; to work it out concretely in particular governmental systems has been one of the most difficult tasks of enlightened statecraft. One of two broad concepts has always been adopted as the underlying principle of division. The first is the concept of concentration and the second the concept of deconcentration. The concept of concentration assumes that strong and efficient government is impossible unless there is one supreme and undivided will. The concept of deconcentration assumes that there are many distinct and different spheres of political action, and that, while there must be one supreme and undivided will in each sphere, it is neither necessary nor desirable that a single will shall prevail in all.

Both concepts sanction the distribution of political authority among different territorial units, but on very different principles. Under the concept of concentration, extensive powers may be assigned to regional and local governments, but they are always gifts with many strings attached to them. They may be exercised only at the pleasure of the central government and under its constant direction and supervision. Su-

premacy remains with the central government, and it may overrule or supersede the regional and local authorities on anything at any time. Under the concept of deconcentration, supremacy itself is divided. The central government is made supreme in some matters and the various regional and local governments are made equally supreme in other matters. Under the concentration principle, as in the unitary governments of Great Britain, France, Sweden, or Italy, the central government selects its own fields of action and delegates (under strict control) other fields of action to approved regional and local authorities. Since the central government creates and controls its own subdivisions, conflicts of jurisdiction, if they arise, are fully amenable to its authority. Just the opposite is the situation under the deconcentration principle, as exemplified in the federal system of the United States. Here a supposedly definitive division of powers is made by the fundamental law controlling both the central and subdivisional governments. Each is expected to stay in its own field and has no constitutional right to invade that of the other. Nevertheless, many uncertainties and conflicts of jurisdiction arise. It has never been possible to draw legal boundaries with sufficient precision to circumscribe each field with absolute exactness.

Deconcentration in the United States. A map showing all governmental units in the United States which exercise autonomous or semiautonomous powers would exhibit the outlines of more than 176,000 separate areas of political authority. Such a map, if it could be drawn, would mark the boundaries not only of the nation and the 48 states, but also those of more than 1,000 federal administrative units, 3,000 counties, 20,000 towns or townships, 16,000 incorporated cities and villages, 127,000 school districts, and 8,000 other special districts. While such a map should graphically suggest the extent of political deconcentration in the United States, it would by no means bring out the whole truth. No map, pictogram, or other form of graphic presentation could possibly bring out all of the complex partitionings, interlacings, and overlappings of legal authority which have led to the intricate network of jurisdictional boundaries now existent in this country.

The reader will remember that the Constitution of the United States sets up two major forms of political authority—that of the national government and that of the states. Each is made supreme in its own sphere, and is also given power to create minor jurisdictions within that sphere. To put it another way, the Constitution freezes into our governmental system a major deconcentration of power (between the federal government and the states), and empowers each of the dual authorities thus established to extend the process of deconcentration in its own sphere as much farther as it may wish. Both the federal government

and the states have made abundant use of their power of deconcentration.

Federal deconcentration. Very early in the history of the national government it became apparent that not everything could be managed from Washington. The country was so large, and conditions varied so greatly from one section to another, that not even routine administration could be successfully carried on from a single center. Not only for the sake of greater efficiency and flexibility, but also for the convenience of the public, some degree of deconcentration was necessary. Therefore Congress began to create or to authorize the creation, by administrative orders, of various kinds of federal subdivisions throughout the country. At the present time at least seven varieties of these are to be found—regions, districts, areas, field divisions, field offices, branch offices, and state offices.

To what extent a region is different from a district, a district from an area, and so on, is not easy to determine. In many instances there appears to be no essential difference, but in other cases some differences may be detected. A state office, for example, differs from all other federal subdivisions in that its jurisdiction is confined to a single state of the Union which has been designated as a distinct unit for federal administrative purposes. All other federal subdivisions disregard state lines. The Selective Service Administration furnishes one of the best examples of the state-office type of federal subdivision. A separate selective service administration has been set up in each state, with state headquarters in one of the larger cities of the state and local boards in each county. The state office serves as a connecting link between the local boards and the national Selective Service Administration at Washington.

Between regions and districts no fundamental differences can be discerned. Field offices and field divisions also appear to be one and the same thing, and are different from regions and districts principally in that they are less permanent and are more tightly controlled by the central authority at Washington. Branch offices are very much like field offices and field divisions, but are perhaps a bit more closely integrated with the home office at the national capital. Areas are found only in the organization of the Army, and do not appear to be radically different from the districts of the Navy and other federal departments.

Some of the federal subdivisions have a good deal of local autonomy and some have none at all. In the Selective Service Administration the law places certain powers almost entirely in the hands of the local boards and state headquarters. Likewise, in the Federal Reserve Banking System the district authorities enjoy certain independent or semi-

independent powers. The same is true of the regional authorities of the Wages and Hours Division of the Department of Labor. Most federal subdivisions, however, are primarily units of central administration and have little authority to act independently.

There is no uniform plan of organizing federal subdivisions. They are of all sizes and shapes; they vary widely in population, social and economic structure, and everything else. If the boundaries of any two of them coincide, it is by accident more than by design. Generally, they crisscross and overlap in crazy-quilt fashion. Of course it would be impossible, as well as undesirable, for the territorial subdivisions of all federal departments and agencies to be identical, for no two have precisely the same volume of work or the same administrative problems in every section of the country. It may be quite necessary, for example, that the Federal Public Housing Authority have eleven subdivisions, the Farm Credit Administration twelve, the Forest Service ten, and the Social Security Board twelve. But it is poor organization and an unnecessary burden on the citizen to locate such subdivisions and their central offices in such a way as to multiply the difficulties of the person who has to transact business with them. My home town is situated in one of the subdivisions of each of the agencies named above, but, if I need to transact business with all four, I must deal with the Housing Authority at Seattle, Washington, with the Farm Credit Administration at Spokane, Washington, with the Forest Service at Portland, Oregon, and with the Social Security Board at San Francisco, California. I deal with the Customs Bureau of the Department of the Treasury at Seattle and with the Internal Revenue Bureau of the same department at Tacoma, for no good reason that I can see. I deal with the Public Buildings Administration of the Federal Works Agency at San Francisco and with the Public Roads Administration of the same agency at Seattle. Thus, instead of making it easy for me to transact business with him, Uncle Sam makes it unnecessarily complicated and expensive.

State deconcentration. The reserved powers of the states enable them to distribute power among their respective subdivisions as they see fit. In the absence of any provisions to the contrary in the state constitution, the state legislature may give or withhold at will. Most of the state constitutions do contain provisions restricting in some ways the freedom of the state legislature in dealing with political subdivisions. About a third of the states have constitutional provisions guaranteeing home rule to cities. By means of constitutional home rule, the powers of government are divided between the city and the state, and cities are given the right of self-government in their own local affairs. Even though the state constitution may not guarantee home rule to cities, it

usually contains some provisions limiting the authority of the legislature over them and thus giving them some independent powers.

Counties were originally little more than administrative subdivisions of the state in which they were situated. The state legislature had complete authority over them in every way. Now, however, most of the state constitutions contain provisions curtailing the right of the legislature to create new counties and change existing ones. A few states give counties constitutional home rule. Thus counties, as well as cities, have come to be at least semi-independent units of government.

The powers of towns and townships come mainly from the state legislatures, but there are usually restrictive provisions in the state constitution which keep the legislature from making substantial changes in their boundaries, organization, and powers. Thus they have come to enjoy a considerable degree of local self-government. The same thing is true of school districts and the numerous other special districts which have been set up to serve local needs. The states, like the federal government, have set up many special areas for highway administration, tax administration, and other governmental functions directed from the state capital.

Problems of Deconcentration

Basic difficulties. The foregoing summary sharply reveals the basic nature of the problem of territorial jurisdictions in the United States. It is not that we have adhered to the principle of deconcentration rather than that of concentration, but that we have applied the principle of deconcentration without regard to the continuous maintenance of a proper working balance between central and local authority. There is no special merit either in concentration or deconcentration as an end in itself. Both should be regarded as means to a common end—namely, government fully capable of serving all of the needs of a gigantic democracy of 140,000,000 members. The supremely important thing is to have such a distribution of authority that the modes and degrees of both concentration and deconcentration can be varied to meet the problems of the hour. The American people have not seen the matter in this light. As a rule, they have had little sympathy with proposals looking toward the continuous adjustment of central and local powers on the basis of functional utility and efficiency. They have preferred, whether moving in the direction of greater concentration or greater deconcentration, to set up permanent and inflexible arrangements.

These frozen patterns of concentration and deconcentration give rise to endless jurisdictional troubles. In trying to force the fluid and ever-changing processes of social and economic life through the hardened

arteries of our political system, we generate pressures, resistances, and stoppages which cause serious disorders. Underlying each of these are two fundamental difficulties. The first is that very few of our existing governmental units are appropriately designed, either from the standpoint of area or powers, for the kind of work they are supposed to do. The second is that there is no adequate way to readjust areas and powers in keeping with constantly changing needs.

All of the states, for example, enjoy precisely the same powers and perform the same governmental functions, despite the fact that they vary so widely in area, population, and basic social and economic structure that their differences are as numerous as their similarities and sometimes more important. Unquestionably some of the states are appropriate in size and institutional life to be largely self-governing units of a great federal system, but others certainly are not. State loyalty blinds us to the absurdity of the system which lays upon Texas and Rhode Island identical powers and functions, and expects them to be equally suited to the tasks thus imposed. Texas is a region larger than all of New England with New York, Pennsylvania, New Jersey, and Maryland thrown in for good measure. Rhode Island is but a small segment of the great northeastern industrial and commercial region. Most of our states are more like Rhode Island than Texas. They do not constitute distinct areas of social and economic life, but are segments of larger regions which really are distinct sections of the United States needing uniform governmental action in many respects.

Much the same condition is found in respect to counties, cities, towns, townships, and other subdivisions of the states. There are counties which are larger and more complex socially and economically than many of our states, and there are counties so tiny as to be almost entirely superfluous. There are municipal corporations ranging from crossroad villages to vast metropolitan centers containing millions of inhabitants. Similar variations are to be found in school districts, townships, and all other petty units of government.

On every level of deconcentration we have a hodgepodge of areas and jurisdictions, largely inappropriate for modern conditions, yet exceedingly difficult to change because of barriers in the constitutions of the states and the nation. A brief survey of some of the more acute problems which have resulted from this state of affairs will help us to understand some of the specific difficulties which are now causing trouble.

The tax problem. Except for the federal regions, districts, and the like, virtually all of the 176,000 governmental units in the United States are separate tax jurisdictions. Such a muddle of independent and semi-independent taxing authorities can be found nowhere else on earth.

Had we not been the richest of all nations, our taxing system would have driven us to the verge of bankruptcy years ago. Now that we have reached the end of our financial rainbow and are obliged to meet the costs, not only of the most lavish government in the world but the most expensive war in history, the tax problem has become highly critical.

The taxing power in this country is first divided between the national government and the states, and then between each of the states and its multitude of counties, cities, school districts, and other subdivisions. But these divisions of taxing power have not been based on any sound principle of revenue management. The national Constitution gives Congress full power to tax, subject only to the restriction that it may not tax exports from any state, may not levy a direct tax without distributing it among the states in proportion to population, and may not lay duties on vessels plying between two or more states. The courts have ruled that Congress may not tax the necessary agencies and instrumentalities of state government, but by recent decisions the scope of this restrictiton has been considerably narrowed. The federal Constitution expressly forbids the states to tax imports and exports, save for the purposes of paying the cost of valid inspection laws. The courts have ruled that the states may not tax the necessary agencies and instrumentalities of the United States, but recent decisions have also narrowed the scope of this judicial restriction. By judicial decision also, it has been established that the states may not tax interstate and foreign commerce.

Except for these rather slender prohibitions, both the nation and the states are free to tax pretty much as they please, selecting any sources of revenue and imposing such levies as they see fit. Other than imports (which only the national government may tax) and exports (which neither may tax), they can choose the same sources of revenue and pile up the charges to any extent. And they do. Careful studies a few years ago showed that not less than 800 different sources of revenue were being tapped by both the nation and the states at that time. The amount of double taxation certainly has grown materially since then, for both the nation and the states have been engaged in a desperate search for additional tax revenues. The major forms of taxation now employed by both are the personal income tax, corporation taxes, inheritance and estate taxes, amusement admissions taxes, tobacco taxes, beverage taxes, and gasoline taxes. Many states of late years have turned to the retail sales tax as a means of supplementing declining revenues from other kinds of taxation. Realizing the importance of this tax to the states, the federal government has refrained from enacting any general sales tax. During World War II the federal government extended its excise and luxury taxes to many items subject to state sales taxes but did not resort to a general sales tax.

Tax competition between the nation and the states is a bad thing. Not only does it result in unjust distribution of tax burdens; it seriously interferes with prudent budget management. Planned revenues are as much a part of sound budgeting as planned expenditures, and revenue planning calls for adequate and dependable revenue sources. When the nation and the states vie with each other in plucking the same goose, neither can be sure of obtaining a satisfactory portion of the feathers. In times when tax sources are abundant and amply productive, this uncertainty is not a serious matter; for, if one goose will not suffice, others can always be found. But when there is an unlimited demand for feathers and not enough geese to go around, some scheme of priorities is necessary. Otherwise there will be chaos in public finance.

We are approaching chaos at the present time. The taxing power is divided not only between the nation and the states, but also between the states and a multitude of minor tax jurisdictions. The legislature of each state has some control over the distribution of taxing power within the state, but in no case is this control complete. Provisions in state constitutions have so largely circumscribed the legislature's authority to tax and to regulate the taxing power of minor governmental units that nothing short of wholesale constitutional revision would bring order into the taxing systems of the states. No program of allocation and priority designed to distribute tax sources among governmental units according to need and capacity to administer can get anywhere, because there are too many constitutional obstacles in its path—too many governmental units having constitutionally protected taxing powers.

The outcome, as nearly as can be foreseen at present, will be a struggle for survival, in which the strong will despoil the weak. The preliminary sparring is already going on. The burden of federal taxation on personal and corporate incomes severely limits state taxation of those sources. The federal government has made vast inroads on the estate tax, once an exclusive province of the states. It has constantly broadened the base of its excise taxes, thus invading the field occupied by the sales taxes of the states. The states in turn are grasping at revenues that were formerly left to local units of government—license taxes, occupational taxes, and property taxes of various kinds. Local units everywhere, especially cities, are pressing for broader taxing powers. The peril in this struggle is not that the stronger units of government will eventually starve their weaker competitors to death. The strong can and will seriously cripple the weak, but they cannot kill them off. Even the weakest units have enough taxing power to survive, no matter how emaciated they may be. The graver peril is that the competitive extortions of the strong and the weak together will add up to a burden so great and so inequitably distributed that

the taxpaying public will be unable to bear it. In that event, this nation will face a financial crisis the like of which it has never known before.

The crime problem. The looseness of some parts of our governmental system was sharply dramatized a few years ago by the sensational exploits of a desperado named Dillinger. Commenting on Dillinger's repeated escapes from the police nets thrown around him, Senator Copeland of New York, chairman of the Senate committee on racketeering, said: "There has been a pathetic failure of coöperation between federal, state, and local authorities." The same comment would have applied to law enforcement in general throughout the United States.

In law enforcement we are not one people, but many. We have a national government which is responsible for the suppression only of crimes in violation of laws in the delegated field of federal authority. We have forty-eight states, each of which is a separate criminal jurisdiction, with full power to define and punish crimes not falling in the federal sphere. These states are divided into more than 3,000 counties, each of which is a separate unit of law enforcement. In each county the sheriff, prosecuting attorney, trial judge, and various juries are chosen and subject to little or no overhead control or supervision by the state government. Although the law officers of each county are sworn to uphold and enforce the law of the state, they do not have uniform standards in so doing. In a word, for all practical purposes we have county home rule in state law enforcement.

In each state also, there are many incorporated municipalities, each of which is partially responsible for the enforcement of state law within its own boundaries. But the city police are not under the supervision or control of either the state or the county law enforcement officers. Cooperation between city police, county law-enforcing officers, state authorities, and federal agencies is entirely voluntary. Sometimes it is good, and sometimes it is anything but good. Occasionally there is suspicion, hostility, and rivalry instead of close collaboration. In numerous instances federal, state, and local law-enforcing officials have aired their antagonisms in the newspapers and bitterly denounced one another for overstepping authority or trying to "hog all the glory." The more common difficulty, however, is mere failure to work together effectively.

For the professional criminal, this extreme dissipation of law-enforcing power and responsibility is a gift from heaven. He makes his headquarters where law-enforcement is lax or where he can secure political protection, and from there moves out to carry on his depredations in other places as opportunity permits. If he commits a crime in one state and escapes to another, he may escape extradition altogether or delay it long enough for many things to be "fixed" in ways to make it difficult

to convict him of the crime. In many instances, if he is successful in getting back to the comparative safety of his "home" territory, he may escape capture altogether. Faulty teamwork between different sets of police and prosecuting officials has sometimes enabled known criminals to enjoy immunity for years.

Charles Francis Coe, a prominent writer on crime and law enforcement, has contended that there can be no solution of the crime problem in this country unless our state and local governments surrender to the national government their independent authority in criminal matters. Without conceding that so high a degree of centralization is needed, it is evident that strong measures of some kind are imperative if we are to have better coöperation between national, state, and local authorities in the perennial war against crime. A very interesting proposal in this direction has been advanced by the Council of State Governments, a voluntary organization of state officials. The Council has prepared drafts for four uniform laws—one on the subject of the apprehension and arrest of criminal offenders, one on interstate extradition, one on prosecution procedures, and one on the punishment of crimes. It urges all of the states to adopt these laws, believing that if the states had identical laws on basic criminal matters effective coöperation would be much easier to achieve. Uniformity of law would undoubtedly be a great help, but it would not modify the administrative and judicial independence of our many criminal jurisdictions. Uniform laws would not necessarily be uniformly enforced and interpreted. On the administrative and judicial sides, jurisdictional independence can be completely overcome only by the elimination of independent areas of criminal legislation and enforcement. If this is undesirable or impossible, reliance must be placed on voluntary methods. Voluntary conferences of local, state, and national enforcement officials, now regularly held in all parts of the country, have done a great deal to promote better teamwork in the administration of criminal law. The schools of instruction conducted by the Federal Bureau of Investigation at Washington and in various centers of population throughout the nation, and the similar instructional work carried on by state agencies, have likewise been a valuable contribution to better law enforcement.

The social security problem. One of the reasons for the slowness of the United States in the enactment of social security legislation was the difficulty of working out a program that could be adjusted to the many different political jurisdictions which would have to participate. The jurisdictional problem has also been one of the principal difficulties in the administration of the social security system now adopted. John G. Winant, former chairman of the Social Security Board, has said that no

governmental enterprise calls for greater coöperation between national, state, and local authorities than the social security program. State and local governments have found themselves increasingly unable to provide the necessary financial support for large scale programs of unemployment compensation, old-age assistance, and child welfare. In some particulars, also, they have been unable to administer these programs successfully. Hence there has been strong pressure for a program combining national, state, and local agencies.

The present social security legislation of the national government is carried out through the medium of state and local governments. The federal laws provide financial assistance to the states, fix the modes of procedure, and set up the general standards to be followed; but the benefits do not become available to the individual citizen unless his state government enacts and puts into effect social security laws complying with the terms of the federal legislation. Divergencies of state law as to the residential requirement for state citizenship, as to benefits paid, as to proof of qualification for benefits, and various other points have resulted in a marked lack of uniform treatment throughout the country of persons having practically the same economic status. In other words, the kind of treatment one gets under the American social security system (except for the old-age and survivors' insurance, which is federally administered) depends on the state and county in which he resides. In one place he might be given much larger benefits, on very much easier terms, than in another place only a few miles away. Many of these discrepancies will remain so long as we try to carry out a social security program through a multiplicity of independent political jurisdictions.

The problem of trade barriers. The boast is often made that the United States is the world's largest free-trade area. This, like other sweeping generalizations, needs qualification. The Constitution forbids the states to levy duties on imports and exports, but the Supreme Court has interpreted the Constitution in such a way as to permit the states to do things which indirectly have much the same effect as tariffs. The federal Department of Commerce has called attention to more than 1,500 state enactments which discriminate against the products of other states. Mostly these take the form of inspection laws, with required fees to cover the costs of inspection; laws requiring brands, labels, or other markings which place outstate products at a disadvantage; laws setting up standards of quality with which outstate products cannot easily comply; and laws imposing heavy taxes on certain commodities not generally produced in the taxing state.

The Constitution provides that "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, ex-

cept what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." [1] In numerous cases the Supreme Court has held that state inspection laws are not valid unless they are in good faith and not attempts, under the guise of inspection, to accomplish some other object. It has also ruled that taxes levied to cover inspection costs must not be excessive—not out of proportion to the actual cost of making the inspection. The states have found it easily possible to comply with these requirements and still erect serious trade barriers against other states.

How do they do it? State laws favoring home-laid eggs supply a typical illustration. Most of the states now have such laws. Eggs shipped in from other states are required to be inspected in order to ascertain whether they are fresh. Only fresh eggs may be sold in the retail stores and markets. A charge of two, three, or four cents a case is levied to cover the cost of inspection. Though the real purpose of such laws may be to impose deterrent costs and burdens on outstate eggs, the apparent purpose is reasonable inspection for a desirable end, and the inspection fees are not excessive. It incidentally happens that the trouble of going through inspection and the inspection charges that must be paid place outstate eggs at a disadvantage in competition with home-laid eggs. But so long as these results are merely *incidental,* they are entirely constitutional.

Milk, cream, butter, ice cream, fruits, vegetables, and scores of other products are now obliged to go through costly and difficult inspections before they can be sold in states in which they were not produced. The farmers who have lobbied for these laws, the legislatures which have enacted them, and the consumers who pay the bills know that the primary purpose is to favor home industry, but the Supreme Court has not yet found this out. It takes them at face value, and ostensibly they are laws to protect the public against unwholesome, dangerous, or fraudulent products. Congress has authority under the Constitution to "revise" and "control" such legislation; but Congress has ignored them, because the pressure groups responsible for their enactment by state legislatures are equally influential in the national legislature.

Many of the states levy prohibitive taxes on oleomargarine. On the surface these are merely revenue measures, although in fact they produce little or no revenue. They were not intended to yield revenue. The rates are so high that oleomargarine cannot be sold in competition with butter—which is untaxed. If revenue were desired, the tax rates

[1] Article I, Section 10, Clause 2.

would have been placed low enough to insure a large sale of oleomargarine. Yet the Supreme Court has ruled—quite correctly—that the singling out of one commodity for taxation is not unconstitutional. From the very beginning it has been held that the Constitution does not require either the federal government or the states to tax everything or nothing. Taxation must always be selective. And the fact that one commodity is selected for taxation and a competing commodity passed by does not alter the case a whit; nor does the further fact that the rate of taxation may be prohibitive. When its purpose is to raise revenue, a state has full freedom of choice as to the subjects and rates of taxation except for the prohibitions contained in its own constitution and that of the United States. When its purpose is regulation, it may not regulate by taxation anything which it may not directly regulate by other means. The purpose of the oleomargarine tax laws, according to the Supreme Court, is revenue. Hence the states are entirely within their rights, regardless of the consequences.

All of the states have elaborate laws regulating the size, weight, width, and equipment of motor trucks operating on their highways. Ten or more states now maintain "ports of entry" (inspection stations) for the purpose of enforcing motor vehicle regulations and collecting the various fees and taxes incidental thereto. Interstate vehicles, particularly trucks, are treated much as they would be on crossing the boundaries of a foreign country. Outstate carriers are at a disadvantage; because of the delays and inspection costs imposed on them, they have trouble in meeting the competition of home vehicles; because of the expense in providing equipment that will meet the varying requirements of several states, they have overhead costs which home carriers can avoid. Long-distance hauling by truck is greatly slowed down and sometimes seriously interrupted by competitive state regulation.

Regulations requiring special branding, marking, or labeling of outstate products have been enacted in many states. The purpose of these is almost always to discriminate against products from without. Home products are given labels or brands which are specially advantageous in marketing. The same purpose lies behind the quality standards imposed by the laws of many states. Often these are far more severe than public protection requires, and are so devised that local producers can meet them more easily than those who ship goods into the state from long distances. Licensed occupations afford the states another opportunity for discriminatory regulation. The requirements for teaching certification in most states definitely favor home-grown educators; similar partiality is often shown in the licensing of lawyers, doctors, dentists, nurses, and so forth. Licensing requirements are often designed to control the num-

ber of persons admitted to a profession or occupation, and to make it difficult for a qualified person to transfer into the state from outside.

State laws very often require state institutions to use home-mined coal, home-produced lumber, home-quarried stone, and so on, regardless of cost. This type of requirement is a protective tariff with a vengeance, but apparently is entirely within the Constitution. State and local building codes are known to contain many provisions specially favoring local materials and local contractors. Local manufacturers are given an "edge" over outsiders by one or more of the various devices mentioned above.

The foregoing paragraphs contain only a few typical examples of a general trend in state legislation which has become enormously burdensome to national commerce. Congress has power to correct some of these abuses. The Supreme Court, by opening its eyes to the real purpose and effect of much of this legislation and construing it accordingly, could correct many more. But some of them can be remedied only by constitutional amendments substantially altering the jurisdictional structure of our federal system.

The problem of uniform commercial law. The whole field of commercial law, except as it touches interstate and foreign commerce, is reserved to the states. Instead of having one uniform body of law on such subjects as contracts, sales, negotiable paper, bills of lading, and insurance, we have one for each state. This diversity of basic business law has been so confusing and costly that the states themselves have made many efforts to bring about greater uniformity. Numerous interstate commissions to draft uniform laws on commercial subjects have been formed by voluntary action on the part of the states, and in recent years a national conference of commissioners on uniform state laws has been organized. Model drafts for uniform laws on sales, negotiable instruments, bills of lading, and other commercial subjects have been prepared by these commissions, and many of the states have adopted them. Unfortunately, the benefits of this movement for uniformity have been considerably diminished by the failure of state courts to give uniform interpretations to these uniform statutes.

It is not difficult for two or more state legislatures to enact identical laws on any subject, particularly when all they have to do is to adopt an approved model. But the situation of the courts is somewhat different. In deciding a case which requires it to interpret one of these uniform statutes, a state court has no precedents to fall back on. Perhaps the special point in question has not been adjudicated by the courts of any other state having the same statute. In that event the court must blaze its own trail. Suppose it does so, and thus establishes a precedent for

future decisions in its own state. Subsequently the same point or a very similar point comes up for adjudication in a second state. Shall the courts of the second state follow the precedent established in the first state? It is their privilege but not their duty to do so. The judicial decisions of one state are not binding precedents in any other state. If the courts of the second state are convinced that the courts of the first have not correctly interpreted the law, it is their duty to disregard it and apply the interpretation which they honestly believe to be the right one. Because the courts of different states have not been able to agree on the meaning of the identical language of uniform statutes, the uniformity has been largely interpreted out of our uniform state laws.

We can have uniform commercial law only by national action, and the distribution of powers under the Constitution of the United States makes national action impossible in this field.

The motor-vehicle problem. The national government has jurisdiction over motor-vehicle traffic in interstate and foreign commerce; the states have jurisdiction over such traffic in interstate commerce; and counties, towns, and cities have varying degrees of regulatory power over motor-vehicle traffic within their own boundaries. The chairman of the War Production Board has vigorously objected to state and local laws restricting the use of trailers for the temporary housing of emergency workers. The regulation of trailers is entirely a matter of state and local law. Diversity of jurisdiction has produced great diversity of regulation. The same is true of speed laws, registration laws, operator's-license laws, safety laws, civil-liability laws, and many other laws dealing with the ownership and use of motor vehicles. Greater uniformity would be a great boon to the motoring public and would remove many serious impediments to cross-country transportation by motor vehicles.

Through the efforts of such federal agencies as the Department of Commerce and the Bureau of Public Roads, and through the work of various interstate conferences and commissions, some steps in the direction of uniformity of motor vehicle regulation have been taken. Uniform motor-vehicle acts have been drafted and submitted to the states for adoption. As yet, not enough states have adopted these laws to give them nation-wide effect, and they are not being uniformly administered and interpreted in the states which have adopted them. The problem of uniform traffic regulation still remains to be solved.

The problem of business regulation. The regulation of business in modern society includes control of the formation and operation of partnerships and corporations, the sale of securities, the mutual rights and obligations of employer and employee in labor disputes, sanitary laws, fair-trade laws, safety laws, and scores of other restrictions on free enter-

prise. Jurisdiction in all of these matters is divided between our national, state, and local governments. During the period when the national government was desperately trying to save tin for war needs, one of the states enacted legislation standardizing the sizes of commercial baking pans. This required most bakers in that state to buy new pans. Under the laws of many states, dairy and food inspectors had to insist on the use of stainless steel equipment although the national government was trying to restrict the use of stainless steel to war materials. These are characteristic samples of the chaotic diversity of business regulation in this country.

Similar difficulties have resulted from the diversity of state and local laws as to building requirements, the size of sacks and other containers used in various trades, the control of resale prices, the organization and powers of corporations and other business units, and numerous other aspects of business. By federal legislation and by interstate coöperation some steps have been taken to correct the more obvious evils of jurisdictional conflicts in the regulation of business. But neither federal legislation nor interstate coöperation can do more than scratch the surface of this problem. It is an unavoidable by-product of our constitutional system.

The problem of metropolitan disunity. The United States census reports show that there are more than ninety metropolitan areas in this country in which the lack of unified local government is a serious problem. The case of New York is the most extreme. The city of Greater New York has a population of more than seven million, but is merely the core of a vast urban area containing a population of more than ten million. All of the ten million are New Yorkers in their business, professional, and social occupations and interests. They form one great metropolitan center of population. But politically they are divided between three states, 22 counties, 290 municipal corporations, and 146 unincorporated towns and townships. Similar conditions, on a smaller scale, are found in all other metropolitan centers.

The consequences of political disunity in metropolitan areas are bad, not only for the inhabitants of such population centers but often for the nation as a whole. Unity of local government is indispensable to proper management of the local facilities (such as water supply, sewerage, transportation, parks, and police and fire protection) which are essential to city life. In normal times, failure in any of these services imperils the health, safety, and comfort of the local population. In wartime many of these metropolitan areas become important centers of war industry. Multitudes of workers, government officials and employees, and mem-

bers of the armed forces are suddenly added to their populations. The strain upon their various local facilities is heightened to the breaking point. The problem would be difficult with the best of local government; and, with the divided and fractional government which exists, it is doubly difficult. The inability of the many independent local units of government to work together results in housing problems, vice problems, traffic problems, and many other problems which react adversely on all of the industrial and other war operations centered in these areas. Under these circumstances, metropolitan disunity is a national as well as a local problem.

The national government can do nothing to solve the problem of metropolitan disunity. State legislatures usually are able to do little about it, because provisions in the state constitution limit the legislatures' power to change local boundaries and consolidate local units of government. In times of crisis it has usually been possible to secure a certain amount of voluntary coöperation among the local units concerned, but this is a temporary, and often an unreliable, expedient. A complete reconstruction of local government areas is needed, and that is very difficult to bring about.

The problem of rural local government. Population changes and improved means of transportation and communication have rendered many of our counties, towns, townships, and other areas of rural local government obsolete. With fewer and larger counties in most of the states a great deal of money could be saved and more efficient government achieved. Thousands of towns, townships, school districts, and other minor areas within counties no longer are suitable in size or population for the functions they are designed to perform. A general reconstruction of these areas and jurisdictions is long overdue, but the obstacles are many. Local pride, bulwarked by provisions in state constitutions, has defeated all far-reaching programs of reform.

Corrective Procedures

Constitutional change. Our present jungle of governmental areas and jurisdictions is an outgrowth of the divisions of power made by our national and state constitutions. It cannot be substantially altered without fundamental changes in these underlying instruments of government. Direct constitutional change, both in national and state government, does not come easily unless public sentiment is strongly in favor of the proposed change. Public sentiment has never been highly favorable to constitutional amendments proposing to revoke or materially reduce

the powers of any existing unit of government. Generally it has been deeply opposed, not only to the alteration of governmental powers, but also to the alteration of political boundaries.

Since the consent of three-fourths of the states is necessary to amend the national constitution, a proposed amendment to alter the powers of the states would meet formidable opposition. No amendment directly curtailing state powers has ever been adopted with the free consent of the states. The three Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth) imposed heavy limitations on state powers, but it cannot be said that all of the ratifying states freely consented to their adoption. The necessary three-fourths majority would not have been forthcoming without the votes of the "carpetbag" legislatures of states which had been conquered and placed under military control. No other amendment which the states have regarded as an invasion of their powers has ever been adopted. The snail-like progress of the proposed child-labor amendment typifies the response of the states to amendments aiming at a restriction of states' rights. This amendment was submitted to the states in 1924, and is still unratified. Every form of persuasion and pressure the reformist groups could employ has been invoked in behalf of this amendment, but to no avail. Child labor is now outlawed by the Fair Labor Standards Act, which, thanks to a reversal of opinion by the Supreme Court, enlarges the scope of national regulation quite as much as the proposed amendment would have done.

State constitutions, though usually easier to amend than the national constitution, generally require that proposed amendments be submitted to a popular referendum. An amendment contemplating any substantial change in the powers or boundaries of counties, towns, cities, and other local units always arouses stiff opposition. Local patriotism is so strong that it is easy to organize state-wide opposition to any proposal threatening the existing arrangement of local power and units. Experience has shown that the people will vote to increase local powers and multiply local units much more readily than to reduce them.

Constitutional change has not been, and probably never can be, a very reliable and effective means of dealing with the problem of governmental areas and jurisdictions.

Judicial construction. As was noted in the instance of child labor, judicial interpretation may sometimes accomplish what direct constitutional change cannot. There are spacious ambiguities in both the national and state constitutions, particularly in the matter of intergovernmental powers and relations. These afford the courts an opportunity, when cases arise, to make adjustments in accordance with current conditions and needs. It was by an interpretation of the federal power to regulate

interstate and foreign commerce that the Supreme Court established the authority of the national government to place a ban on child labor. The Constitution undoubtedly gives the national government plenary power to regulate interstate and foreign commerce, and it is no encroachment on the reserved powers of the states when, by a valid exercise of that power, the federal government asserts jurisdiction over matters formerly regulated by the states. Having plenary power over the subject of interstate and foreign commerce, the federal government may freely elect to regulate or not, as it sees fit; and, if it chooses to regulate, it has equal freedom in selecting the occasions and methods of regulation. Inasmuch, however, as the Constitution does not precisely define commerce, does not fully explain what the word "regulate" comprehends, and does not clear up certain other ambiguities in the commerce clause, it is necessary for the Supreme Court to decide whether acts of Congress under the commerce power actually fall within the scope of the power intended by the Constitution. When the child-labor issue first came before the Court, it thought that Congress was not trying to regulate commerce but to control industrial relations within the states. So it held the law unconstitutional. But when the Fair Labor Standards Act came before the Court some twenty years later, it was of the opinion that the Act was a proper regulation of federal commerce.

The effect of the first decision was to limit the power of Congress in dealing with child labor and enlarge the power of the states; the effect of the second decision was to enlarge the power of Congress and limit that of the states. Yet the Court did not, in either case, vary the fundamental nature of federal commerce power; it merely changed its mind on the question of whether the prohibition of child labor was *in fact* primarily a regulation of the internal affairs of the states or a regulation of interstate affairs. There was no dispute as to the full power of the national government to regulate interstate commerce and no dispute as to the full power of the states to regulate intrastate commerce. The only issue was whether the prohibition of child labor was in reality the former or the latter. The Supreme Court is constantly faced with similar issues regarding various other provisions of the Constitution which divide power between the nation and the states. A set of facts, involving either an act of Congress or of a state legislature, comes before it in the form of a lawsuit. If it interprets the facts one way, national power applies to them; but, if it interprets them another way, state power applies. Thus the Court is not only constantly adjusting the constitutional distribution of power between the nation and the states, but is making these adjustments in connection with day-to-day assertions of power by the one or the other. The flexibility and up-to-dateness of

adjustment by judicial construction constitute the chief advantage of this method of solving jurisdictional problems.

State courts enjoy a like power in construing the division of authority between the state and its local subdivisions. The actual meaning, in specific cases, of home-rule grants to cities or counties, of constitutional restrictions on the legislature's authority in respect to local government, and of the legislature's statutory grants of power to local subdivisions is determined in the last analysis by the supreme court of the state. By no means all of the problems can be solved by judicial construction, but, as in the cases of federal-state jurisdictional problems, the state judiciary have been able to make adjustments which have smoothed out some of the most serious conflicts and uncertainties.

Legislative action. Despite the many constitutional limitations on legislative power, American legislatures do have some means of promoting better coöperation between different governmental units. Congress cannot alter state boundaries or state powers, but it can enact permissive and facilitating legislation which can be employed to achieve more harmonious relations between the nation and the states and also between the states themselves. Congress has power, for example, to authorize interstate compacts and regulate their terms. It is often desirable for two or more states to enter into a compact establishing a common policy on matters of importance to themselves but not to all of the states. Before they can do this, the consent of Congress must be secured. Congress also has power to regulate interstate commerce in ways which may counteract abuses resulting from the dissimilarity of state policies on matters of general importance. Good examples of this sort of national legislation are the federal lottery act, the federal narcotics act, the federal white-slave act, and the federal motor-vehicle-theft act. In each of these laws Congress, by gaining control over the interstate aspects of a subject on which the states had divergent and conflicting policies, has brought about a high degree of uniformity. The way this method works is well illustrated by the lottery act. Every state has its own policy on lotteries; some forbid them and others permit them. But Congress has banned lottery tickets from interstate commerce, which means that a lottery can operate only in the state authorizing it. Since very few lotteries can prosper on the ticket sales possible in one state, large-scale lotteries almost never occur even in the states which allow them. Thus, for all practical purposes, national uniformity has been secured, despite the diversity of state laws.

State legislatures, because they have larger and more direct authority over their political subdivisions than Congress has over the states, make even larger use of statutory controls. Although every state constitution

restricts the authority of the legislature over political subdivisions in some ways, these shackles have not prevented the enactment of uniform codes covering many important aspects of county, city, township, school-district, and other local affairs. State legislatures, by reason of constitutional limitations, are unable to revamp local government at their own pleasure; but they generally do have enough regulatory authority to maintain a basic uniformity in the processes and policies of local government.

Financial subsidies. Grants-in-aid have long been a favorite mode of extending central control over state and local government. When all other methods fail, substantial gifts of cash from the central treasury (even though the strings attached are perfectly obvious) will usually swing the most obstinate and independent state, county, or city into line with the policies of the central government. Our national government has made lavish use of subsidies to state and local governments to induce them to meet national standards, submit to federal inspection and supervision, and comply with federal rules and regulations. By this device the national government has achieved a large measure of control over the equipment and training of state militia, the construction and management of state highways, the administration of state educational systems, the operation of state health departments, state regulation of agriculture, state irrigation and flood-control enterprises, and state systems of unemployment compensation. State governments, by the same means, have gained a large voice in county, city, and town affairs, particularly in the fields of education, health, and road construction.

Conservative persons have been much alarmed by the rapid growth of centralization by means of financial subsidies. No doubt there are dangers, and serious ones. It should be remembered, however, that beggars cannot be choosers. The donor may give or withhold as he chooses, and therefore may dictate the terms of the gift. Subventions from the national treasury presumably have eased the burdens of state and local taxation, and no doubt have enabled these lesser units greatly to expand their activities and services. Have these gains been too dearly bought? Have the ill effects of centralization been greater than the benefits derived from federally subsidized undertakings of state and local government? The facts are too complex and contradictory for sweeping generalizations. In the days when the tax resources of the national government seemed endless and federal taxation was far lighter than state and local taxation, the subsidy policy facilitated activities that the lesser units of government were unable or unwilling to finance entirely by themselves. Now, however, that the era of tax abundance has departed forever, it is painfully apparent that large central subsidies mean excessive central taxation.

This central taxation will be felt by the governmental units receiving subsidies just as severely as direct increases in their own tax levies. It is possible, therefore, that the years to come may see a change of thinking about central subsidies.

Voluntary action. Several forms of voluntary action have contributed to better coöperation among different governmental units. Voluntary conferences of officials of different states who are in charge of the same work (such as state insurance commissioners, state banking supervisors, state highway directors, and state health officers) have served not only as useful clearinghouses of information but have often led to the adoption of more uniform procedures and policies. Voluntary conferences of federal and state officials working in related fields (such as the Interstate Commerce Commission and state railway or public-utility commissions, the Department of Agriculture and state commissioners of agriculture, the Securities and Exchange Commission and state corporation commissioners) have been exceedingly helpful in closing the gaps between federal and state administration.

General interstate commissions and conferences have now become a regular thing. Many such commissions have been appointed to draft uniform laws on certain subjects. A national conference of commissioners on uniform state laws has existed for many years. Similar commissions, conferences, and associations of county, city, school, and other local officials are found in nearly every state. Quite a number of national associations of local government officials have been organized. Good examples are the National Conference of Mayors and the International City Managers' Association.

The most comprehensive program in voluntary organization is the Council of State Governments. All of the states are invited to become members of this organization, though not all have joined. The organization of the Council consists of a commission of fifteen persons representing the legislative and executive branches of the member states. There is a biennial general assembly composed of three delegates from each member state, a permanent secretariat located at Chicago, district secretariats to serve regional groups of states, and a number of interstate commissions on such subjects as taxation, crime, and highway matters. The central secretariat coördinates the work of all of these bodies. The purpose of the Council of State Governments is to provide machinery wherewith the states may consult and act together on common interests and problems, and in addition to furnish the necessary expert services and aids to render this coöperation more informed and effective than it has been in the past.

Mention should also be made of the Conference of Governors. This

gathering brings together the chief executives of the several states. The Conference of Governors is always attended by leading federal officials and sometimes by the President of the United States. The agenda of the Conference always include important federal-state as well as interstate problems.

Reference has already been made to interstate compacts. These usually, though not always, originate on the initiative of two or more states, but have to be authorized and approved by Congress before they can be finally concluded. Such compacts bring leading state and federal officials together for consultation and negotiation. Interstate compacts may deal with any subject of common interest among the states concerned. The regulation of fishing in interstate streams, the construction and management of interstate bridges, the control of irrigation waters, and the provision and management of port facilities have been frequent subjects of interstate compacts. Such compacts as that between New York and New Jersey, creating the Port of New York Authority, and that between the six states using the waters of the Colorado River have been invaluable achievements in intergovernmental coöperation.

Much has been accomplished by voluntary action, and the promise of future accomplishment is very great. But it is not to be expected that voluntary coöperation alone will suffice to bring about all of the requisite adjustment of governmental areas and jurisdictions. Voluntary coöperation cannot overcome constitutional obstacles. Moreover, voluntary agreements and understandings often break down under the stresses of decentralized administration.

Regional reorganization. The proper adjustment of powers and functions between central and local units of government is not less important than the proper determination of the areas in which those powers and functions are to be exercised. Changing governmental areas has been far more difficult than changing the legal status of such areas. Powers and functions may often be modified indirectly in spite of the legal barriers which preclude direct modification. But areas can be changed only by direct assault on existing political boundaries.

We have some political boundaries that are not going to be changed—at least not for a long time to come. Some of the states are virtually obsolete as vital political areas, but they are going to survive nevertheless. They have the power to perpetuate themselves, and will do so. There have been a good many proposals to wipe out state lines and regroup the present states in large regional units. None of these has much chance of being adopted. Indirectly, however, the grouping of states for particular purposes is actually going on. The various federal regions, districts, and areas described earlier in this chapter are the results of the

grouping of states or parts of states for carrying on federal administrative activities. Many of these federal activities involve relationships with state and local governments, and to some extent oblige the affected states to conform with the regional set-up prescribed by the national government. By means of its financial club (exemplified in grants-in-aid) and the gradual extension of its sphere by judicial construction, the federal government has been able in some matters to subject the states to regional control and supervision not unlike that of a supergovernment. It seems likely that this trend will continue, and that we may ultimately have a vast network of intermediate units of government standing between the states and the central government at Washington. These will be units of federal administration, but will absorb or control a good many of the powers and functions of state government in the fields assigned to them.

A more direct way of bringing the states into regional groupings is by interstate compacts. Such compacts have always been formed for one specific purpose, but there is no reason why (if Congress should approve) more general compacts could not be made. A group of states, with the sanction of Congress, could just as easily unite in forming a regional government for a dozen purposes as for one. Although there is little incentive for states to enter into such an arrangement now, one can imagine some very compelling incentives which might arise in the future. If they should, regional groupings of states by compact might occur very extensively.

County boundaries are almost as indestructible as state boundaries. Consolidation of counties is widely advocated, but little actual consolidation has been accomplished or is likely to be. Counties cling to existence as separate entities just as tenaciously as do states, and constitutional provisions usually enable them to balk all movements for consolidation. However, counties are being regionally grouped for state administrative purposes, just as states are being so grouped for national administrative purposes. Furthermore, many county functions are being wholly or partly transferred to state authorities. In addition to this trend, state subsidies and federal subsidies administered through state departments are greatly sapping county independence. It seems probable that the county, though it will survive, will gradually yield most of its important functions to higher authorities, just as the township has already done in many states.

City boundaries are no less adamant than county and state boundaries. It is the general rule that two or more cities may not be united, one city annexed to another, or unorganized territory annexed to a city without an affirmative vote of the electorates concerned. This rule has

thwarted most attempts to set up unified local government in metropolitan areas, for the people of minor units almost invariably vote against annexation or consolidation. It has been possible, however, to get around this blockade to some extent by indirect methods. The most generally successful method has been to form special metropolitan districts to assume particular functions of local government in which it is imperative to have uniform policies and procedure throughout a whole metropolitan area. Hence we find an ever-growing number of metropolitan water districts, sanitary districts, planning districts, park districts, and utility districts. Such districts are nearly always set up and administered on a regional basis and have jurisdiction over one particular function of government in all of the cities, counties, and towns of a given metropolitan area. Sometimes they are wholly or partially under state control.

Under state laws, school districts are more easily consolidated than other units of government. Declining school population and decreasing tax resources have brought about a widespread movement for consolidation. School organization seems to be definitely moving toward a regional pattern. "Union" high schools are numerous, and elementary schools maintained by uniting two or more formerly independent districts are now appearing in large numbers in the rural sections. A recent development is the establishment of junior colleges by regional unions of school districts.

In conclusion, then, we may say that American governmental areas as well as jurisdictions are slowly undergoing a profound transformation. Whether the trends observed in either case will bring us to a sound solution of the problems resulting from imprudent and inflexible decentralization, only time will tell.

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PART III: AMERICAN POLITICAL MECHANISMS

CHAPTER 10

STRUCTURAL PRINCIPLES AND PROBLEMS

The federal division of powers and the resulting organization of government by territorial units make up one of the most striking characteristics of the American political system. A second, and equally prominent characteristic, appears in the principles followed in the construction of the governmental mechanisms employed in our national, state, and local units of government. These include the principle of separation of powers, the principle of checks and balances, the principle of popular election, and the various principles of organization in the different branches of government.

The Separation of Powers

The threefold concept. The idea of dividing the powers of government functionally as well as territorially is one of the oldest in the history of political thought. It was familiar to the ancient Greeks and the Romans, and was to some extent practiced by them. Practical experience in the art of government quickly reveals to alert minds that the governmental process consists of a number of clearly differentiated and necessarily specialized kinds of work and procedure. Making laws is one thing; carrying them out is another; and administering justice is still another. Different considerations are involved in each, different capacities, and different methods. When all are attempted by one person or by one group of persons, the results often turn out to be very bad. It is easy to perceive that the functions performed are not the same throughout the entire range of governmental action, and that specialization according to function makes for greater efficiency. This obvious truth led, gradually, to the development, in all governmental systems, of more or less specialized instrumentalities of legislation, administration, and justice; but there was seldom any thought, prior to seventeenth century, of making these functionally organized parts of the governmental machine equal in authority and wholly independent of one another.

A favorite idea of John Locke, one of the great political thinkers of

seventeenth-century England, was the deconcentration of power. Locke held that dangerous abuses of political authority could not be prevented when the power to govern was centered in one person, one organ, or one close-knit combination of organs of government. He advocated the separation of powers in such a way that no individual or party could gain sway over the whole government by dominating a single branch, such as the legislative or the executive. Locke's doctrine of separation of powers was taken up some fifty years later by the great French political theorist, Montesquieu, and given an even more appealing treatment. Montesquieu thought the principle of separation of powers was actually in force in the English system of government, and said that condition explained why there was so much more liberty in England than in France. He was mistaken about the English government, but most of his readers, even in England, were scarcely more aware of the mistake than Montesquieu himself, for the English political system was at that time in a transition stage between monarchical and parliamentary control. Montesquieu's eloquent advocacy of the theory that the legislative, executive, and judicial powers must be vested in separate and independent branches of government, if there is to be any real and permanent freedom, gained many disciples.

The American people were influenced toward the principle of separation of powers both by the writings of Locke and Montesquieu and by their own political experience. Nearly every educated American of the Revolutionary period was familiar with the writings of Locke and Montesquieu, and it was easy to find in American political experience, both before and after the Revolution, persuasive evidence that these writers were sound on the theory of separation of powers. The swollen powers of the royal governor had been a leading cause of the difficulties between the colonies and the home government, and the overconcentration of power in the legislature came to be regarded as one of the chief weaknesses of government in the critical period following the Revolution. In the pre-Revolutionary colonial system, however, there had been some separation of powers, both the legislature and the judiciary having enjoyed certain independent powers and a partially independent status. It was easy to conclude that a more complete separation would have been much better. The growing popularity of this idea was prominently reflected in the Massachusetts constitution of 1780. When the Philadelphia Convention met in 1787, it was accepted without much question.

The Constitution of the United States provides for the separation of powers in three clauses, commonly called the distributive clauses. Section 1 of Article I says, "All legislative powers herein granted shall be vested

in a Congress of the United States, . . ." Section 1 of Article II says, "The executive power shall be vested in a President of the United States of America." Section 1 of Article III says, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." To insure separation of personnel as well as separation of powers, it was further provided (Article I, Section 6, Clause 2) that "No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments of which shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." Thus was laid the foundation of the threefold or tripartite plan—a government composed of three separate, independent, and coördinate branches. The same principle of organization eventually became universal in state government and spread extensively downward into city, county, and other units of local government.

The meaning of separation. Constitutional provisions made it clear that legislative, executive, and judicial powers were to be respectively assigned to separate organs of government and were to be exercised only by the organs to which they were assigned. They also made it clear that one person or one body of persons should not serve in more than one capacity. This meant, beyond any question, that each of the three branches was to be confined to its own field of power, and could not be allowed or compelled to exercise powers other than those properly belonging to it. United States courts, from the Supreme Court down, have repeatedly affirmed this proposition. Many times the courts have refused to exercise certain powers bestowed upon them by legislative enactment, on the ground that they were not judicial powers; many times, likewise, they have refused to sustain laws granting legislative powers to executive agencies and attempts of legislatures to exercise judicial and executive powers.

Drawing lines between legislative, executive, and judicial powers has been, in some instances, a relatively easy thing to do; but in others it has been one of the most troublesome problems the courts have had to face. No authoritative definition of these three classes of power is to be found in the Constitution of the United States or any state constitution, nor have any definitions been evolved which satisfactorily cover all situations. The legislative power, of course, is the lawmaking power; the executive power, the power to carry law into effect; and the judicial power, the power to hear and decide controversies at law. These broad classifications are simple enough. It is the borderline cases that cause the

trouble. When a legislature conducts an inquiry, taking testimony, summoning and compelling the testimony of witnesses, and inflicting penalties for noncompliance, is it exercising legislative or judicial power? When a court formulates and puts into effect rules of procedure, is it exercising legislative or judicial power? When an executive officer or agency conducts a hearing and makes a ruling, is it executive or judicial power that is being exercised? When executives put out rules and regulations, is it executive or legislative power that is being exercised?

Such questions have come before the courts many times and in a great variety of ways. No ready-made answers have been forthcoming. In general, the courts have looked to the substance and not the form of the thing done. For example, in dealing with the power of the United States Senate to punish a refractory witness for contempt, the Supreme Court of the United States said:

> While these cases [previous decisions of the Court on similar questions] are not decisive of the question we are considering, they definitely settle two propositions . . . : One, that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.[1]

The rule of interpretation on which the Court relied in that case is one that has been found equally helpful in testing the validity of seemingly incompatible powers exercised by the executive and judicial branches as well as the legislative. It is proper for a legislative body to exercise nonlawmaking powers when such powers are "necessary and appropriate" to make its legislative powers effective, and are employed for that purpose and no other. It is likewise proper for courts to exercise nonjudicial powers and for executives to exercise non-executive powers under the same restrictive principle. Thus, a court may properly wield the power of appointment and the power of making rules in connection with and in furtherance of its judicial functions, and executives similarly may make rules and conduct hearings properly connected with their executive functions. But it must be established in each case that the apparently incompatible power actually is "necessary and appropriate" to make the granted power effective, which means that each must stand or fall on its own merits.

The converse question of whether incompatible powers may be im-

[1] *McGrain v. Daugherty*, 273 U.S. 135 (1927).

posed upon or delegated to a branch of the government to which they have not been assigned by constitutional grant, has been universally answered in the negative. A good many years ago, when Congress passed a law empowering the Supreme Court to decide appeals from the Court of Claims, the Court said: "Its [the Court's] jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the Court to exercise any other jurisdiction or power, or perform any other duty." [2] The attempt to confer incompatible powers has given rise to only one problem of great difficulty, and that is the question of the delegation of legislative power.

The delegation of legislative power. This is an important matter because legislation necessarily must speak in broad and general terms. It is impossible for a legislature to enact measures in such detail as to anticipate and provide for every contingency which may arise in connection with their execution. Human knowledge and foresight are not equal to such a task. It is necessary in many cases, especially when technical matters are involved, or the application of the law depends on facts to be ascertained in the future, for the legislature to outline a policy and then give the executive authority to work out the details as need arises. If the principle of separation of powers forbids such procedure, many of the most vital tasks of modern government cannot be efficiently performed. A legislative body obviously cannot work out in advance all of the minute rules necessary for the proper regulation of vast and complicated public-utility systems, intricate structures of corporate finance, state-wide or nation-wide social security systems, and innumerable other regulatory tasks which are indispensable to modern industrial society.

Though consistently holding that legislative power may not be delegated, the courts have been equally consistent in saying that the delegation of subordinate authority to carry out details is not an unconstitutional delegation of legislative power. " 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' " [3] This pronouncement of the Federal Supreme Court, endorsing an opinion handed down by the Ohio Supreme Court, is an excellent statement of the principle which the courts have tried to follow. More often than not they have upheld the legislative delega-

[2] *Gordon v. United States*, 117 U.S. 697 (1865).
[3] *Field v. Clark*, 143 U.S. 649 (1892).

tion, but there have been a few prominent cases in which they have felt obliged to turn thumbs down on the legislative delegation because it did not, in their judgment, adhere to this principle.

One of the grounds on which the United States Supreme Court declined to sustain the highly controversial National Industrial Recovery Act of 1933 was that two of its provisions improperly delegated legislative power to the President. In attempting to make its position clear at that time, the Court said:

> The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary sources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[4]

Careful study of such judicial declarations, together with a close examination of the cases in which the courts have disapproved the legislative delegation, has led authoritative students of the subject to conclude that a valid delegation of legislative power must conform to the following requirements:

1. The subject of the delegation must be clearly and understandably defined.
2. The legislature must lay down and definitely outline a policy to be effected by the law.
3. The legislature must set up in the law itself certain criteria to limit and guide the discretion of the executive.
4. The legislature must, if the execution of the policy is made contingent on a finding of facts, require the executive to make such a finding.
5. The legislature may delegate only to public officials, never to private persons.
6. The legislature may not allow or authorize the executive to impose, on its own discretion, any penal sanction.

It is because the courts believe that such requirements have been met that they have not overruled the vast delegations of power to such agencies as the Interstate Commerce Commission, the Federal Communications Commission, the Securities and Exchange Commission, and

[4] *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

and perhaps a few outstanding officials in other branches of government. If popular election could guarantee democratic government, the government of the United States must be the most thoroughgoing democracy on earth.

Organic Structure

The internal structure of each of the three branches of government in the United States has been deeply influenced by the basic principles of governmental organization described in the preceding sections of this chapter. We have evolved, therefore, certain characteristically American types of legislative, executive, and judicial organization. These will now be briefly surveyed.

Legislative structure. The typical American legislature of the nineteenth century was a two-house body, consisting of a relatively large lower house with a broadly popular basis of representation and a smaller upper house with a somewhat narrower basis of representation. This pattern still obtains in Congress and in all state legislatures save one. The two-chambered city council is now a rarity, though such was the common type of municipal legislature in nearly all large American cities until 1900 or later. The bicameral plan did not make headway in small cities, chiefly because it was found to be ill-suited to municipal conditions. Similar considerations in state government have given rise to a widespread movement to substitute the unicameral for the bicameral legislature. Nebraska, in 1937, was the first state to take this step.

Colonial legislatures had consisted of an elected assembly and an appointed council handpicked by the governor to represent the grandees of the colony. They have been customarily described as bicameral legislatures, the council being considered the upper house. The council was not solely a branch of the legislature; it was an advisory board for the governor on all matters; it devoted as much time to nonlegislative as to legislative business, or more, and was widely accused of being merely an echo of the governor in legislation. Two of the states, Pennsylvania and Georgia, when they set up independent governments adopted the unicameral legislature; the others adhered to the bicameral plan, but established a state senate in place of the council. When the Constitution introduced a bicameral Congress instead of the unicameral Congress under the Articles of Confederation, the scales were turned against the unicameral legislature. The bicameral plan was more in conformance with check-and-balance idea: each house would check the other, and the people would check both. Ultimately, all state legislatures and many city councils became bicameral.

Another characteristic feature of American legislative organization is

the committee system. This feature, too, is to some extent a result of the threefold structure of American government. All legislatures have need of some means of preconsidering and sifting legislative proposals before they are brought up for conclusive action. Owing to the separation of powers, there was no responsible ministry or cabinet in American legislatures to assume this task. The legislature had to find other ways of getting the job done, and the simplest and easiest way was to set up a number of permanent committees, each to have jurisdiction over a special field or subject of legislation. Thus it became the universal practice to refer each bill immediately after introduction to an appropriate standing committee, and to await the committee's report before taking further action. The importance of the committee stage and the power of committees over bills referred to them became so great that the legislature was, for all practical purposes, broken down into a large number of sublegislatures. Legislators came to regard committee services as the most important part of their duties. This exaltation of committees and committee service is typical of American legislatures, and not of legislatures anywhere else in the world.

Executive structure. Executive organization may be single-headed or plural-headed, integrated or disintegrated. American executive organization is of all four types. We have a single chief executive in national and state government. In most cities there is a single chief executive, though a good many are headed by boards or commissions. In counties, as a rule, there is no chief executive at all, and in other units of local government the practice varies, though plural heads are as common as single ones. American opinion and usage, until very recent times, has not favored giving supreme and all-embracing executive authority to one person. The Constitution of the United States expressly states that the executive power shall be vested in the President, and for this reason it is correct to say that the President is the chief executive of the United States. But the Constitution leaves to Congress the creation of all executive agencies under the President, and Congress has shown a decided inclination at times to set up agencies in such a way that they will not be fully under the control of the President. The ten executive departments are definitely placed under the full authority of the President, but there are a good many boards and commissions (such as the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Reserve Board) which are far from being completely under the President's thumb. He cannot order them to act, and (according to the Supreme Court) cannot remove their members from office for refusing to follow his orders. So, while the executive organization of our na-

tional government is nominally single-headed, in actual operation it is not.

State constitutions all designate the governor as the chief executive of the state, but he is far from that in most states. As a rule the secretary of state, the state treasurer, the state auditor, the attorney general, and other important executive officials of the state are elected by popular vote and thus almost entirely removed from the governor's control. State constitutions do not give the governor broad authority to make executive appointments and removals, and it is therefore possible for the legislature to create executive agencies and make them entirely independent of the governor. At one time this was a very common practice. Since 1917 there has been a widespread tendency to unify the executive machinery of the state under the governor and to increase his administrative powers, but we still cannot say that the executive structure of our states is truly single-headed.

In city government there has been more progress toward the really single-headed type of executive organization than in other units of American government. The strong-mayor plan of city government and the city-manager plan are both based on the principle that one man shall have complete power to hire and fire and to order and direct in every unit of the executive organization. Several hundred American cities now operate under one or the other of these systems. Cities under the commission plan, of course, have a plural executive, as do various other units of local government.

Integrated executive organization is set up in pyramidal form under the chief executive. Directly under the chief executive are departments, the head of each being directly and completely accountable to the chief executive. Each department is similarly divided into bureaus, each bureau in turn being divided into divisions, and the divisions being each divided into offices, and so on and on. The terminology differs widely, but the plan is everywhere the same. It is the military plan of centralization of authority from top to bottom. Disintegrated executive organization may be entirely headless, as in the typical American county; or may be made up of two or more coördinate chiefs, whether so titled or not. American state executive organization is of this type, though nominally it is otherwise. The departments and subunits in disintegrated organization are likewise more or less independent of centralized overhead control. A department, bureau, or division may be made up of single-headed organizations and also semi-independent boards and committees.

Judicial structure. The lower courts in the United States, both federal and state, generally consist of one judge, while the courts of appeal

have from two to nine judges. In the lower tribunals each judge manages the business of his own court, whereas in the appellate courts one of the members is named presiding judge or chief justice and is responsible for managing the business of the court. Juries are used in the lower courts, but not in the appellate courts. Federal judges of all grades are appointed to hold office during good behavior. The same rule applies in a few of the states, though in most of the states the judges of all courts are elected by direct popular vote. There are also a few states in which judges are appointed by the state legislature. The judicial term of office in most of the states is four or six years, but the judges of the higher courts in some states have a term of ten years or longer.

Neither in the federal government nor in the states is there a unified judicial system. Instead of having a single organization with specialized branches for different levels and varieties of judicial work, as many countries have, we prefer to organize our courts by territorial units. For each city, county, judicial district, or circuit, as the case may be, we provide separate judicial machinery. In each of these areas there will be a court of general jurisdiction, and possibly one or more special courts for juvenile work, probate work, domestic-relations cases, or claims against the state. Each tribunal, in its own area, carries on its work with very little overhead supervision. The chief coördinating factor is the power of higher courts to review and correct the decisions of lower courts brought up on appeal.

Old Machinery and New Tasks

Adherence to the principles outlined in the foregoing sections of this chapter has given us the American governmental system of today—a baffling complex of divided powers, disjointed parts, loose connections, and tangled processes. The people, theoretically, have the means to make it function as they wish—efficiently, if they want efficiency; otherwise, if they do not. Actually, the people have no such power. True, the people elect most of the important officials; but they do not elect them, even in any one unit of government, all at one time, on a common issue, for equal terms of office, and with a common understanding of what the people want or ought to have done. And the people, after electing their leading officials, have no effective means of correlating and controlling their services. Our governmental system is a mechanism of many separate parts, loosely hung together and designed in many instances to work against each other. The people have ample power to choose and install new parts, but more than that they cannot do unless they want to trade in the old machine for a new and better model.

The new tasks of government. In the old days, when the social order was much simpler than now, when there was less need for extensive governmental controls and services, and when it might have been true that the best government was that which governed least, the American type of government was far more adequate than it is today. The chief business of government then was to maintain law and order, protect private rights, and regulate such private enterprises as had a direct bearing on public health, safety, and morals. There were no railroads to regulate, no wire or radio communication systems to control, no gigantic business monopolies to hold in check, no security and commodity exchanges to supervise, no huge engineering works to construct and operate, no armies of unemployed to look after, no social security program to administer, no elaborately technical services of public health to carry on, no mechanized wars to be fought—in fact, none of the great major tasks of modern political society.

The tasks of government in the twentieth century are not merely of greater magnitude than ever before; they are infinitely more complex and technical. This point may be well illustrated by a single example. The authors of our Federal Constitution clearly recognized the need for uniform commercial regulation throughout the United States and therefore provided that the national government should have power to regulate interstate and foreign commerce. They realized also that transportation was an important part of commerce, and expected the national government to regulate interstate and foreign transportation as far as might be necessary. Only two forms of transportation existed at that time, and no others were in prospect. Water transportation was carried on entirely by sailing vessels, and land transportation was furnished by horse-drawn or ox-drawn vehicles. The regulation of such traffic was simple and easy. Almost any intelligent person could understand what needed to be done and how to do it. Modern transportation includes railroads, steamship lines, motor trucks and buses, airplane lines, pipe lines, and innumerable auxiliary facilities. Each of these is so complex and technical that none but trained experts can understand what should be done and how to do it.

The new tasks of government are mostly of this nature. They can be performed only by experts. Unfortunately, however, the structure of our governmental system is such that it is very difficult to get experts in the right places, and, when we do manage to get them, they are so fearfully handicapped by the limitations under which they must work that their expertness is largely wasted. For this reason we are slowly coming to realize that our governmental mechanism needs a good deal of overhauling. We are not yet of one mind as to the extent and nature

of the necessary overhauling job, but there are significant trends in governmental reorganization which now indicate what we may be likely to do on a much vaster scale in the future.

Trends in structural reform. The most notable and significant innovations in American government structure in recent years have taken place in local government. Because there are fewer obstacles on this level of government in the form of deep-rooted constitutional requirements, it has been easier to bring about sweeping changes in local than in state and national government. This statement has been particularly true in city government and in special districts, such as school districts, port districts, sanitary districts, park districts, and the like.

It is an impressive fact that nearly all of the new departures in forms and processes of local government have abandoned the tripartite, check-and-balance concept. This trend is conspicuously exemplified by the commission and the manager plans of city government, which have achieved nation-wide acceptance since 1900. These increasingly popular forms of city government not only deviate from the orthodox three-ring-circus pattern, but also do away with all elective offices except members of the city council or commission and give larger authority and greater permanence and security to professional civil servants.

The bicameral legislature has gone out of style in local government; also the large and unwieldy one-house legislature. Bases of representation have been broadened, and systems of election designed to give the independent voter a better chance to express himself have been introduced. Administrative organization has been simplified, unified, and centralized under a single responsible head. The modern city manager, the modern school superintendent, and in many cases even the modern mayor, are looked upon as business executives, and head establishments which are organized and conducted very much like business institutions. In a great many cities local courts have been thoroughly remodeled, the old justice of the peace and police courts having been replaced by unified municipal courts.

Changes in state government give evidence of the same trend toward streamlining. There has been a widespread movement for the consolidation of overlapping administrative agencies, the abolition of superfluous boards and commissions, and the centralization of executive power and responsibility in the governor. The legislative council, a small preconsidering and sifting body made up of selected members of both houses, has been established in several states. Many states have created expert research and bill-drafting bureaus to aid the legislature in its work. A good many states have established judicial councils, composed of selected county-, district-, and supreme-court judges. The chief function of

the judicial council is to meet at stated intervals and consider problems of court organization and procedure which are common to all of the courts of the state.

All of these modern trends will be more fully described and examined in later chapters of this book.

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CHAPTER 11

THE NATIONAL GOVERNMENT

The Legislative Branch

Judged by the space allotted to it in the Constitution, the Philadelphia Convention was much surer of its ideas about the legislative than the other two branches of government. Twice as much space is used in outlining the organization, procedure, and powers of the Congress as in treating both the executive and the judiciary. Nearly all of the framers of the Constitution had been members of legislative bodies and had, therefore, extensive and definite notions about what should be done in legislative matters.

One of the first points they agreed upon was that the Congress should be a bicameral legislature. Benjamin Franklin and a few other delegates were in favor of retaining the unicameral plan, but the majority favored two houses. Some undoubtedly believed that a bicameral legislature would be superior under all circumstances, because of the restraining influence of each house on the other; but the most compelling advantage of the two-house plan was that it gave an opportunity to compromise the controversy between the large and small states on the question of representation by giving the states equal representation in one chamber and proportionate representation in the other. Accordingly, it was provided that the Congress should consist of a Senate and a House of Representatives.

The House of Representatives. The Constitution states that the House of Representatives shall be "composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." [1] Two things in this clause are noteworthy: (1) that the members of the House are to come fresh from the electorate every two years; (2) that the electorate is to consist of any persons to whom the states give the right to vote for members of the most popular branch of the state legislature. Here we have a clear intimation of what the framers of the Constitution thought the House of Representatives should be. It was to represent the largest class of persons to whom the states granted the right of suffrage, and was to be accountable to this

[1] Article I, Section 2.

electorate every two years. The House was intended to be the people's branch of the national legislature. Although the states did not in 1787 grant the right to vote on easy terms, most of the property-owning, taxpaying, and other restrictive qualifications have now been removed. The right to vote for members of the House of Representatives is now enjoyed by practically every adult citizen who has resided long enough in a state to satisfy its suffrage requirements. The authors of the Constitution, instead of adopting the state suffrage requirements, might have set up a federal requirement. This was not done for various reasons, including the fact that it was difficult to agree upon an appropriate and universally satisfactory federal requirement, and the further fact that such a requirement might have necessitated the creation of special machinery to administer it.

Apportionment of the House. The Constitution does not fix the size of the House of Representatives. It states that each state shall have at least one member, and may have additional members according to a scheme of apportionment in ratio to population. Briefly, this scheme provides that the number of representatives for any state may never exceed one for every thirty thousand inhabitants, but may be as much less than that as Congress shall determine; that there shall be a national census within three years of the first meeting of Congress and every ten years thereafter; that the number of representatives for each state shall be determined by dividing the state's population by the agreed ratio of representation.

The plan of apportionment did not work out quite as simply as might have been expected. The rapid increase of population made it necessary to reduce the ratio of representation proportionately; otherwise the number of members would necessarily increase to the point where it would be difficult to get them all assembled under one roof. On the other hand, to place an arbitrary limit on the size of the House and maintain it, would mean that at every reapportionment would take representatives away from states which had not kept pace with the general growth of population and give them to states which had—a step which would naturally arouse bitter opposition in the losing states. Moreover, even though such difficulties might not arise, it was impossible to apportion representation with absolute mathematical equality, because the population of a state could very seldom be divided by the ratio of representation without leaving a fractional remainder. If the fractional remainder was less than half of the ratio, it was called a minor fraction; if more than half, a major fraction. If the size of the House had been fixed in advance in order to establish the ratio of representation, the fractional remainders could not be thrown away without leaving some representa-

tives unapportioned. But if, on the contrary, the ratio of representation had been set without regard to the size of the House, every reapportionment would result in an increase, because no state would risk voting for a ratio which might by any chance cut the size of its delegation in the House.

Congress has shied away from these problems as much as possible since 1910. Prior to that time the House had been regularly increased with every reapportionment, no state losing seats and most of them gaining one or more. The returns of the 1910 census showed that the House could not be allowed to grow much larger. It was already too large to function efficiently as a deliberative assembly, and there would not be enough space on the floor or accommodations in the office buildings to take care of many additions. It was decided to fix the total membership at 435, and the reapportionment of 1911 was made on that basis. Following the census of 1920 the issue of reapportionment became very embarrassing. To increase the size of the House, seemed out of the question; but, on the basis of 435, a number of states were doomed to lose one or more seats. The prospective losers naturally resisted reapportionment, while the prospective gainers insisted that it should be made. Congress could not be coerced, because the Constitution does not expressly state that a decennial reapportionment is mandatory. Finally, in 1929, Congress passed an act directing the President, after the 1930 census, and each succeeding one, to provide Congress with information showing how the new apportionment would work out according to the system last used, according to the system of major fractions, and according to the system of equal proportions. If, following this report, Congress took no action, the law provided that the reapportionment should proceed under the system last used. The President made his report in 1932; Congress took no action; and the reapportionment, as of the system of 1911, went into effect. The same procedure followed the 1940 census.

The 1911 method of reapportionment, which, by default, became the method of 1932 and 1941, was substantially as follows: (1) The membership of the House was fixed at 435; (2) the population of all of the states was divided by 435 to get the ratio of representation; (3) each state was allotted one representative as required by the Constitution; (4) the remaining 387 seats were then apportioned by applying the ratio of representation to the population figures of each state, fractional remainders being disregarded; (5) the seats still undistributed (because the divisions would not come out even) were then apportioned, as far as they would go, to the major-fraction states, starting with the state having the largest major fraction. Twenty-one states lost seats under the

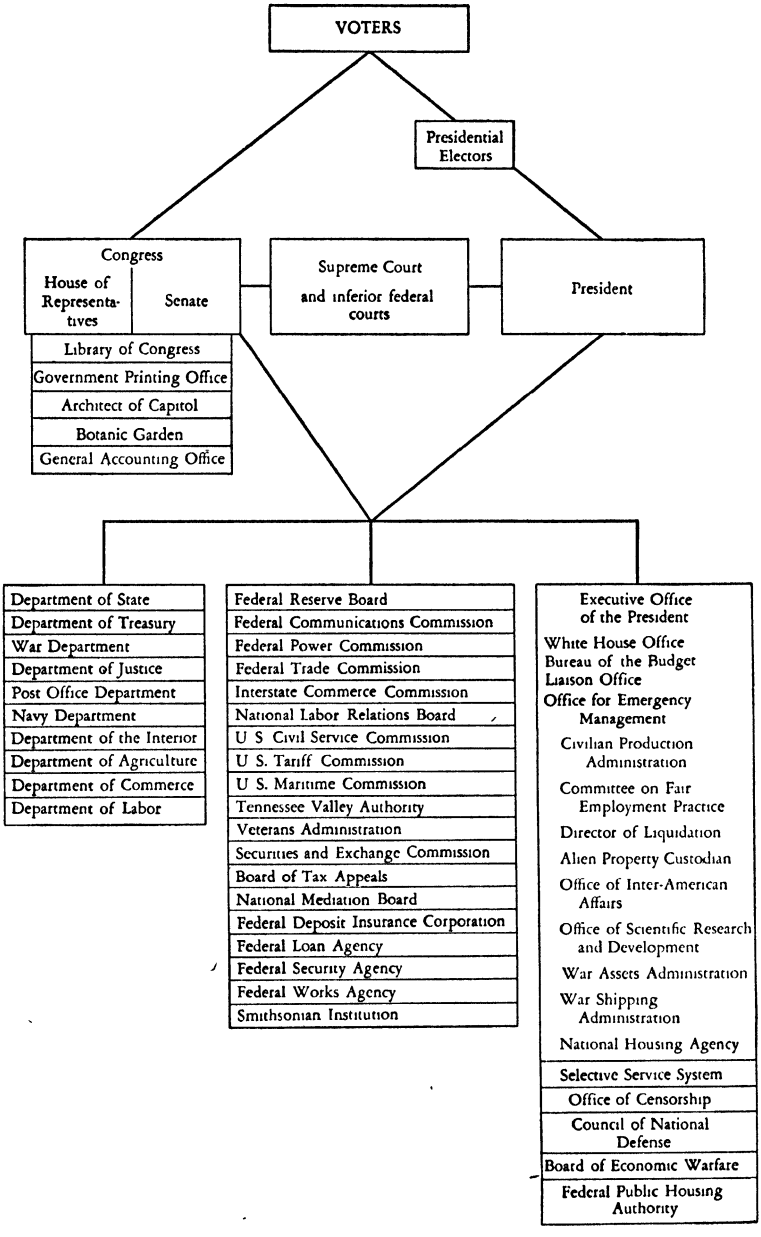


Chart 5. The National Government of the United States, 1946

1932 reapportionment, eleven gained, and sixteen were unaffected. Under the 1941 reapportionment, ten states lost, eight gained, and thirty were unaffected.

Prompt and fair reapportionment of membership in the House of Representatives is important for two reasons: (1) Faulty apportionment means that some portions of the country are underrepresented while others are overrepresented, and that the House, under such conditions, does not accurately reflect public opinion; (2) each state's vote in the electoral college is the same as its membership in the Senate and House of Representatives combined, and faulty apportionment of the House may, therefore, result in the election of a President by a minority of the popular vote.

Congressional districts. The Constitution does not prescribe the method by which the states shall elect members of the House of Representatives. Prior to 1842 most of the states elected all of their members on a general ticket for the whole state; then Congress passed an act requiring the use of the district system. It was made the duty of the state legislature to divide the state into congressional districts "composed of nearly equal population and of compact and contiguous territory." Each district was to elect one representative. State legislatures may redistrict their state at will, although they usually do so only after a reapportionment which has changed the number of representatives for the state. Sometimes there is a delay in redistricting. When representatives have been apportioned to a state, but districts have not been provided for them, they are elected at large by the voters of the whole state.

The introduction of the district system was accompanied by the practice of "gerrymandering." This is a form of political sharp practice by which the state legislature carves out congressional districts in such a way as to give one political party a permanent advantage over the other. Disregarding the rule that districts shall be of nearly equal population and of compact and contiguous territory, the legislature creates "shoestring" districts, "saddle-bag" districts, "T-formation" districts, and districts of other weird shapes and sizes. It pays little or no attention to equality of population. These misbegotten political monstrosities are formed in order to distribute representation according to party strength. By lumping the voters of the opposing party into as few districts as possible, the party controlling the legislature not only has a better chance to win in the remaining districts but also to gain more seats in Congress than its numerical strength justifies. The result, very often, is gross misrepresentation. On the basis of the 1940 census a congressional district should contain approximately 302,000 inhabitants. Owing to gerrymandering, we have some congressional districts with less than 100,000

inhabitants and others with upwards of a million. A great many, though not so far out of line, fall considerably below or above 302,000. The people of the overpopulous districts are underrepresented, while those of the underpopulated districts are just as greatly overrepresented.

Qualifications and elections of House members. To be eligible for the House of Representatives, according to the Constitution, a person must be twenty-five years of age, must have been seven years a citizen of the United States, and must, at the time of his election, be a citizen of the state in which he is chosen. Neither Congress nor the state legislatures have specific constitutional authority to subtract from or add to these qualifications. Custom dictates, however, that a member must reside in the congressional district in which he is elected, and some of the states have so devised their primary election laws that it is impossible for a nonresident of a congressional district to be nominated therein. The House itself has at times sanctioned deviations from the prescribed constitutional qualifications. The Constitution makes the House the sole judge of the elections, returns, and qualifications of its own members. Occasionally the House has refused to seat a duly elected member, regardless of the fact that he possessed all of the required constitutional qualifications; and at other times it has closed its eyes to the constitutional requirements and seated persons who were lacking in one or more of them. Under the Constitution, since the House is the "sole judge" of the qualifications of its own members, there can be no appeal from a decision of the House on such a matter. Should it allow a person to take his seat, though he has not been seven years a citizen, or refuse to seat him because he is a Socialist, nothing can be done about it.

The law governing the election of members of the House of Representatives is mainly state law. The Constitution reserves to Congress the power to "make or alter" such legislation, but this power has not been extensively used. Congress has provided that congressional elections shall be held, with certain exceptions, on the first Tuesday after the first Monday of November of the election year, has enacted legislation regulating campaign expenses, and has forbidden various objectionable and corrupt practices in connection with federal elections; but has not endeavored to control the details of election procedure. If there is any doubt as to the regularity or validity of any member's election, the House alone can determine whether he shall be allowed to take his seat. Even though prosecuted and convicted in the courts for violation of election laws, his right to his seat depends not on the judgment of the courts but on the action of the House. Disputed and contested elections are brought to the House of Representatives for final settlement. Such controversies are referred to a committee of the House. The com-

mittee investigates, holds hearings, and reports its conclusions to the House. A vote is then taken in the House, and this vote concludes the case.

Organization and powers of the House. The internal organization of the House of Representatives is largely of its own making. The Constitution says that the House shall choose its own speaker and other officers. It is left to the House to determine what officers in addition to the speaker it shall have, and what shall be the powers and duties of all of its officers and employees. The most important officers other than the speaker are the clerk and the sergeant-at-arms. The rules adopted by the House for its own government define the powers and duties of these and all officers and employees on the staff of the House. In the same way the House creates all of its own committees and outlines their respective functions and jurisdictions. The speaker is elected from the membership of the House; all other officers and employees are chosen from the outside. In transacting its business the House is subject to the following restrictions laid down by the Constitution: It may not proceed without a quorum, and a quorum is defined as a majority of the members; it must keep a journal of its proceedings and from time to time publish the same, excepting such parts as may in its judgment require secrecy; it must order a yea and nay vote at the request of one-fifth of the members present and enter the same in the journal; it may not adjourn for more than three days without the consent of the Senate, nor to any other place than the one where the two houses may be sitting; it may punish its own members, but may not expel a member with less than a two-thirds vote. Apart from these restrictions, it proceeds under its own self-imposed rules.

The House of Representatives is given the sole power to vote impeachments. All money bills must originate in the House. In the event that no candidate for President receives a majority of the electoral votes, the House of Representatives is authorized to choose one of the three persons standing highest in the electoral vote as President of the United States. But when the presidential election is thus taken to the House of Representatives (as has occurred twice), the vote is taken by states; each state delegation has one vote; a member or members from two-thirds of the states must be present in order to constitute a quorum; and a majority of all of the states is necessary to make a choice. In choosing a President, the House acts more as an organ of the states than as an organ of the people.

The Senate. This branch of Congress was intended to be the opposite of the House of Representatives in many respects. It would not have been far amiss to have named it the "Council of the States," for some-

thing of that sort was what the framers evidently had in mind. In the Senate the states are represented as states, regardless of population. Each state has two members. It was provided that the senators from each state should be chosen by the state legislature, but this practice was changed by the adoption in 1913 of the Seventeenth Amendment which required senators to be elected by direct vote of the people of the respective states. It is still, however, an election by states and not an election by units of population as such.

The term of office for senators was fixed at six years, and it was required that the terms of one-third of the senators would expire every two years. The purpose of these arrangements was to make the Senate a continuous and stable body, remote from the fickle crosscurrents of popular opinion, and essentially an instrumentality not of the masses but of permanently organized political communities. To this end, also, the Senate was given special powers of primary concern to the states as states. The power to confirm executive appointments was given to the Senate not alone as a check on executive discretion, but to insure an equalized distribution among the several states of the executive posts of the federal government. For similar reasons the Senate was given power to ratify treaties. It was not merely that it was needful to have a check on the treaty-making power of the President (the House could have checked this as well as or better than the Senate), but that, unless the Senate had a check on treaties, the individual states, particularly the smaller ones, would have no defense against commercial treaties seriously adverse to their interests.

Special powers and functions of the Senate. The Senate obviously was designed to be a more aristocratic and conservative body than the House. Not only were senators given longer terms and greater security of office; the qualifications for membership were also made stiffer. To be eligible for the Senate, one had to be thirty years of age, nine years a citizen, and a citizen of the state in which he was elected. Under the high property qualification prevailing in the states at the time of the making of the Constitution, state legislatures would be sure to consist largely of men of wealth and property. It was not to be expected that such bodies would disregard property and wealth in choosing federal senators.

The Senate was given equal power with the House in all respects save one. The Constitution specified that revenue bills must originate in the lower house. The purpose of this was not only to place the control of the purse in the popular body, but also to protect the more populous and wealthy states, which would be likely to be in the minority in the Senate, against tax exploitation by the poorer states. The Senate was given the duty of trying all impeachment charges voted by the

House, it being provided that a two-thirds vote should be necessary for conviction and that, in case the President should be tried, the Chief Justice should preside. The Senate was given practically the same powers over its internal organization and was made subject to the same constitutional restrictions as the House. It was provided that the Vice President should be ex officio president of the Senate, but that the Senate might choose a president pro tempore to act in the absence of the Vice President or when the latter should exercise the office of President. The Senate provides for all its other officers and employees, also all its committees, by its own rules. Like the House, it is the final judge of the elections, returns, and qualifications of its own members, and has used that power in much the same way as has the lower chamber.

Despite the well-laid plans of the Fathers, the Senate has grown up to be a different sort of legislative body from what they intended. The persistent pressure of democratic sentiment, given added force by the frequent scandals connected with the choice of senators by state legislatures, brought about the adoption of the Seventeenth Amendment requiring direct election of senators. Thus the Senate was brought as close to the people as the House. The smaller size of the Senate, moreover, has enabled it to preserve a large freedom of debate and to avoid the necessary time-saving devices which are essential to the transaction of business in the House. The Senate has continued to be a deliberative assembly, while the House has become a high-geared legislative mill. The House, which was expected to be the great forum of public opinion, has tended more and more to become a mere recording mechanism for registering the decisions of caucuses and committees; whereas the Senate, which was expected to be conservative council of spokesmen for the state legislatures, serving as a counterweight to the vagaries of the popular body, has become the real forum of important discussion and debate of public questions.

Political strength of the Senate. Contrary, also, to the expectations of the Fathers, the Senate has preëmpted the rôle of political leadership. By means of the practice of "senatorial courtesy" (see above, p. 187) the senators have gained a large share of the appointing power. The possession of this power of dispensing jobs in return for political favors and support puts a senator in a position to play the leading rôle in party affairs in his state. If his state happens to be one having a large electoral vote, he may also become a figure of first magnitude in national politics. The political stature of the senators is still further heightened by their greater immunity from immediate retribution when they blunder or take an unpopular stand on issues of the day. A member of the House is called to account before his constituency once every two years, a senator

once in six years. A great deal more is forgiven or forgotten in six years than in two, and the senator's feeling of security and independence is correspondingly greater. The senator usually has a loyal band of job-holders ready to "go down the line" for him in season and out; the representative has no jobs to dispense unless the senators from his state allow him to make recommendations for federal appointments in his congressional district. Hence, in order to build up a political machine of his own, the representative must "stand in" with the senators from his state. It is probably true, also, that the political prestige of senators is much enhanced by the Senate's share in treaty-making. Foreign affairs are coming to occupy an ever larger place in public concerns, and the Senate is the people's only check on the President's power to commit us to engagements with foreign countries.

Because of the unforeseen developments outlined above, the United States Senate has achieved a unique position among legislative bodies. It is the only second chamber anywhere in the world which outranks in power and popularity the lower house of the legislature. Americans should be more aware of the significance of this fact.

The Executive Branch

The Constitution is far more reticent about the executive branch of our national government than about Congress. It declares that the executive power shall be vested in the office of President, but does not define the executive power. It also creates the office of Vice President, but treats this office even more sketchily than that of President. It casually mentions executive departments, but gives no clue as to the position they are to occupy in the governmental system. There is no mention at all of a cabinet or executive council. It was left for Congress to fill in the outline and set up the executive mechanism as a going concern.

The President. The nature of the presidential office, as conceived by the Fathers, may be fairly well deduced from the provisions of the Constitution relating to it. They did not intend it to be a political office. That was made clear in several ways. They rejected election by the state legislatures, election by Congress, election by the people, and other methods of choice that would involve the presidency in political struggles. Instead they devised the indirect process of choice by presidential electors, and, to make doubly sure, they provided that no senator, representative, or other person holding an office of trust or profit under the United States should be a presidential elector. To render the President further immune from political influence, they

provided that the compensation of the President should be neither increased nor diminished during his term of office, and that he should not during that period receive any other emolument from the United States or any state. They gave the President a fixed four-year term of office, during which time he could be removed only by impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. He was not to be turned out of office, as prime ministers are, for purely political reasons.

It was clearly intended, also, that the President should be the chief magistrate of the United States. Otherwise he would not have been given the power to grant pardons, to receive ambassadors and other public ministers, to issue commissions to all officers of the United States, and to be commander in chief of the Army and Navy—all of which were powers customarily reposed in sovereigns. The framers of the Constitution seriously considered for a time using the title of governor for the chief magistrate of the nation, thus suggesting that what they had in mind was an office which, in the federal sphere, would be a nonpartisan replica of the colonial office of royal governor.

In the broader sense of the term, it must have been intended to make the President the chief executive of the United States; for he was given power to "take care that the laws be faithfully executed"; to make certain executive appointments with the approval of the Senate, and others without such approval, if so authorized by Congress; and was vested with what the Constitution termed "the executive power." But was it intended that the President should be the administrative head of the government as well as the chief executive? Was it intended that the President should be the managing and directing head of a vast administrative organization such as we now have to carry on the daily operations of government? The answer to these questions probably should be no.

It is unlikely that the framers of the Constitution foresaw the need of such a gigantic administrative machine, and they apparently thought it best not to attempt to define the exact relation of the President to the administrative agencies which were already in existence and would doubtless be carried over from the old government to the new. Five administrative departments had been set up under the Articles of Confederation. These were headed by secretaries appointed and supervised by Congress. Were these to go on as before, or were they to be placed under the President? The Constitution gives no clear answer to this question. It empowers the President to "require an opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." It does not

authorize him to issue instructions which they must obey, to overrule them on any matters pertaining to their departmental duties, or to remove them from office. It does not make them strictly accountable to the President for the proper discharge of their duties. All of these powers have been subsequently acquired by the President; but it seems likely that the framers of the Constitution thought that the executive departments might continue to be under Congress as in the past, and that the President would act as a sort of general monitor over all. This view is reinforced by the fact that the President was expressly required "from time to time [to] give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."

The election of the President. The electoral-college system of choosing the President was one of the most generally approved features of the proposed Constitution during the campaign for ratification. No serious objections were urged against it, and nearly everyone seemed to think it would work well. Strangely enough, it was one of the first provisions to cause trouble and one of the few to become completely obsolete. Under the original plan, each state was to choose, in a manner to be determined by its legislature, a number of presidential electors equal to the number of its representation in the two houses of Congress. The electors of each state were required to meet in their respective states and vote by ballot for two persons. The results of this balloting were to be transmitted to the president of the Senate and by him opened and counted in the presence of the Senate and the House of Representatives. The person having the highest number of votes, if this number equaled a majority of the number of electors, was then to be declared elected President, and the person having the next highest number was to be declared elected Vice President. This was the system used in the first four presidential elections.

In the election of 1800 it broke down. It had been designed to secure a nonpartisan election, but political parties had found that it could be bent to their purposes. Since electors were chosen by methods determined by state legislatures, it was natural for party majorities in state legislatures to use this power to insure the choice of electors of their own party. Sometimes the legislature itself did the choosing, and sometimes the legislature ordered the state's electors to be elected by popular vote; but in either case the electors were pledged in advance to support their party's nominees for President and Vice President and not to vote for any other persons. Thus presidential electors ceased to be free agents, as the Constitution had intended, and became little more than mechanical recorders of the party vote in their respective states. Each party

had one nominee for President and one for Vice President, and no more. Each elector of that party was bound in advance to cast his vote for those two and no others. In 1800 this procedure resulted in a tie between Jefferson, the Anti-Federalist candidate for President, and Burr, the same party's candidate for Vice President. Since there was a tie in the electoral vote, the election went to the House of Representatives, where an effort was made to cheat Jefferson out of the presidency by lining up a combination that would throw the election to Burr.

The repercussions of this affair led to the adoption in 1804 of the Twelfth Amendment, which recognized the party system to the extent of requiring each elector to cast his ballot for one person for President and for another person for Vice President The person receiving the highest number of votes for President, if this number was a majority, was to be declared elected President; and the one having the highest number for Vice President, if this number was a majority, was to be declared elected Vice President. But not even this reform could save the electoral system. State legislatures one by one gave the choice of presidential electors directly to the people, and most of them eventually provided that the electors should be voted for on party tickets. The party whose electors received a plurality of the popular vote got all of the state's presidential electors. Quite a number of states have now passed laws relieving the voter of the necessity of marking his ballot for presidential electors. Under these laws each party puts up a list of nominees for presidential elector, but these are not printed on the ballot. On the ballot the voter sees only names of the party nominees for President and Vice President. He marks his ballot accordingly, and the law takes care of the rest. The electors of the party whose nominees for President and Vice President receive a plurality are declared to be elected, though their names did not appear on the ballot and no votes were cast for them.

Nearly all state legislation regulating the choice of presidential electors has been actuated by party considerations. The presidency has become the grand prize of political competition, both for individuals and for parties. Every state legislature has this in mind, and therefore tries to do everything it can to favor the position of its state in the presidential sweepstakes. To allow the electoral vote of a state to be divided obviously weakens the bargaining power of its political leaders, of all parties, in both pre-election and post-election politics. For that reason, state legislatures have put aside all schemes which would divide the state's electors in proportion with the distribution of the popular vote, and have adhered to the general-ticket system. The recent innovation by which a vote for a party's presidential and vice-presidential nominees

is automatically counted as a vote for all of its nominees for presidential elector, caps the climax by making it impossible for the individual voter to split his ticket in voting for presidential electors, even though he may wish to do so.

Minority elections. Owing to the fact that presidential electors are chosen by popular vote, the electoral vote of each state going solidly to the party carrying that state by a plurality, many persons imagine that we have in effect reduced the presidential elector system to a hollow form, and achieved, for all practical purposes, the direct election of the president. It is not quite so simple as that, however. Sometimes we do elect the President and Vice President by what is in reality a majority of the popular vote; occasionally, however, we elect them by a minority of the popular vote; and we always elect them by an electoral majority which does not truly reflect the distribution of the popular vote. In the 1936 election 16,679,583 votes were cast for Republican presidential electors, but Mr. Landon, the Republican nominee, received only 8 electoral votes; Mr. Roosevelt, the Democratic nominee, received 523 electoral votes as a result of 27,476,673 votes cast for Democratic electors. With less than a 2-to-1 majority of the popular vote, Roosevelt secured a 65-to-1 majority in the electoral vote. If the electoral vote had been proportionate to the popular vote, Landon would have had 196 electoral votes and Roosevelt 335. In the 1944 election Roosevelt decisively defeated Dewey in the electoral count, 432 to 99. The popular vote was Roosevelt 25,603,152 and Dewey 22,006,616. A proportionate division of the electoral vote would have given Roosevelt 283 to Dewey's 248 instead of the 4-to-1 majority he actually received. Roosevelt's lopsided electoral majority was misleading. He seemed to win overwhelmingly; actually, he barely nosed Dewey out.

In neither of the two cases just described would a fair distribution of the electoral vote have changed the results of the election. Unfortunately, this has not always happened. At least nine of our Presidents have been elected by a minority of the popular vote, and two of them did not even have a plurality. Such results are made possible by the fact that, when the popular vote is evenly divided, a candidate who receives the total electoral vote of a populous state like New York may get a majority of the electoral vote and still fall behind his rival in aggregate popular vote throughout the nation. In 1884 Cleveland had a popular vote of 4,854,986 and Blaine had a popular vote of 4,885,011. Cleveland carried New York by a popular plurality of 1,149 and got all of New York's 36 electoral votes. This gave him a majority in the electoral vote, and gave him the presidency, though a majority of the voting population did not want him.

The occasional election of a President by a minority of the popular vote is not the only bad result of the present system. It is not necessarily fatal to have a minority President, though in critical times it may seriously enhance the difficulty of uniting the people under the leadership of the President. Even more objectionable, however, is the fact that millions of voters are virtually disfranchised in every presidential election. In 1936, more than 16,000,000 Republican votes failed to choose a single presidential elector, because they were cast in states where the majority was Democratic; whereas 249,846 Republican votes, which happened to be cast in two states with Republican majorities, chose 8 presidential electors. The Republican voters in the other 46 states might as well have stayed at home on election day. This condition is chronic in states where party strength is not fairly evenly divided. On the other hand, the voters of a few doubtful states of great electoral strength exert a disproportionately decisive influence on the outcome of presidential elections. Often the shifting of a few hundred votes in one or two of these pivotal states have more bearing on the final result than millions of votes in states of lesser electoral strength can possibly have. As a consequence, party leaders and oftentimes reprehensible party machines and bosses in a few big states obtain a grip on national politics that the people of the rest of the country, to whom these state politicians are not accountable, are unable to break. A further unfortunate result of the present system is that presidential talent is recruited almost entirely from a half dozen states. No matter how outstanding a statesman may be, if he does not come from one of the big doubtful states, his chances of securing a presidential nomination are very small.

There are two obvious remedies for these defects of our presidential election system. One would be the adoption of a constitutional amendment abolishing the electoral system and providing for election by direct popular vote. The other would be for the state legislatures to enact laws requiring the division of the state's electoral vote in the same ratio as the popular vote. There is not much likelihood that state legislatures could be induced to do such a thing. The small states could not afford to divide their electoral strength if the large ones did not do likewise, and the large ones would not voluntarily surrender the advantages which accrue to them from casting their electoral votes in a solid block. A constitutional amendment effectively sponsored and promoted might have a better chance of success, particularly if the campaign were carried to the people in an impressive way. It is not the people, but the politicians, who benefit by the anomalous survival of the electoral system; and, if the people should become fully aware of this, the politicians might be less hostile to a change.

Nonexecutive powers of the President. In addition to the executive power the President is given various powers which cannot be classified as strictly executive. Possibly the authors of the Constitution did not understand the term "executive" in quite the same sense that it is now used. In our thought the President is considerably more than the chief executive of the United States.

In previous pages (see pp. 183–185) we have commented on the presidential veto as a check on legislative power. President Taft, who was a great constitutional lawyer, was of the opinion that such was the primary purpose of the veto power, and that it ought to be used mainly as a defense against unconstitutional legislation. Nevertheless, Mr. Taft, in common with all modern Presidents, did not confine himself to this limited use of the veto power. Andrew Jackson was the first President to make wide use of the veto power to enforce his views on matters of legislative policy. Succeeding Presidents, regardless of their private views about the essential nature of the veto power, have been unable to escape the obligations of political leadership and the resulting necessity of invoking all possible means of bringing Congress into accord with their concepts of proper public policy. Presidents have found the veto power as useful in bringing Congress into line with their views as in defeating measures passed by Congress. When the President sends a measure back to Congress with a statement of his reasons for disapproving it, he not only forces Congress to reconsider but rivets public attention on what he wishes Congress to do as well as not to do. Senators and representatives of the President's party cannot well afford to be at outs with the head of their party all the time. It is a serious matter, both from the party and the personal standpoint, to override the executive veto on an important public question. Members of Congress on the President's side of the party alignment prefer to go along with him as much as possible. Even a threatened veto is oftentimes enough to serve the President's purpose.

A similar evolution has taken place in connection with the message power of the President. He was required by the Constitution to give Congress information, from time to time, of the state of the Union, and to recommend such measures as he might deem necessary and expedient. He was also given power to call Congress in special session, but not to prescribe the business of such sessions. Undoubtedly the framers expected the President to give Congress information and advice, but they would probably be surprised to learn to what extent Presidents have used such occasions to place before Congress (and the country) a full-fledged legislative program which Congress must seriously heed and consider.

This development has become possible because a presidential message to Congress, particularly when it is delivered in person, is one of the most dramatic events of our political life. The President gets the ear of the whole country, sometimes appeals over the heads of Congress to the people. A legislative program outlined by the President cannot be lightly put aside by Congress without a later reckoning with the voters. Since the coming of radio, Presidents have assumed the prerogative of addressing the people directly over national hookups which take the President's words and voice to as many as sixty million listeners at one time. A message to Congress, preceded or followed by a "fireside chat" with the people, is apt to be almost as much a command as a message. When, in addition to the legislative leadership the President can exercise through the message power, he is able to convoke Congress in a special session for a particular purpose fully explained to the country by message and "fireside chat," it is evident that the special session will be strongly impelled to transact the business which the President wants done. Woodrow Wilson once referred to himself as the captain of the team, and said it was his job to call the signals. Members of Congress, including many of his own party, criticised this statement as a usurpation of legislative functions not given to the President by the Constitution; but, so long as Mr. Wilson had the country behind him, the alleged usurpation was not seriously challenged.

A pardon is an act of grace, and the power to grant pardons has always been regarded as a prerogative of sovereignty. In England, that power belonged exclusively to the Crown. Under our federal system sovereignty was supposedly divided between the national and state governments, and so the pardoning power was correspondingly divided. The President was given power to grant pardons for all offenses against the United States, save in cases of impeachments; but the power to grant pardons for offenses against the states was left to the determination of state constitutions. The President may pardon before or after conviction, though the former practice is very rare. He may pardon conditionally or unconditionally. In granting a pardon conditionally the President may reduce the penalty—commute the sentence—or leave the penalty unchanged by suspending enforcement so long as the offender complies with certain stipulated conditions. He may also postpone the execution of a sentence by granting a reprieve. Most pardons are granted to individuals, but it is possible for the President to issue a single pardon covering a large number of persons guilty of the same offense. He is then said to grant an amnesty. Applications for pardon are now so numerous that the President does not ordinarily consider them until

after they have been investigated and reviewed by the Attorney General's office.

One of the most important powers given to the President is the management of the foreign affairs of the United States. This power is derived from four sources. The Constitution empowers the President "to make treaties, provided two-thirds of the senators present concur"; to appoint, by and with the advice and consent of the Senate, "ambassadors, consuls, and other public ministers"; to "receive ambassadors and other public ministers"; and to be "commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States." This combination of powers gives the President the initiative in all matters of foreign intercourse and foreign policy. No treaty can be negotiated unless and until the President acts. The Senate can defeat a treaty submitted for ratification by the President, but there is no way to force him to negotiate a treaty if he does not wish to. The Senate may ratify a treaty conditionally, but there is no way to compel the President to put such a treaty into effect. The Senate can refuse to approve the President's appointment of diplomatic and consular officials to represent us in foreign countries, but there is no way to oblige him to send anybody at all to represent us abroad, and no way to require him to entrust any responsibilities to those whom he may send. The President alone has the right to receive diplomatic representatives from foreign countries, and hence is the sole channel of communication between foreign governments and our own. If he declines to receive the diplomatic representative of a foreign country, the government of that country cannot deal with our government in a direct and official way. And, if the President declines to continue to receive (in other words, dismisses) an already accredited diplomatic representative, it means that normal intercourse between that diplomat's government and our own may be terminated. Taking all of the foregoing powers into account, and then remembering that as commander in chief the President may throw the Army and Navy into action to back up his foreign policy, it is easy to see that the intercourse of this country with other nations is almost wholly in the hands of the President.

Although the President is made commander in chief of the Army and Navy, the power to declare war is reserved to Congress, as is also the power to raise and support armies and provide and maintain a navy. The President's power is solely that of command, but it is nevertheless a tremendous power. Even in time of peace it may be used to involve the United States in difficulties which may render war inescapable,

and in time of war it may approach the magnitude of dictatorial authority. When war occurs Congress usually votes large authority to the President. How far such grants are necessary is uncertain. In the theater of military operations they are certainly not required, for the Constitution, by making the President commander in chief, has clearly made him supreme. There used to be a fairly sharp line between military and civil activities, but in modern total war that distinction has almost disappeared. Industrial operations, labor relations, civilian morale, and various other nonmilitary activities are just as vital to military success as is what takes place on the battle front. Did the Constitution intend that the President's power of command should not include command over civilian activities essential to the fighting strength of the forces in the field? On this question we have, as yet, no conclusive answer from the Supreme Court, but a long succession of cases indicates that the courts are inclined to give the President a great deal of latitude in time of war.

The President's Cabinet. After considering proposals for the creation of an executive council to advise and control the President, the Philadelphia Convention decided against them all. The Constitution was entirely silent on the matter. President Washington assumed that the Senate might serve in such a capacity, but, after discovering that his overtures in that direction were not welcomed by the senators, gave up the idea. For a time he consulted his department heads separately, but sometimes called them together for joint deliberations. Gradually this came to be a regular custom, and the department heads sitting in council with the President came to be known as the Cabinet.

The President's Cabinet is not an executive council in the legal sense, nor is it a cabinet in the political sense as that term is understood in European countries. It has no joint powers or responsibilities. It has no right to meet except at the call of the President; it has no authority to control the decisions of the President in any way; it has, as a cabinet, no legal powers or duties whatever. Its membership is determined entirely by the President. By custom the heads of the regular executive departments are always included; in recent years the Vice President has usually been invited to attend; and on occasion the President has asked other important administrative officials to be present. The Cabinet represents only a segment of the national administration today, and seems to be declining in influence. Other advisers are often closer to the President, and the executive departments no longer include all or most of the major administrative establishments of the federal government. The Cabinet no doubt does useful work in counseling and coördinating,

but so much of the national administration now lies outside its sphere, that the value of its work is much less than formerly was the case.

The Vice President. The framers of the Constitution evidently intended that the Vice President should be an important man, if not an important official. In the original scheme of election it was provided that the runner-up for the office of President should become Vice President. It was further provided that "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President . . ."

Was it intended that the Vice President should succeed to the office of President, in the event of a vacancy in that position? The Constitution does not say so. On the contrary, it says that the powers and duties of the President "shall devolve on the Vice President." Furthermore, it authorizes the Senate to choose a president pro tempore to serve "in the absence of the Vice President, or when he shall exercise the office of President of the United States." It also empowers Congress by law to "provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

These quotations from the Constitution strongly imply that it was the intention that the Vice President should never be more than Acting President, and that he might assume this capacity not only when the office of President was vacated but when the President was temporarily incapacitated. The first vacancy in the office of President occurred on the death of William Henry Harrison in 1841. The Vice President, John Tyler, instead of taking over as Acting President, was sworn into office as President. Considerable discussion of the correctness of this procedure took place at the time, but did not make much practical difference whether Tyler was Acting President or President. Harrison was dead, and there was no provision in the Constitution whereby an election could be held before the expiration of the term for which he had been elected. So the action was allowed to stand, and a firm precedent was established.

The expectation that the Vice President might serve as Acting President during the temporary disability of the President has not been fulfilled. There have been only two cases of prolonged incapacitation of the President—that of President Garfield and that of President Wilson. The former lasted less than three months, and during part of that time the President was able to give some attention to the duties of his office.

The latter was of much greater duration, and resulted for a time in serious interruptions in the transaction of public business. Vice President Marshall was urged by many, even in official quarters, to assume the rôle of Acting President until the President should recover. He refused to do so. What would have been the result, had his decision been otherwise, no one can say.

The Vice President's duties as president of the Senate may be rather exacting, if he takes them seriously. His casting a vote in case of a tie has rarely been of great importance, but as a presiding officer, provided he is an accomplished parliamentarian and understands the psychology and traditions of the Senate, he may exert a very substantial influence on legislation. In recent years the Vice President has usually been invited to attend meetings of the President's Cabinet. Whether he wields any influence in these counsels depends, of course, on his political stature and personal qualities.

Presidential succession. In 1886 Congress established the line of succession to the powers and duties of the President in the event of the removal, death, resignation, or inability of both the President and the Vice President. First in succession was the Secretary of State; then the other heads of departments, each in the order of the establishment of his particular department. In 1947 Congress, after being strongly urged by President Truman, enacted a new succession law under which the first successor after the Vice President is the Speaker of the House of Representatives and after him the President *pro tempore* of the Senate. Mr. Truman's chief arguments in favor of this change were that no President should have power to choose his own successor and that it would be preferable for an elected rather than an appointed official to succeed to the presidency.

The national administration. The administrative machinery of the federal government consists of agencies of five general types: executive departments, independent establishments, presidential agencies, government corporations, and agencies under Congress. All of these are created by or under authority of legislation enacted by Congress.

The executive departments have been established as such by acts of Congress. Each is headed by a single official appointed by the President (with the confirmation of the Senate) and immediately under his authority and direction. The departments are somewhat uniformly, though not identically, organized. The general plan of organization is as follows: Under the department head are two or more assistant heads (assistant secretary, assistant postmaster general, and so on), each having supervision over a group of bureaus; each department is divided into major units called bureaus, each headed by a bureau chief responsible directly to one of the assistant secretaries; each bureau is made up of

two or more divisions and is presided over by a division chief responsible to the head of the bureau; each division is composed of two or more offices, each headed by a person responsible to the division chief. Though this general pattern of organization is followed in all of the departments, there are many deviations in matters of detail. The ten executive departments at the present time are: State, Treasury, War, Justice, Post Office, Navy, Interior, Agriculture, Commerce, and Labor. Many proposals to create additional executive departments have come before Congress.

The independent establishments have been created by act of Congress, but not organized as departments and placed under the immediate control of the President. Most of them are headed by boards or commissions, though some have single heads. The members of these bodies are appointed by the President and Senate for terms of four years or longer, and the terms are usually so rotated that not more than one or two posts fall vacant at one time. Each board or commission has a chairman, who is designated for that post by the President or is chosen by his fellow members. The chairman is the presiding member, and generally has some duties of direction and supervision. There is also a secretary, not a member of the board or commission, who is in charge of the routine work of the agency. There may also be a number of specialized subunits called bureaus, divisions, or offices.

Congress gives the independent establishments discretionary powers which are not subject to direct control through orders and instructions by the President. Congress also protects the tenure of office of the members of these agencies by restricting the President's power to remove them from office. The Supreme Court has upheld the right of Congress to do this. The prominent and important independent establishments at the present time include: the Civil Service Commission, the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Power Commission, the United States Tariff Commission, the United States Maritime Commission, the Federal Reserve Board, the Securities and Exchange Commission, the National Labor Relations Board, the Federal Mediation Commission, the Railroad Retirement Board, the General Accounting Office, the Tennessee Valley Authority, the Smithsonian Institution, and the National Archives.

The presidential agencies are created by Congress and put fully under the control of the President, but are not organized as executive departments; or else they are created by order of the President acting under authority given him by the Administrative Reorganization Act of 1939 or by other acts of Congress such as the defense and war-powers legisla-

tion of recent years. They are not of any uniform type, and most of them may be revamped, abolished, or consolidated with other agencies by order of the President. The one thing they have in common is their complete dependence on the President. Their powers and duties are not described at all by statute or are described very sparingly; they are almost entirely subject to the President's orders and instructions in all they do; their personnel may be removed from office by the President without restriction; and the agencies themselves, or many of them, may exist only at the pleasure of the President. Among the more prominent presidential agencies of recent years are: the White House Staff (including the President's secretaries and assistants), the Bureau of the Budget, the Central Statistics Board, the National Resources Board, the Federal Works Agency, the Federal Security Agency, and the many special agencies of the war period, such as the War Production Board, the Supply, Priorities, and Allocation Board, the Office of Price Administration, the Office of Civilian Defense, the Office of Lend-Lease Administration, the National Defense Mediation Board, and scores of others.

The government corporations are agencies created by Congress to function either as stock or nonstock corporations and thus transact certain kinds of governmental business which corporations are particularly well suited to handle. If they are stock corporations, the federal government holds all or a controlling portion of the stock; if they are nonstock corporations, federal officers hold the key posts in their directing boards. They may be chartered by the federal government, or may receive charters under state law. Their affairs are conducted by directing boards, officers, and employees in the usual manner of corporations. The directors and in some instances certain of the officers are appointed by the President and Senate. Like the independent establishments, however, they are not fully and immediately under the President's control. The leading government corporations at the present time are: the Reconstruction Finance Corporation, the United States Housing Authority, the Federal Deposit Insurance Corporation, the Commodity Credit Corporation, the Inland Waterways Corporation, the Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Disaster Loans Corporation, and the Electric Farm and Home Authority. Some of these corporations are totally separate agencies and others are autonomous units within the framework of other agencies.

The agencies under Congress are not very numerous. They are created by Congress and are responsible to Congress. In a sense they are not a part of the national administration at all, but are staff agencies for the legislative branch of the government. The principal agencies of

this type at present are: the Library of Congress, the Government Printing Office, and the Architect of the Capitol.

For many years the problem of administrative organization has occupied the attention of Presidents, members of Congress, and independent students of public administration. It was obvious to all that the national administrative structure had become so huge and complex that general overhauling was badly needed. There were duplications, conflicts, and lack of effective coördination in dozens of vital spots. Beginning with President Taft's Commission on Efficiency and Economy in 1910, nearly every succeeding administration saw studies made and reports rendered on how to cope with this problem. The latest study of this kind was that of the President's Committee on Administrative Management in 1937. The problem was not only one of general overhauling, but of continuous readjustment to keep up with changing circumstances and requirements.

Resistances of many kinds, both in Congress and in the various departments and agencies themselves, prevented thoroughgoing streamlining. However, in 1939, Congress broke a small hole in the ice by enacting the so-called Administrative Reorganization Act. This measure, after enumerating twenty-one agencies which he may not touch and saying that he may abolish no existing executive department or create a new one, empowers the President to shift administrative units from one agency to another and to regroup existing agencies to form new ones. When the President issues such a reorganization order it must be reported to Congress, and Congress may, by concurrent resolution, disapprove it. But, if Congress fails to take action within sixty days, the presidential order becomes effective. Although the President has made considerable use of this power, there has been no striking improvement of the national administrative structure. The task is too big for the very limited power given to the President in 1939.

The Judicial Branch

On the judicial branch of the federal government the Constitution is so brief as to give little idea of the intended character of the judicial system. It simply says that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. It says nothing about the organization and procedure of the courts on any level, and very little about the division of jurisdiction among them. It is stated that the Supreme Court is to have appellate jurisdiction in all cases save those affecting ambassadors, other public ministers, and consuls, "with such

exceptions, and under such regulations as the Congress shall make." But, to insure the independence of the judiciary, it is provided that the judges of the federal courts shall hold office during good behavior and shall receive a compensation which shall not be diminished during their continuance in office. Subject to these limitations, Congress has fashioned the federal judicial system pretty much according to its own conceptions.

The Supreme Court. Since the Constitution mentions the Supreme Court, it is assumed that there must always be a Supreme Court, but whether this court shall consist of one judge or a hundred, whether appeals must go directly to this court, whether all appeals must be finally decided by it and no other court, what its forms and modes of procedure shall be—all such matters are left to be determined by legislation. Congress provided that the first Supreme Court should consist of a chief justice and five associate justices. Congress has increased and decreased the size of the Court from time to time, but the present number (nine) has not been changed since 1869. One part of Franklin D. Roosevelt's 1937 proposal to modernize the judiciary was a sort of sliding scale arrangement which would have made it possible for the membership of the Supreme Court to be increased to a maximum of fifteen. Much of the opposition which defeated this measure was based on the belief that a larger court is not needed and might be less efficient than a tribunal of nine.

As was pointed out above, the original jurisdiction of the Supreme Court (that is, those cases which may go to the Supreme Court without being first heard in a lower court) was defined by the Constitution. The appellate jurisdiction (cases which go to the Supreme Court on appeal from a lower court) was left to be regulated by Congress. For many years Congress did not greatly restrict the appellate jurisdiction of the Supreme Court, and therefore nearly every appeal found its way ultimately to the Supreme Court for final decision. With the growth of our country and the accompanying increase in the volume of judicial business, the Supreme Court had so many appeals to hear that it fell years behind with its dockets. To relieve this situation, Congress in 1925 modified the appellate jurisdiction of the Courts so that now only certain types of appeals can go to the Supreme Court. Other tribunals were given authority to render final judgment in cases which cannot be appealed to the Supreme Court.

The Circuit Courts of Appeal. Congress has divided the United States into ten judicial circuits, and in each has established a Circuit Court of Appeals consisting of three judges, appointed by the President and the Senate to serve during good behavior. This tribunal holds an annual session in one or more cities in its circuit. It is strictly a court of appeals,

and is given authority to render final judgment in all cases not appealable to the Supreme Court. Other cases, in which its authority is not final, may be appealed from the Circuit Court of Appeals to the Supreme Court if the amount involved is $1,000 besides costs. Each member of the Supreme Court is assigned to a judicial circuit (one is assigned to two), and is authorized to sit as a judge in the Circuit Court of Appeals of that Circuit. Actually the members of the Supreme Court are so busy with their own job that they rarely have time to sit in the Circuit Courts of Appeal, and it is not obligatory on them to do so.

The District Courts. The tribunal in which the great majority of federal cases originate is the United States District Court. Congress has established eighty-five judicial districts and has provided for a District Court in each of these. In most of these districts there is but one judge, but some have two or more judges. As a rule the District Court is conducted by a single judge, but under some circumstances two or more judges may sit together. The district judges are appointed by the President and Senate and hold office during good behavior.

Any case involving the Constitution and laws of the United States, save those in which the Supreme Court has original jurisdiction, may originate in the District Courts. Appeals from the District Courts go directly to the Supreme Court in some instances and in others to the Circuit Court of Appeals.

Special courts. The Supreme Court, the Circuit Courts of Appeal, and District Courts are often called the constitutional courts of the United States, because they have been established by or under authority based on Article III of the Constitution. These tribunals exercise the judicial power conferred by that article of the Constitution. Congress has also created another series of courts, which are sometimes called the legislative courts or special courts. These tribunals are created under the special legislative powers which are conferred on Congress in Article I of the Constitution, and hear cases of a specialized nature incidental to the enforcement of certain types of legislation.

The Court of Claims is one of the most important of these special tribunals. It consists of a chief justice and four associates, and sits only at the national capital. Its principal duty is to examine and make decisions on financial claims against the federal government. Being sovereign, the United States government cannot be sued without its own consent. By laws enacted in 1863 and 1887 and greatly extended in 1947, Congress has relaxed this rule so as to allow suits against the government under stated conditions. Most of these suits go first to the District Courts, whence they may be appealed to the Court of Claims. This tribunal renders final judgment save when constitutional issues are involved. Con-

gress then appropriates money to pay judgments in which it is held that the claim against the United States was valid.

Congress has also created a Court of Customs to hear appeals from the decisions of customs appraisers on questions of the classification and valuation of imports, and a Court of Customs and Patent Appeals to review and render final judgment on appeals from the Court of Customs and on appeals from certain kinds of decisions made by the Patent Office. The Territorial courts of Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands are also classified as federal tribunals, and the courts of the District of Columbia function as both federal and local courts.

In 1939 Congress established the Administrative Office of the United States Courts. The director and assistant director of this office are appointed by the Supreme Court of the United States. The Office operates under the supervision and direction of the conference of senior circuit judges. Its principal duties are to have general oversight and direction of the routine business operations of the federal courts. It gives special attention to such matters as clerical and administrative personnel, the disbursement of funds, the purchase and distribution of supplies, the examination of accounts, the housing accommodations of the courts, making reports on the transaction of judicial business, the preparation of budgets, and the handling of bankruptcy cases.

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CHAPTER 12

STATE GOVERNMENT

State government in this country is both older and newer than national government. The beginnings of state government reach back to the time when there was no national government, and some of the recent developments in state government foreshadow things yet to come in the government of the nation. The structural evolution of state and national government have been strikingly parallel in many features, but in some there has been considerable divergence. Much that we find in the national government was borrowed from the institutions and practices of the early state governments, and much that we find in modern state government has been borrowed from the national government. The same threefold separation of powers and the same mechanism of checks and balances that we have studied in the national government are to be found in all of the states. The same schemes of organization and the same general types of procedure which characterize the national government are likewise found in the states. But there are differences, both of degree and of kind. We shall comment on these differences as we proceed with the description of state government.

The Legislative Branch

The legislative branch of state government is a small edition of Congress. All but one of the state legislatures are bicameral. The lower house is generally called the house of representatives and the upper house the senate. In some of the states the lower house is called the assembly, and in a few it is named the house of delegates. The size of each house, and thus of the legislature in the aggregate, is determined in various ways. Sometimes the state constitution sets the maximum number of members for each, and allows the legislature to fix the actual number at any point below the maximum. In some instances the constitution fixes both a minimum and a maximum for one or both houses. The constitution in a few cases specifies an absolute number for one or both houses, from which there can be no deviations. Occasionally, the legislature is given a free hand in determining the size of one house (usually the lower house), but is greatly restricted by constitutional

provisions in respect to the size of the other. The typical state house of representatives numbers from 100 to 150 members, and the typical state senate from thirty to fifty members. The actual numbers, even in a single state, may vary considerably from session to session. The smallest lower house in 1946 was that of Delaware with 35 members; the largest, that of New Hampshire with 400 members. The smallest state senate was found in Delaware and Nevada (17 members) and the largest in Minnesota (67 members). Nebraska had the smallest legislature, a unicameral assembly of 43 members.

The system of representation. The customary unit of representation is a geographical subdivision (town, county, district) which is sometimes given representation in proportion to population and sometimes not. As a rule, some effort is made to secure representation in proportion to population in one house, if not in both. In some states, however, counties or towns are guaranteed a certain minimum representation in one branch regardless of population, and in a few states equal representation of counties or towns in one branch of the legislature is provided by the constitution. The single-member system and the plural-member system are both employed. Some use one system for one branch of the legislature and the other for the second branch.

Where representation is by artificial districts changeable by the legislature, the practice of gerrymandering flourishes. There are few state legislatures which are not gerrymandered to some extent. But gerrymandering is not the only cause of maldistributed representation in state legislatures. The practice of giving minimum representation to counties and towns irrespective of population also results in an inequitable distribution. It usually works out that the urban areas of the state are underrepresented and the rural areas overrepresented. Realizing the unwisdom of a grossly unfair distribution of representation, most of the state constitutions provide for a periodic reapportionment of representation in one or both houses of the legislature. Such reapportionments are usually required after each decennial census taken by the federal government, but some of the states make provision for a state census midway between the federal census years and require a reapportionment after each state census also. These constitutional mandates are not always promptly obeyed by the state legislature, nor is the principle of representation strictly in proportion to population always faithfully followed. The methods of apportionment used in the states are much the same as those employed in distributing seats in the national House of Representatives.

Election and qualifications of members. State legislators are elected by the same methods, and usually at the same time, as members of Con-

gress. State laws as to nominations and elections apply equally to both, and the same ballot is used for both. A few states elect members of the state legislature in the odd-numbered years when there is no congressional or presidential election. This plan is thought to have the advantage of enabling people to deal with state issues independently of national questions, but is frequently criticised because of the additional expense necessitated by an extra election.

Qualifications for membership in state legislatures are numerous, but not very exacting. Minimum-age requirements are found in about one-half of the state constitutions. For the lower house the minimum ranges from twenty-one to twenty-five years; for the upper house from twenty-one to thirty. A stated period of residence in the state and electoral district is required in nearly all of the states. Approximately a fourth of the states require members of the legislature to be citizens of the United States, and about the same number require them to be citizens of the state. Most of the states have some sort of prohibition against dual officeholding. These forbid the legislator to hold any other lucrative office under the state, and some forbid the holding of any federal office by a member of the state legislature. Some of the state constitutions specifically name the offices which a legislator shall be ineligible to hold. Most of the states disqualify persons convicted of a felony or other infamous crime, and two states disqualify ministers of the gospel and priests of any denomination. It is generally provided that each house shall be the judge of the elections and qualifications of its own members, and the authority thus granted is used by state legislatures in just about the same way that it is used by the two branches of Congress.

Organization and sessions. In respect to rules, procedure, and internal organization of the legislature, state constitutions usually go into more detail than the national Constitution does with respect to Congress. State legislatures are frequently hemmed about with constitutional requirements as to the form and content of bills, the proper steps in introduction, the procedure and work of committees, the steps in the consideration and passage of bills, the printing of bills, the keeping of journals and records, the maintenance of a quorum, and other matters of detail which the makers of state constitutions have thought should not be left entirely to the discretion of the legislature. Congress has far more freedom to determine its own course in such matters than the state legislatures, and it frequently happens that enactments of state legislatures are declared invalid for failure to observe procedural requirements set up in state constitutions. Acts of Congress almost never offend in this respect. State constitutions commonly authorize the house of representatives to choose its own speaker and other officers. In states having the

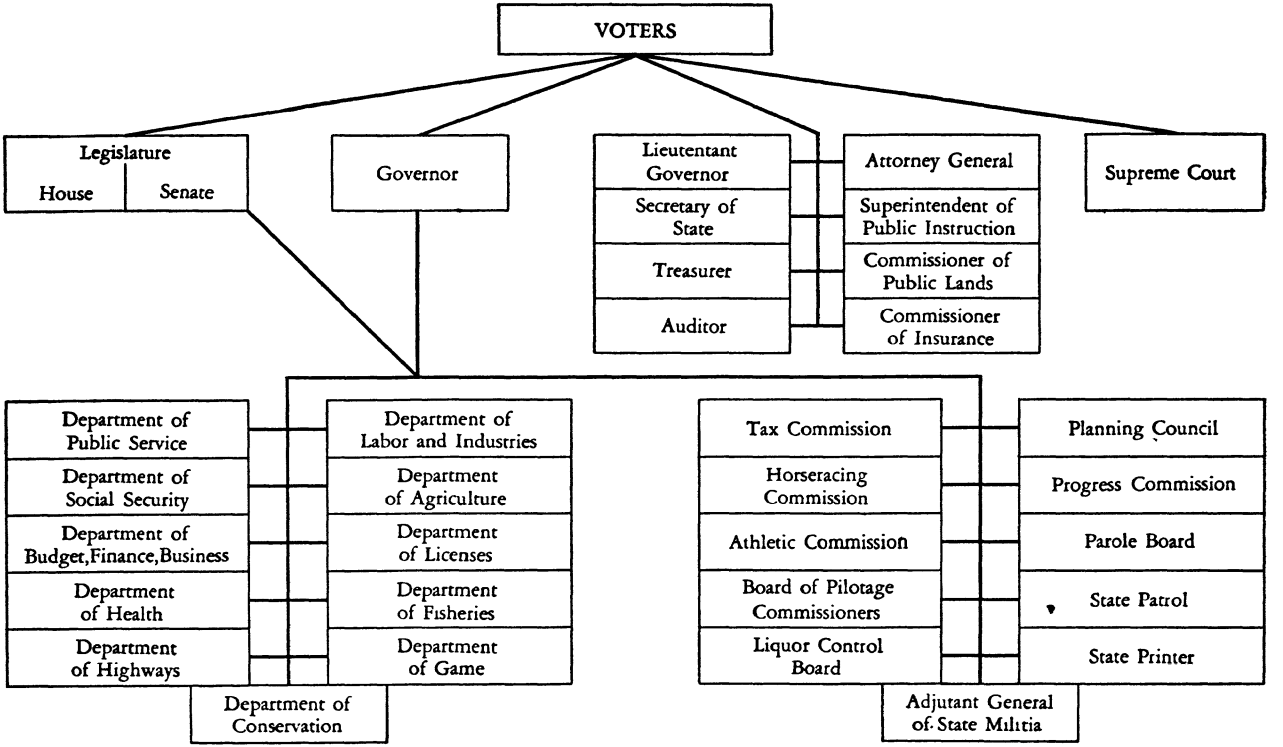


Chart 6. State Governmental Structure

office of lieutenant governor the constitution specifies that he shall be president of the senate, but shall vote only in the case of a tie. The senate is always authorized to choose a president pro tempore to act in the place of the lieutenant governor. Where there is no lieutenant governor, the senate is empowered to choose its own president. The president of the senate in these states is chosen from the membership of the senate and has a regular casting vote like all other members. State senates, like the lower houses, are usually given authority to choose their own clerks, sergeants-at-arms, doorkeepers, and other officers and employees. State legislatures use the committee system just as extensively and in the same way as Congress.

In five states the legislature is required to meet annually; in the remaining forty-three, biennial sessions are the rule. Four of the biennial states require the legislature to meet in the even-numbered years and thirty-nine in the odd-numbered years. Nineteen state constitutions place no limit on the duration of legislative sessions, though two of these reduce the pay or grant no pay at all after sixty days. Seventeen states limit the legislative session to sixty days, and one sets the limit at sixty-one days. Of the remaining states, two fix the duration at forty days, two at fifty days, one at seventy days, one at seventy-five days, two at ninety days, one at one hundred days, and two at six months. Thus it is apparent that most state legislatures operate under time limitations to which Congress is not subject.

The two houses compared. In the early history of state government there were substantial differences between the two houses of the legislature. The senate represented wealth and property more than the lower house, and also represented established communities such as counties or towns. The age qualifications for membership were higher, and there were often relatively high taxpaying or property-owning qualifications. These differences have largely disappeared. The chief differences now are that the senators are elected for longer terms and represent larger constituencies. Rotation of senatorial terms to create a continuous body, like the Senate of the United States, is also a common practice.

Two special functions—the confirmation of executive appointments and the trial of impeachments—are often conferred exclusively on the senate. Impeachment as a mode of removal has been used even less frequently in the states than in the federal government, and state senates have gained no prestige or advantage from the possession of final power in such actions. The power to confirm executive appointments has perhaps given state senates a slight political advantage over members of the lower chamber, but it has not resulted a vast accrual of political power. The rule of senatorial courtesy, though not unknown in the

states, has not been as advantageous to state as to United States senators. There are two reasons for this. One is that the governor's appointing power often does not include several of the major executive offices, their chiefs being elected by popular vote and not subject to senatorial confirmation. The other is that the number of state jobs per county or senatorial district is usually not sufficient to give the senator much patronage to disperse. Most state jobs are located either at the state capital or in the relatively few counties fortunate enough to have large state institutions. Senatorial courtesy can scarcely go so far as to allow the senators from those few fortunate counties to monopolize the lion's share of the jobs. All of the senators, naturally, want to share in the distribution of the jobs. This means that the courtesy of respecting one another's territorial prerogatives in patronage matters is often displaced by a very keen senatorial rivalry.

The powers of state legislatures. In respect to the nature of their powers there is a very striking contrast between Congress and the state legislatures. The Constitution of the United States operates as a grant of power to Congress. All of the powers which Congress enjoys are given to it by the Constitution, and, if no warrant for an act of Congress can be found in the express or implied grants of power in the Constitution, the act is unconstitutional. Just the opposite is the situation of the state legislature. State legislatures existed before state constitutions; in fact, most of the early state constitutions were framed by the legislatures of the states, and some of them were never ratified by the people at all. In legal theory, therefore, the legislature was looked upon as the original repository of all of the sovereign power possessed by the state. Unless that power was in some way surrendered by the legislature or taken from it, the legislature still had it. Thus the state constitution came to be regarded, not as an instrument necessary to enable the legislature to act, but as one necessary to regulate and control the actions of the legislature. As a result, we have the principle that the state legislature may do anything that is not forbidden to it by the Constitution of the United States and that of the state, whereas Congress may only do what it is authorized and empowered to do by the Constitution of the United States. For that reason, it is much more difficult to determine the precise scope of the powers of state legislatures than the powers of Congress.

The Executive Branch

The executive branch of state government consists of the governor, a varying number of department heads elected by popular vote, a number of independent or semi-independent boards and commissions, and a

number of departments and officials placed under the governor. The governor nominally is the chief executive, but, in most states, does not have the necessary administrative powers to enable him to direct and control the executive machinery of the state in its entirety. Executive organization in the states is often more decentralized than the executive organization of the federal government.

The governor. The governor is elected by the direct votes of the people. Mississippi has a peculiar system which requires the governor to receive a majority of both the popular vote and the electoral votes, each county or legislative district casting as many electoral votes as it has members in the state house of representatives. Should a candidate fail to receive a majority of both popular and electoral votes, the state house of representatives chooses between the two candidates who have received the highest number of popular votes. Since the nominee of the Democratic party in Mississippi never faces serious opposition, the candidate receiving the popular majority has invariably received the electoral majority also.

The governor's term of office is two years in twenty-one states, four years in twenty-six states, and three years in one state. The trend is in the direction of the longer term, as it is becoming increasingly apparent that a two-year term does not afford sufficient time for the governor to familiarize himself with the duties of his office and carry through his preëlection program. About one-fourth of the states make the governor ineligible to succeed himself, which has come to mean in practice that one term must elapse before he is eligible for reëlection. The constitution of one state forbids a third term. In the remaining states the governor may be consecutively reëlected any number of times. Restrictions on reeligibility are found mostly in the states which give the governor a four-year term.

The qualifications for the office of governor are not numerous or difficult to meet. Nearly every state has an age qualification. This ranges from twenty-one years in Arizona to thirty-five years in Maine, Missouri, and West Virginia. Thirty years is the most common age requirement. Thirty-five states require the governor to be a citizen of the United States; one requires him to be a native-born citizen, and eighteen require him to have been an American citizen for a stated period prior to his election. Thirteen require him also to have been a citizen of the state for a specified period before his election. Prior residence in the state is an almost universal qualification, and dual officeholding is a very general disqualification. South Carolina disqualifies any person who denies the existence of a Supreme Being.

State constitutions have not generously endowed the governor with

executive powers, though he is invariably given the title of chief executive. Some state constitutions give the governor power to make certain executive appointments without legislative confirmation, but in all but two or three cases the adjutant general and the officers of the state militia are the only ones placed in this class. Other appointments of the governor are specifically required to be confirmed either by the state senate or by both houses. Offices not mentioned in the constitution may or may not require confirmation, as the legislature determines. It generally exacts confirmation.

The federal courts, as we have seen, have held that the power to remove is incident to the power to appoint, and that removals may be made even without the consent of the confirming body. State courts generally have held that the power to appoint does not carry with it the power to remove, and that the governor's power to remove, unless granted by the constitution, is fully subject to regulation by the legislature. Nine state constitutions expressly give the governor power, for certain specified causes, to remove officers named in the constitution and other officers appointed by the governor. In the remaining states the method of removal is left for the legislature to determine by law. A good many states give the governor authority to investigate the conduct of all state offices, and some of these empower him to suspend state officials pending a hearing of charges against them.

In the field of legislation the governor fares much better. All but one of the state constitutions require that every bill passed by the legislature shall go to the governor for approval. Should he disapprove, he refuses to sign the measure and returns it to the house of its origin. It may not then become law unless repassed by the legislature. A few states permit the legislature to repass vetoed bills by a simple majority in each house, but most of them require an extraordinary majority of three-fifths or two-thirds. Approximately three-fourths of the states permit the governor to veto items of all bills. The veto may be a potent political weapon in the hands of the governor. As a rule it is even more difficult to repass a vetoed item than an entire bill, for only a few members are likely to be interested in the vetoed item. By means of the item veto, the governor can single out items important to his political foes and put these items on the blacklist without hurting his friends. In dealing with bills which reach him after the adjournment of the legislature he is often in a specially good position to deal out rewards and punishments to members of the legislature. Owing to the limited duration of state legislative sessions, a major part of the legislative grist goes to the governor either after adjournment or in the ten-day period just prior thereto. Since the governor is generally allowed ten days in which to

act, the legislature usually has made its exit before the governor is compelled to act. He is then in a position to use the item veto even more freely than when the legislature is in session. Fear on the part of members of the legislature of what the governor may do with the item veto works greatly to his advantage in bargaining with legislators throughout the legislative session.

The governor has the power to address the legislature by regular or special messages. Although governors have not been able to build political prestige quite as dramatically as the President by means of legislative messages, many governors have found them very convenient and effective measures for influencing legislative decisions. The same is true of the power, universally given to the governor, to summon special sessions of the legislature. A few state constitutions go so far as to prescribe that the legislature, when called in special session, may consider nothing but the business submitted to it by the governor, or nothing else until it has finished that business. In these states the governor can force a special session of the legislature to consider a program of legislation submitted by him.

The governor is generally given the power to grant pardons for offenses against the laws of the state. In some states the governor's power to pardon is absolute and unrestricted; in others it is subject to limitations of various kinds. Like the President, the governor is usually forbidden to pardon in cases of impeachment. Some states also forbid him to pardon in cases of treason. In most of the states the constitution prescribes, as the Constitution of the United States does not, that no pardon may be granted until after the conviction of the accused. In several states the governor must exercise his pardoning power in conjunction with a board of pardons. This board sometimes has power only to advise the governor; sometimes, however, the governor may pardon only on the recommendation of the board; sometimes, too, the governor is merely a member of the board with one vote, and all pardons are granted by vote of the board. There are a few states in which the governor has nothing to do with the pardoning power, it being placed in a board or tribunal of which he is not a member. The power to pardon, in the states as in the federal government, generally includes the lesser power to remit fines, suspend sentences, and commute penalties.

The governor in all of the states is designated commander in chief of the militia, and is generally given full discretion in calling out the militia. Unrestricted authority to call out the militia is given to the governor in a few states only when the legislature is not in session; otherwise he must have the sanction of the legislature before calling out

the troops. Once the troops are in the field, the governor is their commander in chief and may direct their operations as he sees fit. He may even go so far in most states as to declare martial law and suspend the ordinary civil government throughout the entire state or such portions thereof as he may designate. When the state militia are called into the service of the nation by the President, the governor ceases to be their commander in chief. The adjutant general of the state is the governor's chief of staff in command of the militia.

The twentieth century has summoned the governor to a new rôle. The tangled problems of the machine age require a kind of leadership that state legislatures have been unable to supply. The mantle therefore has fallen on the governor. The people have come to look to him for leadership and programs. He may fail as an executive, as general manager of the routine business of the state, and still be forgiven; but if he fails as a political leader, he will be deemed an unsuccessful governor. That our tripartite form of government makes it highly difficult for the governor to play the leading part successfully makes no difference in the expectations of the people. They look to the governor more than to the legislature and the judiciary; they expect the governor to be able to carry the legislature with him on important policies, and hold him responsible if he fails. On the other hand, if he succeeds, they honor and exalt him. He becomes a national figure, often a presidential possibility. More than half of our Presidents served political apprenticeships as state governors before emerging on the broader stage of national politics.

Elected state officials. The constitutions of most of the states provide for several elected state officials in addition to the governor. These generally include the lieutenant governor, the secretary of state, the attorney general, the state treasurer, the state auditor or comptroller, and the commissioner of education or superintendent of public instruction. Each of these elected officials is head of one of the major administrative departments of the state, and conducts this department more or less independently.

About three-fourths of the states have the office of lieutenant governor. The most conspicuous duties of this officer are to act as president of the state senate and succeed to the office of governor in the event of a vacancy. However, the lieutenant governor is not generally quite so much a mere gentleman in waiting as is the Vice President of the United States. As a rule he becomes acting governor whenever the governor leaves the state or is temporarily incapacitated. In some states he is made a member ex officio of one or more important state boards, and in several states he is an important factor in legislation by reason of being allowed to appoint the committees of the senate. States not having the

office of lieutenant governor designate some other official to succeed to the governorship, usually either the president of the senate or the secretary of state. The office of lieutenant governor, though in no way indispensable, is likely to survive for a long time as a traditional ornament of the executive branch of state government.

The office of secretary of state is found in every state. In thirty-eight states it is filled by popular election, in three by the legislature, and in seven by appointment by the governor. The secretary of state is the principal keeper of the records of the state, and the original copies of all enactments of the legislature and amendments of the constitution are deposited in his office and duly authenticated by him. He is also the authenticating officer for proclamations of the governor and various other important public documents. A great variety of additional duties have been conferred on the secretary of state in most of the states. These commonly include such duties as the issuance of corporation charters, the supervision of elections, and the issuance of motor-vehicle licenses. Students sometimes wonder why the states, having no foreign affairs, should have an official bearing the title of secretary of state. The truth is that the federal government borrowed this title from the states. Under the Articles of Confederation there was a Department of Foreign Affairs. This was reëstablished and continued by Congress after the Constitution went into effect in 1789, but its name was changed to the Department of State. This was done because the office was given, in addition to the management of foreign affairs, the secretarial, custodial, and authenticating duties which had long been characteristic of the office of secretary of state in the states. These duties are still performed by the federal Department of State, but its duties in foreign affairs now completely eclipse its other duties—a fact which our early legislators probably did not foresee.

The attorney general is the law officer of the state. The office exists in all of the states, and in forty-two of them is filled by popular election. In four states the attorney general is appointed by the governor; in one he is elected by the legislature; and in one he is appointed by the state supreme court. The attorney general is the legal adviser of all executive offices of the state and is required to give opinions on request. He also appears as counsel for the state in certain lawsuits to which the state is a party, particularly those taking place in the Supreme Court of the United States. He is generally required to approve the legality of certain acts and procedures of state agencies, such as the sale and purchase of bonds, the levying and collection of certain kinds of taxes, and certain election processes.

The office of state treasurer is found in every state but one. The state

treasurer is elected by popular vote in forty-one states, by the legislature in five states, and is appointed by the governor in one state. He is custodian of the public funds of the state, and disburses those funds on proper warrant or certification issued by officers authorized by law to spend state monies. It is his duty to see that the funds of the state are safely kept in vaults or responsible banks and that all deposits and withdrawals are correctly accounted for. He is usually made responsible for the selection of banks as state depositories and for the collection of the interest which the law requires such banks to pay for the use of state funds.

The office of auditor or comptroller exists in all but two states, where the secretary of state is made ex officio state auditor. The auditor or comptroller is chosen by popular vote in forty states, by the legislature in four, and is appointed by the governor in two. His principal duty is to examine and check the accounts of all state offices. In many states warrants drawn on the state treasurer for the disbursement of funds are not payable unless first examined and countersigned by the auditor or comptroller. This is called pre-audit, that is, audit before expenditure. The purpose of pre-audit is to secure a check as to the authorization of the proposed expenditure, the propriety of the object, and the sufficiency of the funds available to meet it. The purpose of post-audit (audit after expenditure) is to obtain a check on the actual use of the money and the correctness of the accounts kept with regard to it.

The office of commissioner of education or superintendent of public instruction is found in every state. It is filled by popular vote in thirty-four states and by appointment, either by the governor or the state board of education, in the remaining states. The chief task of this officer is to supervise the general management of the public school system of the state, particularly as to the apportionment of state funds to local school districts and the administration of the general requirements of the curriculum. He rarely has any direct power over local school authorities.

State administrative organization. Despite the general consolidation and reorganization movement of recent years, state administrative organization remains pretty much a disjointed and poorly assembled affair. In addition to the group of elected department heads described above, there will generally be found a group of single-headed departments under the governor, a group of unsalaried boards and commissions, a group of paid boards and commissions, a group of vocational licensing boards, a group of special staff or service agencies, and a group of miscellaneous advisory and ex officio agencies or bodies.

It has always been the practice to place certain administrative agencies

entirely under the governor. During the first third of the present century this practice was given a great impetus by the widespread movement for efficiency and economy. Investigating bodies of various types were established in most of the states to study the problem of governmental procedures and costs. Almost invariably the reports of these bodies noted the waste motion, duplication of organization, overlappings and conflicts of function, and undue costs resulting from the rambling briar-patch structure of state administrative systems. With equal unanimity, they almost invariably recommended consolidation, simplification, and centralization. In a great many states these recommendations bore fruit in constitutional or legislative enactments abolishing various offices, boards, and commissions and placing their functions in a smaller number of single-headed departments under the governor. No two of these administrative reorganization programs were identical, but the departments most commonly established under the governor were finance, agriculture, labor, public works, highways, public welfare, health, insurance, conservation, and mines. Heading each of these new departments was a director or commissioner appointed by and directly responsible to the governor.

In most of the states, however, administrative reorganization did not do away with anything like all of the numerous boards and commissions. In most of the states there were a number of unsalaried boards and commissions in charge of state institutions or services which it was difficult for political or other reasons to give over to a single-headed department. These included such bodies as those in charge of state colleges and universities, state hospitals, state penal and correctional institutions, and state fish and game control. Such boards and commissions were for the most part retained, though they were often empowered or required to appoint an executive officer who would conduct their affairs almost as though they were single-headed departments. Another group of boards quite generally retained were full-time, salaried boards in charge of regulatory work consisting to a great extent of making rules and conducting hearings. State railroad commissions, state utility commissions, and state tax commissions are common examples of such boards. A third group of boards which generally survived the reorganization programs was the vocation-licensing boards composed of selected members of a profession or occupation charged with the duty of administering examinations and issuing licenses to applicants for admission to certain restricted trades and professions. Boards of medical examiners, dental examiners, pharmaceutical examiners, law examiners, and optometry examiners are found almost everywhere, and many states have special examining boards for chiropractors, osteopaths, nurses, chi-

ropodists, veterinarians, architects, accountants, plumbers, barbers, embalmers, cosmetologists, and electricians.

In a good many states there will be found agencies, organized either as boards or single-headed departments, in charge of expert services rendered to the various units of the state administration but performing no service for the people directly. The civil-service commission or director of personnel, the state purchasing agent, the state printer, and the state architect are common examples of agencies of this kind. Sometimes these agencies are placed directly under the governor and sometimes they have a semi-independent status. Also there may usually be found a group of miscellaneous ex officio or advisory bodies such as state planning boards, state parole boards, state sinking-fund commissions, and state defense councils which deal with matters lying outside the field of regular routine administration.

Nothing corresponding to the President's Cabinet has developed in the states. The governor's council survives in four of the original thirteen states. In one of these it consists of certain state officers acting ex officio as a council to the governor, but has only advisory powers. In two states the governor's council is chosen by popular vote, and in one it is chosen by the legislature. Maine seems to be the only state in which the council has power to control the actions of the governor to a large degree. Nothing has arisen to take the place of the governor's council in the rest of the states. The heads of the departments under the governor often meet with him in an advisory capacity, but he is under no obligation legally or traditionally to consult them either individually or collectively. He usually does consult them very extensively, but these consultations are just as often individual as group conferences.

The Judicial Branch

The judicial system in all of the states consists of a series of courts graded according to the sort of cases they handle.

Petty courts. The lowest tribunal in all of the states is the court of the justice of the peace. Justices of the peace usually have authority to try both civil and criminal cases of minor importance, the jurisdiction being determined by the amount of money involved in the dispute or the severity of the penalty. It is customary also to authorize justices of the peace to conduct preliminary hearings of persons charged with serious criminal offenses in order to determine whether there is justifiable ground to hold them for further proceedings. As a rule justices of the peace are elected by popular vote, and are not required to be licensed attorneys. In cities the justice court has generally been replaced by a

police court or municipal court, which has about the same jurisdiction as the court of the justice of the peace but is presided over by licensed attorneys, keeps more formal records, and is more elaborately organized.

Courts of general jurisdiction. In every state there is a court to which the great majority of important civil and criminal cases go in the first instance. This court is sometimes called the county court, sometimes the court of common pleas, sometimes the superior court, and sometimes the district court. Usually it has jurisdiction only in a single county, but in some states two or more counties may be joined together to form a judicial district. Practically all cases above the level of those going to the justice of the peace must be first tried in the general court of the county or district. It is a court of record—meaning that it must keep full record of its transactions in a form prescribed by law, and that its records are authentic and final evidence of what happened. Its judges must be licensed attorneys, and in most states they are elected by direct vote of the people of the county or district. There is always one judge to a county or district, and there may be more if the volume of business makes it necessary. It is the rule, however, when there are two or more judges, that each judge has a separate court room and conducts his own court separately.

The intermediate court of appeals. This court is found in many but by no means all of the states. It is usually called the circuit court, the court of appeals, or the court of errors. It is a court of record but not of original jurisdiction. Most cases come to it on appeal from the lower courts, usually the court of general jurisdiction. There is commonly one intermediate court for several counties, and the judges go from one county seat to another at regular intervals to hold court. There may be one judge in such a judicial circuit or more than one. One judge alone may conduct the court, or two or more may sit *en banc*. The judges are required to be licensed attorneys. They are chosen by popular vote or by appointment by the governor, the former method being the more prevalent.

The supreme court. The capstone of the state judicial system is the supreme court of the state, which sits only at the state capital and is the state's court of last resort on appeal. It consists of five or more judges, who always sit as a body. The judges are usually elected by popular vote, but in quite a number of states are appointed by governor. The supreme court (in one or two states it is called the court of errors and appeals) is of course a court of record and its judges must be licensed attorneys. In some states it is not only the supreme court, but is the state's only court of appeals. This is true in the states having no intermediate tribunal. In such states appeals go directly to the supreme court

from the court of general jurisdiction. In states having the intermediate court, a great many appeals go first to it and then to the supreme court, and some go only to the intermediate court.

Special courts. A great many states have set up special courts in addition to the judicial machinery outlined above. These are usually county or district courts of original but limited rather than general jurisdiction. They deal only with matters pertaining to one branch of law. Good examples of such special courts are probate courts, juvenile courts, domestic-relations courts, and insolvency courts. A few states still maintain separate courts of equity jurisdiction, which are known as courts of chancery. These courts deal with a specialized branch of law known as equity. All special courts are courts of record, and their judges are usually required to be licensed attorneys. They are generally elected by direct popular vote.

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CHAPTER 13

LOCAL GOVERNMENT

County Government

There are three main types of county government—the New England type, characterized by the fact that the county is primarily an administrative subdivision of the state and has few strictly local government functions; the Southern and Far Western type, characterized by the fact that the county, though an important unit of state administration, is regarded as chiefly a unit of local government; the North Central type, which almost equally combines state and local functions. The outstanding feature of county government everywhere is its almost complete lack of structural unity. Except for the few instances of county reorganization under the manager plan, there is no head of any kind, either legislative or executive, and no central coördination of machinery or procedure. The powers and duties of county officials are in the main defined by state law. Each official, whether elected or appointed, once installed in office, is more or less free to go his own way and carry on his work according to his own conception of what the law requires.

The county board. The county in general has no legislature, no chief executive, and no judicial organs distinct from the regular court system of the state. The pivotal organ of county government is the county board. It is pivotal in the sense that it has important relations with all county offices and departments, but not in the sense of exerting any considerable degree of authority and control over them. The county board is not the head of the county's governmental system, nor even of its administrative organization. It is primarily an administrative board with certain minor legislative duties added.

More than half of the states have a small county board of three, five, or seven members elected by the voters of the county, either at large or by districts. Eight states have large county boards of a dozen or more members, each member being elected by the voters of a town or township. In a few states the county board is made up of the county judge sitting with the justices of the peace of the county, and in some others of the county judge sitting with two or more elected county commissioners. The county board is given a variety of names, the commonest

being board of county commissioners, board of supervisors, levy court, county court, fiscal court, and commissioners court.

The duties of the county board are primarily financial. It passes on claims against the county, and orders the payment of valid claims; authorizes the expenditure of money for various county purposes, such as construction work and the purchase of supplies, materials, and equipment; awards contracts to successful bidders on various work projects; acts as a board to review tax assessment; fixes salaries and wages for county officials and employees whose rates of compensation are not set by law; and appoints a few of the officers and employees of the county.

The county judge. In most states the county judge presides over the general trial court of the county and has few other duties in connection with the government of the county. He is chairman of the county board in some states, and as such has certain administrative responsibilities. There are some states, however, in which the so-called county judge is not judge of the general trial court, but of the probate or some other special court, and gives as much time to being chairman of the county board as to his judicial work.

The prosecuting attorney. This official is found in all of the states. Various titles other than prosecuting attorney are commonly found—county attorney, district attorney, state's attorney. The duties of the office are to represent the state in bringing charges against and prosecuting violators of state law; to act as attorney for the county when it is a defendant in a suit; and to serve as legal adviser for the county board and various county officials. The county prosecutor is almost always elected by direct vote of the people of the county or district in which he serves.

The county clerk. The county clerk is generally secretary of the county board and custodian of all of its documents and papers. He is responsible in most states for the issuance of various kinds of licenses. In many states it is the duty of the county clerk to provide for the registration of voters, arrange for polling places, appoint election officials, collect and tabulate election results, and generally supervise the conduct of elections. The county clerk as a rule is clerk of the general trial court of the county and is responsible for keeping its records, though a number of states have a separate clerk of the court for this purpose. The county clerk is usually elected by popular vote.

The county sheriff. This officer is found everywhere and is always elected by direct vote of the people. The principal duties of the sheriff are to act as executive officer of the judicial tribunals of the county, maintain peace and order throughout the county, and act as keeper of

the county jail. In some states he has charge of elections, and in few instances he is charged with the collection of taxes.

The county coroner. The chief function of the coroner is to conduct inquests when persons have died under suspicious or unknown circumstances, in order to ascertain whether the death was due to natural causes. He has authority to summon a coroner's jury to assist in these proceedings. The coroner is usually elected by popular vote. A number of states have abolished the office of coroner and conferred its duties on the county prosecutor or on a medical examiner working under the prosecutor.

The county assessor. In the eastern states the assessment of property for taxation is usually done by town or ward officials, but most of the western states and a few of the eastern ones have a county assessor for this work. The county assessor is elected by popular vote. It is his duty each year to make a complete list of all parcels of property subject to taxation and to determine the taxable value of each.

The county treasurer. The county treasurer is the collector of taxes and the custodian of county funds. Upon proper authorization by the county board he disburses county funds and pays county bills. The county treasurer is almost invariably elected by direct vote.

The county auditor or comptroller. This office does not exist in many states. Where it is found, the main function of the office is to inspect and audit the accounts of the various county officials, and to perform various duties of a clerical nature. Pre-audit is mostly done by the county board and post-audit by the county auditor or comptroller. In several states the auditor is given additional functions entirely unrelated to audit. Sometimes he acts as county assessor, sometimes as county recorder, and sometimes as dispenser of marriage, motor-vehicle, and other licenses. The auditor is sometimes elected by popular vote and sometimes appointed by the county board.

The county recorder or register of deeds. This office does not exist as a separate office in many of the states, its duties being performed by the county clerk or the county auditor. Where it is found, the chief duty of the office is to administer the office in which deeds, mortgages, wills, contracts, and other legal instruments are officially and permanently registered and recorded. Books or files containing a complete and correct copy of each recorded document are kept. The county recorder is usually elected by popular vote.

The county surveyor or engineer. The functions of surveyor and engineer are very often combined in a single office, but in some states separate offices are maintained. The original work of the county surveyor

was to run boundary lines for parcels of land and keep accurate official records thereof. This work has declined in importance as compared with the engineering work in connection with roads, bridges, and other county construction projects which now fall to the lot of the county surveyor or engineer. This officer is often elected by popular vote, but in some states is appointed by the county board. .

The county superintendent of schools. This official is generally elected by popular vote. His (quite often *her*) principal duties are to supervise the administration of state school laws within the county, oversee the allocation of state funds between local school districts, look after the proper certification of teachers, collect and assemble statistical information of various kinds, and keep important school records.

The county agricultural agent. This is one of the newer county offices. It has been established to supervise the use of federal and state funds granted in aid of agriculture, and to advise and assist farmers in the introduction of scientific agricultural methods. The county agent is generally selected by federal agricultural officials and approved by the county board.

County health officers. Many states have county boards of health which select a physician as their executive officer. Other states provide for a county health officer appointed by the county board. Quite a number of states have made provision also for one or more county nurses to assist the health officer in various duties. The principal duty of the health officials of the county is to enforce the state health and sanitary codes, particularly in respect to the reporting of communicable diseases, the establishment of quarantines, the collection of vital statistics, and the inspection of premises harboring insanitary conditions. County nurses also do a great deal of visitation work in connection with the care of sick persons receiving financial aid from the state or county.

County welfare officers. There used to be in nearly all of the states a county superintendent or commissioner of the poor. He was usually appointed by the county board, and had charge of the county almshouse or poor farm. Sometimes he administered the dispensation of aid to the poor in the form of grants in cash. With the coming of federal and state social security systems, aid to the poor now mostly takes the form of old-age pensions, cash benefits, and food stamps which enable the holder to purchase certain commodities at less than regular market prices. Although a large part of the money which underwrites these programs comes from the national and state treasuries, the administration is left to the county under state and federal supervision. For this purpose most counties have established a county department of welfare, headed by a director or supervisor of welfare. This officer is usually appointed by the

county board, but it is often required that the appointment be approved by the state department of welfare.

The problem of county reorganization. The county is the one part of our governmental system which has successfully resisted nearly all reform movements. In city, state, and federal government there have been structural changes of great importance; but the average county has about the same organization and conducts its business in much the same way that it did a century ago. Many reforms have been proposed for county government, but none has made much progress. The obvious need is reorganization to eliminate superfluous jobs and duplication of organization, to introduce centralized direction and responsibility, and to separate politics and business administration. The most promising reform of this character is the county manager plan, an adaptation to county requirements of the manager form of city government. It has been made possible in several states (e.g., Virginia, North Carolina, Oregon, and California) for counties to adopt this plan by local referendum. By this means a few counties in these and other states have introduced the manager form. Undoubtedly county manager system would spread more rapidly if it were not for the fact that in most states it is necessary to amend the state constitution in order to extend to counties the privilege of adopting any new system of governmental organization. The county-manager plan, like the city-manager plan, eliminates all elective officials except a small governing board or commission; this body chooses a manager as chief executive; the manager in turn selects all other officials and employees and supervises their work. Through its long use in public school administration, the manager principle has become well understood.

Another proposal for great centralization of administrative organization and management in county government is to transform the county board into an administrative commission after the pattern of the commission plan of city government. This plan also would eliminate most of the elective officials and place the entire administrative organization of the county under one head, the county board. The same constitutional barriers stand in the way of the speedy adoption of this plan that have been noted in relation to the manager plan. Because state constitutions specifically mention various county offices and sometimes fix the tenure of office and the compensation of the incumbent, it is impossible to change the form of county government without first changing the constitution.

Town and Township Government

In the New England and some of the North Atlantic and North Central states counties are divided into towns or townships. These units

are more than mere geographical districts; they have various functions of local government which in other states are carried on by counties, school districts, or other units of local government.

The New England town. The town in New England is a portion of the state which has acquired or has been given certain privileges and powers of local self-government. It is not just a subordinate administrative area, nor is it, strictly speaking, a village or a city. It is simply a small region, usually of rural or semirural character, which has been set apart by law as a self-governing local community. As a rule it includes one or more little trading centers which elsewhere would be called villages. The legal authority of the town is derived from the state legislature, and usually extends to such matters as the levying and collection of taxes, the administration of poor relief, the support and management of schools, the construction and repair of local roads and bridges, the maintenance of peace and order, the enforcement of sanitary regulations, and other local concerns. Each county includes several towns, but town affairs and county affairs are quite distinct. Local government is chiefly in the hands of the towns, whereas the county devotes itself to the enforcement of state law and to other matters of broader importance.

The town meeting. The governmental system of the New England town is exceedingly simple. Everything revolves about the town meeting. Once a year, and oftener on special summons, all of the qualified voters of the town are notified to assemble in the town hall. The principal purposes of this meeting are to elect town officers for the ensuing year, vote the annual tax levies and appropriations, authorize local improvements, and decide other questions pertaining to the affairs of the town. The town meeting is the town's legislature—the voters coming together as a body and acting as their own legislature. In the meeting the voters choose their own presiding officer and authorize the appointment of all necessary committees and other functionaries. Any voter may address the meeting, make motions, and cast a vote on all questions up for decision.

The town board. The town meeting chooses the town board, generally called the board of selectmen. The town board is a sort of continuing executive committee of the town meeting. It oversees the business of the town in the intervals between town meetings, appoints certain town employees, audits claims against the town, prepares warrants for the town meeting, lays out highways, supervises the conduct of elections, and has charge of other matters of town business.

The town clerk. This officer is probably the most important official chosen by the town meeting. He serves as secretary of the meeting and of the board, has charge of the registration of births and deaths, issues

licenses, and sometimes acts as recorder of deeds, mortgages, and other legal instruments.

The town treasurer. The treasurer, likewise chosen by the town meeting, is collector and receiver of taxes and custodian of town funds. On proper authorization from the town meeting or the board of selectmen, he pays out money to defray town expenses. He keeps the financial accounts of the town.

The town constable. There is always one constable and there may be more. The constable is the town's peace officer. He is usually chosen by the town meeting, but may be appointed by the board. He arrests offenders against the by-laws and ordinances of the town; he also arrests violators of state law; he serves warrants and other legal processes for the justice of the peace; and in some states he acts as tax collector.

The justice of the peace. Each town has one or more justices of the peace, chosen either by the town meeting or by ballot at the regular elections. The justice of the peace hears cases involving infractions of town legislation and minor cases involving violations of state law.

The school committee, or school board, is chosen by the town meeting. Its duties are to employ teachers, erect school buildings, and regulate the course of study in accordance with the school laws of the state.

The overseers of the poor are chosen either by the town meeting or the town board. Their duties are to administer poor relief and manage the almshouse or poor farm.

The assessors are chosen either by the town meeting or the town board. Their principal function is to assess property for tax purposes.

Other town officials may be found in various parts of New England. Those most often encountered are water board, a library board, a park board, a poundkeeper, a fish warden, a fence viewer, and a sealer of weights and measures.

In the rural and semirural sections of New England the town system renders excellent service, but in the urban sections it has proved less adequate. It is not possible, in a large urban community, for all of the voters to attend the town meeting, and as a matter of practice most of them never do. If all should attend, the meeting would degenerate into an unwieldy mass assembly. Because of the habitually small attendance in the more populous towns, the meeting often falls into the hands of specially interested groups of professional politicians and their supporters. Thus the government of the town is delivered over to the tender mercies of a political machine. The problems of urban government are often too complex and technical to be handled effectively by the town-meeting method, and, for that reason, there has been a decided tendency to establish municipal corporations in the larger centers of the more

populous towns and attach the rural portions to nearby towns of a rural character.

The North Central and Western township. In some seventeen states of the Middle West and North Atlantic regions, counties are divided into townships or towns which do not play as prominent a part in local government as does the New England town. In most of the states of the Middle West the township is an arbitrary geographical subdivision of the county and is usually six miles square. East of the Alleghenies towns often grew up before county lines were established and became important units of local government, but with the rise of the county as a local-government area the towns yielded most of their important functions to the county. The local-government functions still remaining to the towns or townships include the levying and collection of certain special taxes, the conduct of elections, the improvement and maintenance of minor roads, the control of minor matters of sanitation and drainage, the operation of cemeteries, and some aspects of poor relief.

In organization these towns and townships somewhat resemble the New England town, save that the town meeting has been largely abandoned. The law provides for town meetings in nine of the seventeen states in this group, but the law is not always faithfully followed. There is usually a township board, often called the board of trustees. In some states the board consists of persons elected to serve primarily as board members; in others it is an ex officio body made up of township officers designated by law to compose the township board. In several of these states the chairman of the township board automatically becomes the township member of the county board. The customary township officers are the clerk, the treasurer, the assessor, the constable, the road com missioner, and the overseers of the poor. All are elected by popular vote. Justices of the peace are elected by townships in most of these states.

Outside New England, the town or township has ceased to be a vital unit of government. Its functions have been largely absorbed by the county, and the people take little interest in township matters. There is a growing movement, particularly in the Middle West, to abolish the township entirely.

City Government

Lawyers usually describe a city as a municipal corporation. That means that the inhabitants of the territory included in the city have been permitted to organize themselves as a corporation for the purpose of carrying on local government, much as people form a corporation for carrying on any other common business. A city in the United States is always

a corporation; other units of government are not, though by special provision of the constitution and laws of a state other units are sometimes treated as corporate bodies.

The nature of a municipal corporation. In organizing a corporation an artificial legal person is brought into being—a person in the eyes of the law, having the legal but not the physical characteristics of a human being. As a legal person, a corporation may acquire, hold, and dispose of property much as though it were an individual human being; may sue and be sued; may have a corporate name to distinguish it from other persons; may enjoy many of the civil rights and be liable under many of the civil obligations which attach to an ordinary human being. It is a great advantage, when many people wish to associate in a common undertaking, to be able to organize as a corporation and thus appear before the law as one person. The corporate form of organization has similar advantages for a community wishing to carry on the various activities of local government, and that is why cities are always organized as corporations.

The usual way of creating a corporation in this country, whether for private or governmental purposes, is to secure authorization from a proper source of authority. The national government creates and authorizes the creation of corporations to engage in interstate and foreign commerce and for other federal purposes, but the great majority of corporations are created under authorization by state law. The state grants to the persons wishing to form a corporation, a charter. This instrument authorizes the incorporators to form a body corporate and choose a corporate name; it determines what power and rights the corporation shall have; and often it goes into much detail as to the manner in which the corporation shall be organized and how it shall conduct its affairs. The power to grant charters of incorporation once belonged exclusively to the state legislature, but now in most of the states the constitution directs the legislature to pass general laws under which corporations of various kinds may be formed without a special act of the legislature in each case. By following the steps prescribed by such laws, the incorporators may secure a charter.

A city can no more enjoy corporate power and privileges without authorization from the state than can a private corporation. Formerly, all municipal corporations were chartered by special enactment of the legislature, but most of the states now require the legislature to provide for the incorporation of municipalities by general law. The procedure followed under the municipal corporations laws of most of the states is much the same everywhere. A petition, signed by a required number of registered voters residing within the limits of the proposed city, is

filed with the county board. This petition asserts the desire of the people of the described community to form a municipal corporation and that qualifications prescribed by law (such as area and population) are fully satisfied. The board checks this petition and orders a public hearing on it. If the hearing develops no serious opposition and shows that everything is in good order, the board orders an election to be held in the proposed municipality on the question of incorporation. If the results of the election are favorable to incorporation, the board enters an order of incorporation on its minutes and transmits a duly certified copy of the same to the secretary of state at the state capital. The secretary of state files this in his records and forthwith issues a charter of incorporation or puts out an order declaring the place to be duly incorporated as a city of a certain class and entitled to act as a municipal corporation of that rank under the general laws of the state. The charter or statutory authorization thus secured is the basic law of the city.

The relation of the city to the state. The city's dependence on the state for its charter has entailed a long and complicated chain of legal circumstances. In colonial times the granting of municipal charters was one of the functions of the governor, but after the Revolution that power was transferred to the legislature. Thus the city became, in a legal sense, a creature of the legislature. It could exercise no powers unless they were granted by the legislature in the city's charter or in statutes supplementing the charter. The legislature could revoke the city's charter at will, modify its powers, change its form of government, and compel it to perform any specific acts the legislature might command. Legislatures chose as a rule to deal with each city separately rather than to enact uniform laws applicable to all cities.

It was not long before legislatures began to abuse their autocratic power over cities—began to interfere in city affairs for malicious and corrupt purposes. Laws would be passed arbitrarily compelling a particular city to raise the salary of a city official who had influential friends in the legislature, obliging the city to create or abolish jobs at the whim of the legislature, forcing the city to grant franchises to public-utility companies that had political influence in the legislatures, requiring the city to pave streets or undertake other municipal improvements under conditions favorable to contractors having political connections with the legislature. When the political party in control of the legislature was not the same as that in control of the city, the legislature would sometimes use its power to change the entire organization of the city government so as to unseat city officials who were in the opposing party camp. In brief, the legislature forgot all about the original purpose of a municipal corporation (which was to enable the people of a local com-

munity to enjoy self-government in local affairs) and treated the city as a political plaything.

There was also another difficulty. Even though the legislature might not be given to malicious meddling in municipal affairs, the city was in a position which made it impossible for it to regulate its local concerns without specific authorization by the legislature. If the legislature failed, through ignorance or oversight, to give the city adequate charter powers or to pass supplementary legislation covering the deficiencies of the charter, the city had to be forever coming to the legislature with requests for authority to do this, that, or the other thing which had not been included in the scope of its granted powers. This situation was not only inconvenient, but was also at times positively perilous. No matter how great an emergency the city might face, if the legislature was not in session, nothing could be done. Moreover, the legislature, consisting largely of members from the rural sections of the state, often did not clearly grasp the problems and difficulties of city government and was slow to give the city the powers essential to the proper performance of the functions.

At length the evils of legislative domination became so unbearable that people began to demand that the power of the state legislature to make a puppet of the city be curbed. This result was sought in various ways. Constitutional amendments were put through in many states forbidding the legislature to enact special legislation dealing with cities. Under this prohibition the legislature could no longer single out one city and grant a charter to it or pass statutes affecting it alone, but must enact uniform laws applying equally to all cities or perhaps to all cities of a given population class. Another common limitation of the power of the legislature was a constitutional requirement depriving the legislature of power to grant any franchises for the use of city streets without the consent of the city authorities. Still another was that the legislature should have no power to impose taxes upon a city for municipal purposes without the city's consent. Most state constitutions were also amended in such a way as to forbid the legislature to interfere with the city's freedom in choosing its own officials.

Many abuses were corrected by these various curbs on legislative domination of cities, but cities still remained without power to act independently in managing their own local affairs. Although there were many afflictions the legislature could no longer perpetrate upon them, cities still had to go to the legislature for authorization to initiate any action whatsoever, no matter how completely local it might be. This condition led to the movement for municipal home rule. In 1876 the state of Missouri adopted a constitutional amendment guaranteeing cities

the right to frame and adopt their own charters and to enact ordinances for their own local self-government, provided such enactments were not in conflict with the constitution and laws of the state. Constitutional home rule for cities has now been adopted in more than a third of the states, and in most of the other states the legislature, under the pressure of public opinion, has enacted a municipal code which accords cities freedom almost as extensive as constitutional home rule. A great many practical difficulties have arisen in connection with municipal home rule. It has not been easy to draw a sharp and clear line between municipal activities that concern the city alone and those which affect the state as a whole, and for that reason home-rule cities have sometimes found the actual degree of local independence under home-rule provisions to be much less than was expected. Nevertheless, it is generally agreed that the legal status of the city under home rule is much better than before, and that cities now have far more freedom to solve their own problems in their own ways.

Various forms of city government. The original form of city government in this country was very simple. It was directly descended from the borough government of colonial days, and was very much like the governmental system of English municipalities. There was a single organ of government called the council. The council was made up of the mayor, the recorder, the aldermen, and the assistants or councilors. The mayor was appointed by the governor, the state legislature, or the council. He was the ceremonial head of the city, was presiding officer of the city council, and very often was chief magistrate of the municipal court. He was not the head of an independent branch of the city government, but was an integral part of the council—in fact, he had to be present in order to make meetings of the council official and regular. The recorder was the principal law officer of the city and was also an integral part of the council. He was usually chosen in the same way as the mayor. The aldermen and councilors were elected by the voters of the several wards of the city. The chief difference between them was that the aldermen were justices of the peace as well as members of the council. Sitting together as one body, the mayor, the recorder, the aldermen, and the councilors managed all of the affairs of the city.

Shortly after the American Revolution this unified system of city government began to give way to the threefold type of organization which had gained so strong a hold in state and national government. By 1850 city government throughout the entire country, save in some of the smaller communities, had been made over according to the new pattern. The mayor was made elective by popular vote, was given the veto power, was given certain administrative duties, and eventually

ceased to be presiding officer of the council. His judicial functions were taken away and conferred on courts entirely independent of other branches of the city government. The council was quite often divided into two houses—a board of aldermen, regarded as the upper house, and the common council, regarded as the lower house. The power to choose the various administrative officials was taken from the council to a very large extent. Certain appointments were bestowed on the mayor, or on the mayor and council jointly; and a number of the most

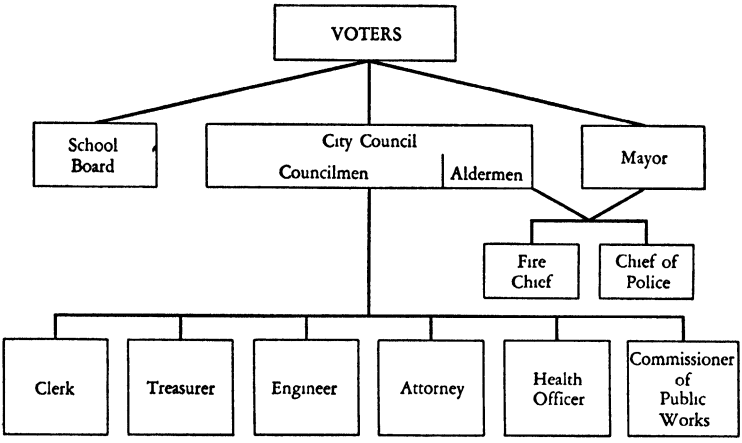


Chart 7. The Councilmanic Plan

important offices were made elective by popular vote. City government became just a small edition of state government.

This decentralization of city government proved unsuccessful. The period during which it was in vogue was characterized by the greatest inefficiency and the worst political scandals in the history of American government. About 1890 a reform wave set in. Cities all over the country adopted or were granted new charters, and the tide turned back toward unification. The two-chambered council was given up; the number of officials elected by popular vote was greatly reduced; the office of mayor was strengthened and made responsible for the conduct of administration. In 1901 an entirely new system of city government appeared. This was known as the commission plan, and its most conspicuous feature was the complete abandonment of the principle of separation of powers. In the course of a dozen years several hundred cities adopted this plan. In 1908 the city-manager plan made its bow. Like the commission plan, it rejected the principle of separation of powers;

but it added the feature of a professional chief executive appointed by the city commission or council. More than four hundred cities have adopted this scheme of government.

As a result of the developments thus outlined, there is no uniform plan of city government in the United States today. There are four major types and an uncounted number of variants of each. Varying examples of all four may often be found in a single state. The laws of many states now allow each city to choose its own form of government, and other states offer cities a choice between three or four standard plans provided for in the municipal code.

The councilmanic plan. The once popular decentralized plan no longer is found in many of the larger cities, but it has survived in a great number of the smaller cities and villages where elaborate municipal services have not been needed. It is usually known as the councilmanic plan, by reason of the prominence of the city council in the operations of government. The outstanding features of this plan of government are: (1) relatively a large city council (occasionally with two houses) elected by wards; (2) a mayor elected by popular vote and generally having the veto power but not much administrative power; (3) a varying number of offices, boards, and commissions elected by popular vote, appointed by state or county officials, or chosen by the council or the mayor and council jointly, but each performing its duties without much overhead administrative control. Where there is not a large amount of difficult administrative work to be done, this plan, despite its obvious shortcomings, has worked well enough to satisfy public opinion.

The strong-mayor plan. This plan is characterized by the exaltation of the office of mayor to a dominant position in the processes of city government. All, or nearly all, of the elective offices, boards and commissions are eliminated. The mayor, often without the consent of the council, appoints and has power to remove practically all of the administrative officials of the city. The mayor not only has the veto power but also, in many instances, the power to veto items. The mayor prepares and presents to the council the annual budget of the city, and is fully responsible for its execution after adoption. The mayor is often given the right to introduce measures in the council, and in some cities the mayor and his department heads are given seats in the council with the right to participate in debate but not to vote. The mayor together with certain other officials may constitute a special board of finance with power to let contracts, fix salaries, and decide other matters of business operation. The mayor is elected by the people of the city to run their business for them; the council legislates but does not lead. It is usually a small body, and its members generally are elected at large rather than by

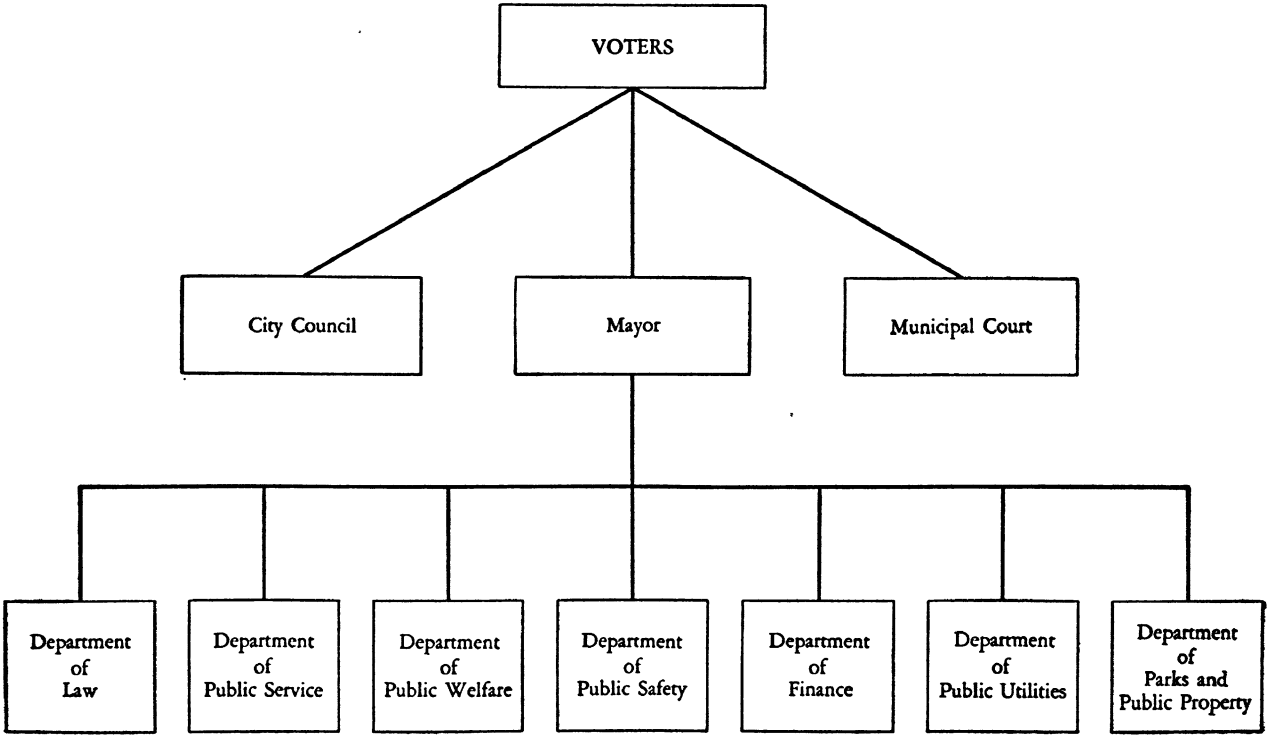


Chart 8. The Strong-Mayor Plan

wards. It watches over the mayor, imposes checks on him, enacts necessary legislation, votes the budget, receives reports, and investigates any matters needing special attention.

The strong-mayor plan has been adopted in many of the large cities of the country. Although the details vary greatly from city to city, the features outlined above are followed in all. Under the strong-mayor plan there have been numerous instances of extremely good city gov-

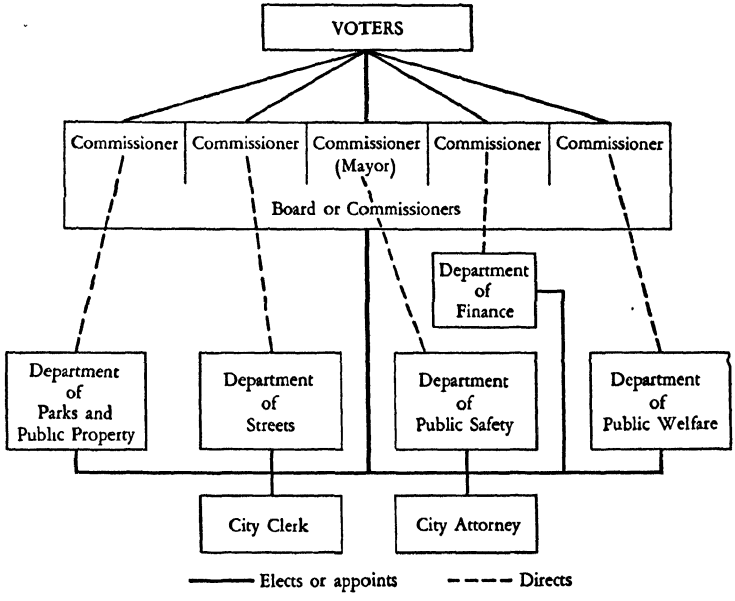


Chart 9. The Commission Plan

ernment and some conspicuous instances of very bad city government. All depends on the character of the person elected mayor. When a man of high ideals and great political and administrative ability occupies the office of mayor, the results are generally excellent; but when a man of second-rate talents and dubious political ethics is chosen mayor, the results are never very admirable.

The commission plan. The commission plan originated in Galveston, Texas, in 1901. It was first introduced as a temporary substitute for the councilmanic system, which had proved unequal to the emergency following the great tidal wave and flood disaster of 1900. Its advantage were so pronounced that it was soon installed as a permanent system of

government. Other Texas cities followed suit, and in a few years the plan gained nation-wide recognition and adoption. The essential features of the commission plan are: (1) the concentration of all legislative and administrative powers of the city in a small board of three, five, or seven commissioners elected at large by the voters of the city; (2) the commissioners acting together as a body serve both as the city council and the executive head of the city; (3) each commissioner acts as the director or head of an administrative department and is responsible to the commission as a whole for the management of his department; (4) all offices and agencies of the city are grouped into a number of departments equal to the number of commissioners; (5) the commissioners devote their full time to the work of the city and are paid adequate salaries for their services.

At the peak of its popularity the commission plan could boast an adoption list of more than three hundred cities, including some of the major municipalities of the nation. However, this popularity did not last, and in recent years there has been a decline of commission government. Experience showed that the commission plan was best suited to medium-sized cities. It was too expensive for the smaller places and not sufficiently unified on the administrative side for cities of first magnitude. For the medium-sized city, however, it provides a governmental system devoid of the delays, deadlocks, and confusions of check-and-balance government, and concentrates all authority, power, and responsibility in a small body of paid managers directly accountable to the people.

The manager plan. The city-manager plan originated in the city of Staunton, Virginia, in 1908. The commission-manager plan, a combination of the commission and manager principles, which is the most widely adopted variant of the manager plan, was first introduced in Sumter, South Carolina, in 1913 and adopted later in the same year by the city of Dayton, Ohio. The manager plan has spread even more rapidly than the commission plan, and is now in vogue in more than four hundred cities, including several of the major cities of the country.

The characteristic features of the manager plan are: (1) the concentration of all legislative and executive authority in the city council or commission, which usually numbers from three to fifteen members; (2) the council or commission exercises its legislative powers directly, but is obliged to exercise its executive powers through a city manager whom it appoints as chief executive of the city; (3) the city manager is appointed by the council or commission for an indefinite term of office and may be removed at any time, and is a high-salaried professional executive; (4) all administrative offices and departments are placed under the manager, and he is commonly given large freedom to hire and fire, though sub-

ordinate administrative officials are generally appointed under the merit plan by competitive examination and hold their jobs during good behavior.

The manager plan is supposed to have most of the virtues of the commission plan and none of its defects. It brings about a full concentration of power and responsibility and yet avoids the dangerous commingling of politics and administration which has been a conspicuous fault of the commission plan in large cities. The council or commission, elected by the people, is responsible for deciding the policies of the city

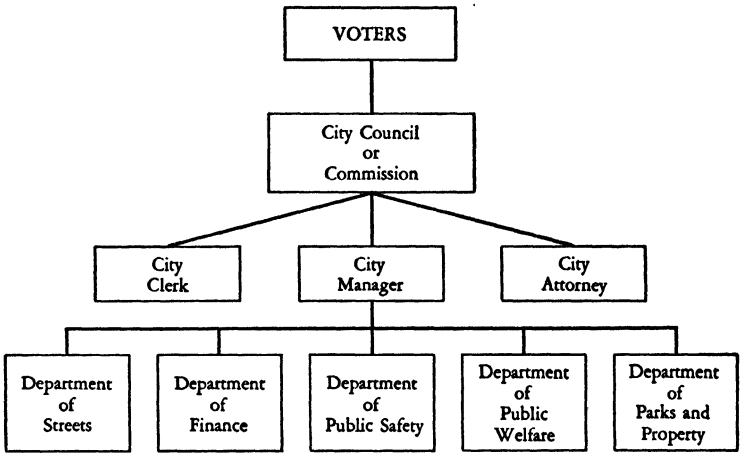


Chart 10. The Manager Plan

government and for choosing a manager capable of executing those policies with the highest degree of efficiency. If the manager falls down on his job, it is the council's business to get rid of him. This responsibility cannot be evaded, for the council has power to remove the manager instantly. If the council selects a professional politician rather than a professional executive as city manager, the misdeeds and mistakes of the manager collect on the council's doorstep. He is the council's man, and only the council can oust him. If, on the other hand, the council appoints a professional executive who values his reputation and looks forward to a career as a city manager, he will be likely to resign rather than stoop to petty politics, and thus again the issue comes straight back to the council. Not being an elected official, the manager does not have to campaign for office and does not have to pick subordinates with a view to their political connections and vote-gathering ability. He can run the

affairs of the city much as he would a private business of his own—much as a city school superintendent runs the public schools, for the manager plan is nothing more nor less than our century-old system of public school administration adapted to general municipal government.

One-purpose Units

Our survey of American governmental machinery would not be complete without brief mention of the more than 135,000 special districts which have been created to carry out a single governmental purpose. The best known of these units is the school district, but commonly found also are local improvement districts, sanitary districts, port districts, public-utility districts, irrigation districts, park districts, water-supply districts, drainage districts, flood-control districts, library districts, and road districts. Such districts are established for the most part by or under the authorization of state law. Their powers, functions, organization, and procedure are determined in the same way. They generally are given power to levy taxes and borrow money through the sale of bonds, and are sometimes given rather extensive police powers.

The school district. Our most numerous special districts are school districts. These are found everywhere. A school district is a subdivision of a county or town created for the sole purpose of providing and operating public schools. School districts are of every size and circumstance from those operating one-room country schools to those operating the huge school systems of large cities. School district boundaries seldom coincide with city boundaries or the boundaries of any other unit of local government. In fact, the arrangements for school administration are ordinarily set up without immediate consideration of their relation to other local government units.

The governmental organization of school districts is relatively simple. There is a board of directors or trustees elected by the qualified voters of the district. This board, subject to the regulations and restrictions of the state school law, is usually given complete charge of the operation of schools. It appoints the superintendent, principal, teachers, clerks, business agents, and janitors. In many instances the law gives the board large authority to organize the teaching and business staff according to its own ideas. The size of the school board varies from three to seven members, and it is customary to rotate the terms so that the board is never totally renewed at one election. The county school board (in states where such a body exists) and the county school superintendent exert some authority over school-district officials in respect to compliance with state law, as also does the state superintendent of public instruction; but

very rarely do these higher officials directly intervene in the management of local school affairs.

Other special districts. In general the plan of organization and procedure found in one-purpose districts other than school districts is of much the same pattern as school-district organization. There is usually a board or commission empowered to conduct the affairs of the district, whatever they may be. The members of the board may be elected by the voters or the property owners of the district, though there are many instances of such boards appointed by the governor, the mayor, the city council, or the county board. The district board is ordinarily empowered to appoint such officials and employ such persons as may be necessary to the performance of the work of the district. Sometimes there is no chief executive under the board, and each officer or employee reports independently to the board. In such cases the chairman of the board may act somewhat in the capacity of chief executive. Sometimes, however, the board builds up a large staff and appoints a chief executive to run it. This chief executive may be the secretary of the board, the chief engineer, or some other functionary.

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PART IV: AMERICAN POLITICAL PROCESSES

CHAPTER 14

THE LEGISLATIVE PROCESS

Free government has never existed without some sort of legislative process, directly or indirectly under popular control. The overthrow of autocratic authority has always resulted in the establishment of an assembly of representatives, chosen to be the spokesman either of the whole people or of such a portion of them as might be admitted to participation in the government. Conversely, the overthrow of democratic government has always resulted either in the abolition or the throttling of legislative assemblies.

Tyrants and dictators must destroy or dominate legislatures in order to continue as tyrants and dictators. To share their power with a representative assembly of any kind is ultimately to lose it. Popular governments, on the contrary, cannot survive without potent and widely representative legislatures. The only organ of government capable of speaking and acting for the masses is the legislature. When legislatures fail, democracy fails. That is why it is so vitally important that the people of democratic countries clearly understand what is involved in the legislative process of government and what steps must be taken to make sure that democratic legislatures do not fail.

Americans commonly think of legislatures as lawmaking bodies, but in reality they are much more. Lawmaking is a product of legislation, but not the only one and sometimes not the most important. A legislature is a segment of the voting public, chosen not only to represent the public and voice its desires and opinions, but to wield power as a many-sided instrument of public authority. Lawmaking is one of the legislature's ways of wielding power; others are by interpreting and crystallizing public opinion, by serving as an authoritative channel of communication between the people and the bureaucratic officialdom of the government, by studying public problems and inquiring into public needs, and by exercising a controlling oversight, in behalf of the public, over all aspects of the governmental process.

In order to perform these important functions successfully, legislatures need to be constructed and operated for their particular job as efficiently as it is possible for a political mechanism to be. It is often said

that if the people would only elect good men to represent them in their legislatures, they would have good legislatures. Nothing could be farther from the truth. As a matter of fact, the people usually do elect good men. But they do not get good legislatures—the good men they elect are not able to surmount the handicap of bad organization and inefficient procedure. With this truth in mind, let us now proceed to examine American legislatures and legislative processes.

General Structure

The bicameral plan. Congress and all of our state legislatures except that of Nebraska are bicameral, or two-house, assemblies. The bicameral legislature is more or less a historical accident. The earliest representative assemblies usually were single-chambered bodies. Later, in response to various political forces, they were split into two or more branches. A good example is found in the evolution of the British Parliament. Originally there was a single grand assembly of the representatives of the different orders of society—the archbishops, the bishops, the abbots, the lesser clergy, the earls, the barons, the county knights, and the burghers of the towns and cities. The chosen spokesmen of these divergent groups or classes met and transacted business as one body. However, for groups of representatives whose interests required that they make a common front against those having contrary interests, it became the practice to meet separately in unofficial private conclaves. In these caucus meetings they would consult together regarding common concerns and agree upon a common course of action in the general assembly. At one time there were as many as five groupings of this character. Gradually the five coalesced into two gatherings of representatives, one consisting of the spokesmen of the high-ranking clergy and the great lords of the realm and the other of the spokesmen of the minor clergy, the lesser nobility, the country squires, and the municipal burghers. In time these two major groups drew apart permanently and no longer met together in a general assembly. Thus Parliament came to consist of the House of Lords and the House of Commons. Although this bicameral arrangement was not planned, but just happened, Englishmen eventually came to regard it not only as a rationally conceived but as a highly superior form of legislative organization.

The bicameral plan was imitatively introduced in most of the thirteen English colonies in America. Pennsylvania and Georgia, however, had single-chambered legislatures, and Vermont later was admitted to the Union with a unicameral legislature. The Articles of Confederation provided for a unicameral Congress, and, as has been pointed out above

(see p. 198), the Philadelphia Convention of 1787 departed from the unicameral system chiefly because a bicameral Congress made it possible to solve the controversy between the large and small states by providing for equal representation in one house and proportionate representation in the other. The example of the Federal Constitution undoubtedly did much to extend the bicameral system in state and local governments. All of the states and most of the larger cities eventually went over to that system.

Arguments for bicameralism. Many theoretical arguments have been advanced in support of the bicameral principle. Not all of these arguments have been borne out by experience, but most of them are still widely accepted nevertheless.

First, there is the contention that a legislature of two coördinate branches is less susceptible than a single-chambered body to hasty and ill-considered action. Each house, it is argued, checks and reviews the work of the other, thus preventing ill-advised actions and slips due to haste which would be more likely to get by if there were only one house. Second, there is the kindred idea that two houses afford greater security than one against corruption, jobbery, and breach of trust on the part of legislators. Third, it is said that the bicameral legislature tends to counteract the dangers of demagogism and the baneful effects of sudden gusts of popular passion and excitement. Fourth, it is claimed that, because it divides legislative power, the bicameral system prevents an accumulation of power in the legislature or elsewhere in the government which might result in arbitrary and oppressive government. Fifth, it is asserted that a two-house legislature is more representative than a unicameral legislature because of the supposedly greater opportunity to parcel out seats among diverse elements and interests of the population.

The bicameral principle in operation. Nearly every evil that the bicameral principle is supposed to prevent or cure has emerged in American legislative experience. Some of them have become almost chronic. Hasty and ill-considered legislation has not been rare; corruption and jobbery have been far too prevalent; demagogues have flourished; abuses of power have frequently occurred; and representation has sometimes been a travesty on the principle of representation. In short, the check-and-balance idea, as exemplified in bicameralism, has quite often worked in reverse of all theoretical forecasts.

Various factors have combined to produce this result. One of these is the party system. A party that would control a bicameral legislature must of necessity build up an organization with the purpose of controlling both houses. A party organization is set up in each house, and,

though the two are not formally linked together, the leaders of the party machine in each house are in frequent contact with each other both in and out of the legislature. Many times a conference of party leaders in an obscure hotel room makes the real decisions for the majority party in both houses. When the chief executive is of the same party as the legislative majority, the pressure for harmony (usually effected behind the scenes) is even stronger. Being the top leader of his party, the chief executive nearly always has a program of legislation to put through, and expects the loyal support of all members of his party in both houses. Party leaders in the two branches of the legislature serve as his lieutenants in bringing the two houses into line. So great is the prestige of the chief executive that a popular and politically astute President, governor, or mayor has at times been able almost to convert the legislature into a rubber stamp to approve his requests. When this occurs, the bicameral check is largely nullified.

Another factor in the thwarting of the bicameral principle is the influence of organized pressure groups. When organized labor, organized business, organized agriculture, organized war veterans, organized "senior citizens," or any of the multitude of other militant pressure groups which flourish in this country, go to work on a bicameral legislature, they apply the heat simultaneously and equally to both houses. Their paid lobbyists "know all the angles" in both houses, even better than most of the members; they work on the key committees and leaders of both houses; they start political backfires in the home constituencies of members of both houses. Their chief object is to force the two houses to do substantially the same thing, and in this they very often succeed. They succeed, in other words, by forestalling the bicameral check, in making the two houses work as one.

The time element, particularly in state legislatures, is another factor that often works against the bicameral check. The volume of legislative business almost invariably is greater than can be fully and carefully considered, under the procedures now in vogue, even when the length of the session is unlimited. But when a legislature is limited to a session of sixty to a hundred days every other year (as most state legislatures are), it is necessary to act on about a dozen bills a day in order to clean up the calendars before passing the deadline. Such a task is physically and mentally impossible. It takes about half of the allotted time for the legislature to get itself properly organized and to gather information on which to base its judgments Almost invariably, therefore, there is a terrific jam of legislation in the closing days of the session, and scores of measures are put through both houses under a suspension of rules. A

bill passed by one house, comes up for consideration in the other. There is not time to examine it at length. Every member is fagged out and wants to adjourn and go home. If the bill has been approved by the committee reporting it, they are ready to vote for it and get along to the next bill. The committee, likewise overworked and short of time, may have approved it without thorough study. Under such conditions the two houses rubber-stamp each other about as often as they check each other.

Not to be overlooked in this same connection is the informal contact regularly maintained between the two houses through the medium of committees. Both houses have committees dealing with every important subject of legislation, and it is a common thing for the chairman and other members of a committee having jurisdiction over a particular subject to be in frequent touch with the corresponding committee in the other house. When important legislation is under consideration this contact is invariably established. In some states joint sessions of house and senate committees dealing with the same subject are required, and permanent joint committees are required in a few states. Conference committees likewise play an important part in getting the two houses on common ground. When the two houses disagree on a measure it is customary to refer it to a conference committee made up of selected members of both houses. This conference committee tries to iron out the differences between the two houses and generally proposes modifications which it is believed both will accept. The most vital decisions are often made in this joint committee. The conference committee reports its proposals to both houses, and, if both accept (which usually happens), the bill as modified by the conference committee is enacted into law. The results of this procedure may be highly desirable, but they are not what the two houses acting independently would do.

Arguments against bicameralism. Having considered the theoretical arguments for the bicameral system and some of the reasons why they are not always borne out in practice, let us now turn our attention to some of the arguments against bicameralism.

It is often said that a bicameral legislature is an expensive luxury. In a sense this opinion is certainly true. The cost of providing compensation, travel allowances, secretarial assistance, supplies, and the like for two houses is bound to be greater than for one unless the membership of the two is smaller than of a single house. But these are not the only costs which may be swollen as a result of the bicameral system. Pork-barrel appropriations are likely to be more lavish and useless jobs more numerous, for the political expediencies of the members of both houses

must be equally taken care of. The more political "fences" there are to be built and kept in repair, the greater the urge to log rolling and other varieties of political extravagance.

That the bicameral system divides and diffuses responsibility is clearly apparent. The two houses are substantially equal in power and responsibility, but neither has sole power and responsibility. The bewildered citizen cannot be sure where to place the blame for bad legislation. Is the house in which the measure originated more at fault than the one which finally passed it? Obviously not. They are equally responsible, but equal responsibility equally divided is not real responsibility. In order to show his displeasure, the citizen must vote against the incumbent members of both houses from his constituency. But in most cases they do not all come up for reëlection at the same time. Moreover, he usually votes in one constituency for members of the lower house and in a different constituency for members of the upper house. To square his accounts fully with the members of both houses is not easy, and often takes more political bookkeeping than he is able to do.

There is much complaint also that the bicameral system doubles the time required for legislation, multiplies the complexity and intricacy of the legislative process, and greatly increases the opportunities for trickery and sharp practices. Each measure must twice run the gauntlet of introduction, reference to a committee, committee consideration, debate, and so on. This dual network of procedural twists and turns sometimes trips bad measures but also trips many good ones. Unscrupulous legislators and unprincipled lobbyists can take advantage of it much as shyster lawyers take advantage of the technicalities of legal procedure. It is a condition which frequently fosters endless jockeying for political advantage, tricky and dubious compromises, reprehensible intrigues and maneuvers, and undercover bargainings of all kinds.

The unicameral legislature. The one-house legislature is no novelty, even in the United States. As has been pointed out above, most of our city councils are single-chambered bodies. The bicameral experiment in municipal government was not a success. Economy was one of the principal motives leading to the abandonment of the two-house council, but the ills incidental to check-and-balance politics also had a good deal to do with unicameralism. Whether the adoption of the unicameral plan for the state legislature in Nebraska presages a general movement for unicameralism in state government is as yet uncertain. Reports of Nebraska's experience thus far have been generally favorable, and, in consequence thereof, unicameral proposals have been initiated in several other states. There is little reason in principle or in past experience to suppose that the unicameral form would not work just as well in state

government as in city government. Nor is there any sound reason to suppose that the unicameral form is less well suited to the peculiarities of state government than is the bicameral. Tradition is on the side of the bicameral legislature in state and national government, and tradition can sometimes be very stubborn.

National legislatures generally have been bicameral, especially in the major countries. It should be noted, however, that in the parliamentary countries the upper house is largely ornamental and that really decisive and controlling legislative power is mainly concentrated in the lower house. In England, for example, the prime minister and cabinet are responsible to the House of Commons. The House of Lords, after three times refusing to pass a bill coming from the lower house, may be overridden by the House of Commons. For all important purposes, the House of Commons is the Parliament of Great Britain. Unicameral national legislatures have been established in a number of small countries, including Bulgaria, Turkey, Finland, Honduras, Costa Rica, Salvador, and Panama.

Arguments for and against unicameralism. The principal arguments in favor of the unicameral legislature are that it is less costly, less cumbersome in structure and operation, less addicted to devious politics, and less able to evade its responsibilities. Experience fully supports the economy argument. It is also true that unicameral legislatures have been, as a rule, much simpler in organization and procedure than bicameral legislatures. These merits are not entirely explained, however, by the fact that the legislatures are unicameral. Almost invariably they have been relatively small bodies and for that reason could proceed with great informality. A unicameral legislature of four or five hundred members probably would be somewhat simpler in organization and procedure than a bicameral legislature of twice that number, but not enough so to make a striking difference. Undoubtedly many of the benefits of unicameralism have resulted from the fact that unicameral legislatures have generally been kept down to fewer than a hundred members. As to devious politics, there is certainly less chance for *sub rosa* political chicanery in a small unicameral legislature than in a huge bicameral one, but let no one imagine that it cannot or does not occur. No known mechanical device will keep politicians from being politicians. "Passing the buck"—dodging responsibility—usually has been more difficult in unicameral legislatures both because they are unicameral and because they are small. Buck-passing always works best when there are large numbers of people involved in duplicated organizations and procedures.

Against the unicameral system the principal arguments are that it is not as broadly representative as the bicameral; that it is less stable and

more likely to succumb to the wiles of demagogues or the intimidations of dictators; and that it is more likely to be radical in its actions. Some unicameral legislatures have not been as broadly representative as some bicameral legislatures, but it would be hard to prove that this statement has been true of all unicameral as compared with all bicameral legislatures. There is nothing in the inherent nature of a unicameral legislature which makes it impossible to design its composition on a broadly representative basis. On the matter of demagogues and dictators, it cannot be said that the record of bicameral legislatures is anything to boast about. The argument assumes that the record of unicameral legislatures has been or would be worse. There is very little evidence to support either of these assumptions—in fact there is just as much evidence pointing to the contrary. Nor can it be said that radicalism—whatever is meant by the term—is an exclusive characteristic of unicameral legislatures. The political history of mankind discloses a goodly number of radical actions by bicameral legislatures. The radicalism of one house sometimes has been checked by the conservatism of the other, and sometimes it has not. In a unicameral legislature it is possible to have internal checks that would operate against radicalism just as effectively as the bicameral check.

No one should imagine that substituting a unicameral for a bicameral legislature would work a miracle in government or solve all the problems of the legislative process. Unicameralism is no panacea. Unicameral legislatures generally are simpler, more flexible, more economical, and more expeditious in the transaction of business than are bicameral legislatures. But simply to prune off one branch of the legislature without making other fundamental changes in legislative structure and procedure would not lead to any marvelous improvement. For the proof of this we have only to look at American city councils.

Representation and Personnel

The basis of representation. In describing the general structure of American legislatures (see p. 191), we pointed out that it is a well-nigh universal practice to elect members to represent geographical constituencies. In Congress members are elected to represent states and congressional districts, in state legislatures to represent counties, towns, or legislative districts, in city councils to represent wards or the city as a whole. This basis of representation is founded on two deep-seated American beliefs. One is that localities as such are entitled to a voice in legislation; the other is that individual citizens as such are likewise entitled to have a spokesman in the legislative process. Sometimes lo-

calities are given equal representation regardless of population and sometimes they are given representation in proportion to population. Individual citizens, however, are always (in theory) given equal representation. Each voter in a constituency has one vote and it counts the same as every other vote in choosing a legislative representative.

In theory, then, every American legislator represents a geographical area and all individuals residing in that area. Each individual, likewise in theory, is represented in two ways. His local interests—those connected with the territorial constituency in which he resides—are represented, and his individual interests (whether general or local) are also represented. But individuals can be assured of equal representation only within a single constituency. Individuals residing in different constituencies do not necessarily have equal representation, and they very often have grossly unequal representation. Every citizen of New York is represented by two United States senators and so is every citizen of Nevada. In 1940 New York had a population of 13,479,142 and Nevada a population of 110,247. Therefore, on a strictly numerical basis, one citizen in Nevada had as much representation in the United States Senate as 113 citizens in New York. This discrepancy is the most extreme example which could be cited, but corresponding inequities exist between every state in the Union and every less populous or more populous state. The obvious cause of these inequities is the fact that equal representation is given to states regardless of population. The same condition occurs in state legislatures if towns or counties are given representation regardless of population. The fact that the federal Constitution guarantees every state one seat in the House of Representatives, and that state constitutions sometimes do the same for counties or towns in the state legislature, has similar consequences. A Nevada citizen has as much representation in the House of Representatives as two New York citizens.

Numerical inequities of the same character result from the widespread practice of gerrymandering legislative districts. In 1938, for example, the nineteenth congressional district of California had 333,595 inhabitants. The seventh and fifth districts of Illinois at the same time had 889,349 and 140,481 inhabitants respectively. The eighth and twelfth districts of New York had 799,407 and 90,671 inhabitants respectively. A citizen of the New York twelfth district was equal, from the standpoint of numerical representation, to nine citizens of the Illinois fifth district, eight citizens of the New York eighth district, and three citizens of the California nineteenth district. Gerrymandering has like effects on equality of representation in state legislatures and city councils.

There is no need to labor this point further. It is perfectly plain that

the American system of legislative representation does not, and in large part cannot, produce legislatures in which every member represents an equal or substantially equal number of people. The American people firmly believe that one man's vote should be equal in power with every other man's vote; but they have not translated this belief into a rule of legislative representation which would prevent a group of a thousand voters from gaining the same representation as a group of ten thousand. Not only does the system fail to insure equality of representation from the standpoint of numbers, but also from the standpoint of geography. True, territorial constituencies are generally given equal representation, but these are not equal in population, in area, in economic and political importance, or in anything else.

But population and territory are not the only important concerns in representation. People usually have important local interests in the immediate area in which they reside, though not in areas as large as many legislative constituencies. Their most vital interests, however, are often of the kind which cannot be localized. They have interests in their businesses, professions, or occupations, interests in education and religion, interests in various social conditions and movements, which are nation-wide and sometimes world-wide. A legislator chosen by the voters of a limited geographical constituency presumably represents all of their broader interests as well as their strictly local interests. Too often this presumption is nothing more than a presumption. The voters are likely to elect a person who, in addition to promising to be zealous in looking after the interests of the state, county, or district, successfully advertises himself as being fully devoted to the interests of labor, agriculture, business, Catholics, Protestants, Jews, taxpayers, tax spenders, and so on and on. What he means, of course, is that he will do all that he can do for each of these interests without antagonizing another. As a result, he seldom represents any of them very effectively.

Proportional representation. No system of representation entirely capable of giving equal representation to population and territorial groups and at the same time fairly reflecting the diverse social and economic interests of the people has yet been found acceptable to the American people. Some reformers are firmly convinced that the Hare system of proportional representation is the answer to this need, but it has not yet been tried on a sufficiently large scale to have a strong public appeal. The Hare system has been employed in municipal elections in Cleveland, Cincinnati, New York, and four or five smaller American cities; but most of the people of this country are wholly unacquainted with it. There are several systems of so-called proportional representation, but

the Hare system (so named after its inventor) is the only one that has been tried out in this country.

The Hare system. Under the Hare system, the single-member constituency for legislative representation is abandoned. Representatives are chosen either at large or by plural-member districts. If by the latter method, the districts do not need to be equal in area, population, or anything else, but each is assigned a number of legislative members determined by the ratio between its population and the total population of the city, state, or nation of which it is a legislative district. The system of election by majority or plurality vote is also abandoned.

The basic theory of the Hare system is that a successful candidate should not be required to receive a majority or a plurality, but only a quota of votes equal to a fair ratio between the number of seats to be filled and the total number of persons voting in the election. For example, if three seats are to be filled by an election, the Hare principle would say that a successful candidate should not be required to receive more than one-third of the total number of votes cast in the election. Ideally, then, the quota for each successful candidate should be set at a third of the total number of votes cast. But this ideal cannot be realized in practice, because, for three seats there will probably be six or more candidates, and the votes will be so much divided that there is hardly a chance that three candidates will each receive a third of the votes. Therefore the quota must be set somewhat lower than a third, but it must not be placed as low as a fourth, for that would be the ideal quota if there were four seats to be filled. The lowest number of votes a candidate for one of three seats can receive and yet receive more than a fourth of the votes is the whole number next above one-fourth of the votes. This, under the Hare system, would be the required electoral quota if there were three seats to be filled. If he fails to receive this quota, either by first-choice or transferred votes, a candidate is declared defeated, because he has received only enough or fewer than enough to be elected if there were four instead of three places to be filled. And if he should receive the quota, he is declared elected, because he has received the least number of votes that can be required when three seats are to be filled.

However, in order to make sure that the distribution of votes will be somewhat proportionate to the number of seats to be filled, the Hare system employs a transferable ballot and a method of making transfers according to the way the voter marks his ballot. Instead of marking his ballot with the customary cross, the voter uses numerals, and may vote for as many candidates as he desires. He places the figure 1 opposite the

name of the candidate he prefers as his first choice, the figure 2 opposite the name of his second choice, and so on as far as he desires to express preferences. In so doing, he says to the election officials, "If my vote cannot help elect my first-choice candidate, you may transfer it to my second choice; if it cannot help elect him, you may transfer it to my third choice; and so on to the end of the number of choices I have made."

The voter's ballot on the first count is always given to his first choice candidate. Any candidate who receives the quota on the first count is declared elected. But he is not allowed to receive more than the quota. If he has a surplus above the quota, the surplus ballots are transferred to other candidates according to the second choices indicated by the voters. The actual ballots selected for transfer are taken at random from the pile of first choice ballots for the successful candidate. If, after this transfer, no other candidate has received the quota, or, if no candidate received the quota on the first count, the candidate at the bottom of the list is declared defeated, and his ballots are transferred as explained above. This process is continued until three (if that is the number of seats to be filled) have received the quota, or only three candidates remain undefeated. These are forthwith declared elected.

The Hare system is somewhat more difficult to describe than to operate. Its mathematics and mechanics are not at all difficult to carry out, but the count is necessarily much slower than by other methods of election. When a large number of ballots is to be handled, it often takes a week or more to complete the count and certify the final result. Critical observers are not yet able to bring in a unanimous verdict on proportional representation. Experience in the American cities which have tried it has not been wholly convincing for or against the plan. Statistically it can be shown that approximately sixty per cent of the voters see their first choice elected when the Hare method is used, which compares favorably with other methods of representation and election. It can also be shown, statistically at least, that the legislators elected under the Hare method are the chosen spokesmen, not of heterogeneous bodies of voters in arbitrary electoral districts, but of like-minded groups of voters in major territorial units. That these results necessarily produce superior legislative bodies remains to be proved. In some instances the principal result seems to have been a legislative body made up of the spokesmen of fractional minorities, unable to unite on any common program of vigorous government and solid achievement.

Conditions affecting personnel. The quality of the men and women who aspire to and are elected to membership in a legislative body has much to do with the results of the legislative process. It will be remem-

bered from our description of qualifications fixed by law (see pp. 203, 226) that the required standards are not high. To require for eligibility a minimum age, residence in the constituency, and a minimum period of American citizenship are all right as far as such requirements go; but they are not requirements which tend to weed out the unfit or select the conspicuously fit. Perhaps it would not be compatible with American concepts of democracy to place more severe restrictions on the freedom of the people to choose whom they will to represent them in legislative bodies. If such is to be our attitude, however, we should pay far more attention to several factors which have a good deal to do with the quality of the people who voluntarily offer themselves as candidates for legislative office. Included in this category certainly are the mode of election, the tenure of office, and the compensation.

The mode of election. To be elected to any American legislature, one must first secure either a party or a nonpartisan nomination. The nominating methods recognized and approved by law are by party convention, by direct primary election, and in a few instances by petition. In every state the law prescribes one of these methods, and sometimes more than one is made available. Nominations are not easy to secure by any of them. To get the nomination of a party convention, one must be a pretty good party man and must have taken a sufficiently active part in party affairs to gain the support of influential party leaders and workers. It is less necessary to be a recognized party man in order to win a nomination by the direct-primary method, but it is necessary to circulate a petition or pay a prescribed fee, or both, in order to get one's name on the primary ballot, and this must be followed by a vigorous and successful solicitation of votes from the electorate which will vote in the primary election. Direct nomination by petition is easier, provided the required number of signers is not too high, but one must initiate the petition and see that the necessary signatures are secured. Nowhere in the United States is it possible for a person to become a candidate for a legislative office by the simple expedient of announcing himself or of being put forward by a few supporters.

Many good and able men are deterred from seeking legislative office by the difficulty of gaining a nomination. And not alone by the difficulty, but by the fact that the surmounting of the difficulty would oblige them to engage in a lot of petty political activity for which they have neither the taste nor the time. Leading citizens, busy with large personal and community responsibilities, are always reluctant to play the political game necessary to gain a legislative nomination. They might not be unwilling to go through the final campaign, but first to have to go through the distasteful ordeal of trying for the nomination is just too

much. It is not only unpleasant; it takes valuable time and costs money. They are perfectly willing to leave it to persons who like that sort of thing and have an interest in doing it—who, unfortunately, are not always the kind of material the people would prefer if there were any other kind on the ballot. There is no sound reason why nominations should be so walled in by political barriers. It helps the politicians, but it does not help the people make a wise selection of legislators.

The final election for the choice of legislative members is generally a party contest. This is not true of the smaller cities, but it is true of the larger cities and of the state and national governments. Political parties have an important function in democratic government, but not so all-important that the independent candidate should be virtually shut out. Yet the election laws of most of our states give the party man most of the "breaks." They not only discourage independent nominations, but often give party nominees the favored positions on the ballot. No wonder leading citizens of independent inclinations so largely shun legislative service.

Tenure. The legislative term of office has some bearing on both the quality of the membership and the quality of their performance. Too short a term tends to keep the legislator preoccupied with the business of getting reëlected, to the exclusion of more important matters. Too long a term may make him less sensitive to current changes of public opinion than he ought to be. Too short a term may result in the retirement from office of an able member before he has had time to learn his job well enough to render the best service of which he is capable; too long a term may retain a poor stick in office long after his constituents would be glad to get rid of him.

The shortest legislative term in the United States, found in a few state legislatures and a few city councils, is one year; the longest is the six-year term of United States senators. Two and four years are common in state legislatures and city councils. In bicameral legislatures members of the lower house are generally given shorter terms than members of the upper house. It is not disputed that a one-year term is entirely too brief for satisfactory results. As to the two-year term, the judgment depends on circumstances. In city councils, which usually are small unicameral bodies meeting once a week, the two-year term has not been too short to enable members to acquire experience and achieve good results. In the national House of Representatives, a large and complexly organized body, it has been found that a new member can scarcely "learn the ropes" in a single two-year term. And in state legislatures which meet biennially, the two-year term means that a member attends just one legislative session, usually of not more than ninety days, and then

has to come up for reëlection. Just about the time he has learned to find his way about the capitol building, his term of service ends.

Able men, aspiring to distinguished careers as legislators, are not attracted by the short-term seats. That is one reason why service in the lower branch of Congress and the state legislatures is so widely looked upon as a stepping stone either to the upper house or to some other form of government service. The political hazards of the two-year term are so great and the chances of eminence are so slight (unless one can be assured of continuous reëlection every two years) that ambitious men seldom count on making a career in the lower house.

We have not been troubled in this country by the problem of the overlong legislative term. There has been little feeling that the six-year term of United States senators is too long. The Senate responds to public opinion promptly enough to satisfy the great majority of people, and there is a common feeling that senators are more worthy and influential personages than members of the lower chamber. Undoubtedly this feeling is justified. Even in a single term of six years, a senator may, if he has the ability, make a much more impressive record than a member of the House can make in two years.

Compensation. Another condition materially affecting the quality of legislative membership is compensation. There is no argument on the question of whether legislators should be paid. We cannot expect men to sacrifice their private affairs without adequate compensation. The only real question is what constitutes adequate compensation. It is sometimes urged that compensation sufficient to cover travel and living expenses should be enough. Such compensation might be enough if legislative service did not oblige the member to give up his job or take time away from his business or profession; but it is not enough for the man who has no independent income and cannot afford to give his time to legislative service without compensation.

The principle of compensation for legislators has been fully accepted in this country, but we have evolved no rational standards of compensation. Some of our legislators are underpaid and some perhaps are overpaid. Underpayment impairs the usefulness of the legislator and exposes him to various temptations to "knock down something on the side." Overpayment may also impair his usefulness, and tends to give him a mercenary interest in his post. Adequate compensation should cover all of the legislator's legitimate expenses on account of legislative service and in addition should enable him to live comfortably but not luxuriously.

Congressional compensation. The salaries and other financial perquisites of members of both houses of Congress are voted by Congress like all

other legislative enactments. The members were originally compensated on a per diem basis. An annual salary of $3,000 was provided in 1855. This was increased to $5,000 in 1865, to $7,500 in 1907, to $10,000 in 1925; and in 1946 to $12,500 plus $2,500 for "expenses," making in substance a salary of $15,000 a year. Each member is given an annual allowance for stationery and office supplies. The sum voted for this purpose in 1946 was $950. There is an allowance of $10,320 a year for each Senator and $5,000 for each House member for secretarial and clerical assistance. Members of both houses receive a travel allowance of twenty cents a mile from their homes to Washington and return for each session. Free postal and telegraphic service for official business is granted to the members of both houses. Each house operates a restaurant in which members may obtain meals at prices lower than commercial charges for similar services elsewhere, and each operates a barber shop on much the same basis. Gymnasiums, baths, medical attention, and many other special services are also provided. The LaFollette-Monroney Act, adopted in 1946, provided for the pensioning of members who have served six years and reach the age of sixty-two. To be eligible for such a pension, the member must contribute a percentage of his salary to the retirement fund. His pension may never exceed three-fourths of his Congressional salary.

On the whole it would seem that members of our national legislature are generously compensated. Indeed, there are frequent charges, not without foundation, that some members grossly abuse their privileges and substantially augment their salaries. It has been shown that some make a profit on the travel allowance, that some contrive to have much of the secretarial allowance paid to members of their own family, that some use the franking privilege for personal purposes, and that some use the stationery allowance for articles not devoted to public business.

Compensation of state and local legislators. Most of the states are very grudging in the matter of legislative compensation. About a third permit the legislative compensation to be fixed by law, as in the case of Congress; the remainder have provisions in the state constitution rigidly fixing the compensation of members of the legislature. There are two forms of compensation—a per diem allowance and a flat salary—and the states are about equally divided between the two methods. The per diem rate ranges from $3 to $10 a day, the average being about $6.50. The flat salary ranges from $300 a biennium ($150 a year) to $2,500 a year, the average being about $750 a year. Travel allowances run from three cents to twenty-five cents a mile, ten cents a mile being the most common allowance. Stationery and postage allowances vary from none at all to $150 a session. Allowances for clerk hire rarely exceeded $500 a session.

It is apparent that the average state legislator is not handsomely rewarded in money. The legislative compensation in many states is not sufficient to cover actual expenses—a serious handicap to the man of limited means and a constant strain on the character of those on whom are pressed illegal or unethical opportunities of supplementing the official compensation. Considering the loss of time as well as the financial sacrifice, many upright and able men feel that they cannot afford to accept service in a state legislature. This handicap applies to the well-to-do almost as fully as to the less affluent.

Except in the smaller cities and villages, some compensation is usually provided for members of city councils. In some instances a small per diem fee is paid, but an annual salary is more common. The salary paid in the smaller cities seldom goes above $1,000 a year and often falls below $500. In the commission-governed cities the council members are also heads of executive departments and receive salaries as such. These salaries commonly range from $2,000 to $6,000 a year. In the larger cities under the strong-mayor plan, if the councilman is required to devote all or a major portion of his time to city business, the compensation ranges from $2,400 to $8,000 a year. A good many of the larger cities set the councilmanic salary at $5,000. Complaint about the inadequacy of councilmanic compensation is rarely heard. On the contrary, it is sometimes contended that the compensation is often so high as to make councilmanic service too attractive to professional politicians and other undesirables.

Legislative Organization

The character of the legislative process is greatly influenced by the internal organization of the legislature. There are two kinds of legislative organization—official and unofficial.

Official organization. The official organization of a legislature is composed of the officers, employees, committees, and other functionaries required by the constitution, by statutory enactments, or by the rules of one or both branches of the legislature itself. The official organization found in American legislatures is everywhere of the same general pattern. In Congress and the larger state legislatures it is more elaborate than in city councils, but the same characteristic features are always present. There is a presiding officer (usually called the speaker or the president), a clerk or secretary, a sergeant-at-arms, a chaplain, a postmaster, one or more doorkeepers, one or more parliamentarians, a legal counselor, and a number of standing committees. In a bicameral legislature this array of officers, employees, and committees will be found in both houses.

The presiding officer. The speaker is the presiding officer of the national House of Representatives. He is a regularly elected member of the House and is named as speaker by vote of the House. As a member of the House he is entitled to vote on all measures just like any other member. He is elevated to the office of speaker by the united support of his party associates in the House, and is looked upon as a party leader as well as the presiding officer of the House. He acts as an impartial chairman of the sessions of the House when party measures are not under consideration, but, when the issue is one on which there is a party division, he is expected to use his office for the advantage of his own party. In addition to presiding over the House, the speaker has the power of recognition of members wishing to address the House, makes rulings on questions of order, interprets the rules of the House and makes decisions as to their meaning and application to particular situations, appoints a chairman to preside over the committees of the whole, and appoints all special and select committees. Prior to 1910 the speaker also appointed all standing committees and was also chairman of the standing committee on rules. The presiding officer of the lower branch of all state legislatures is likewise called the speaker, and is chosen in the same way and has virtually the same duties as the speaker of the national House of Representatives. In some states he still retains the power to appoint all standing committees and still holds the chairmanship of the rules committee.

The presiding officer of the United States Senate is the Vice President or, when the Vice President is absent or the office of Vice President is vacant, the president pro tempore. The Vice President is expected to be, and usually is, an impartial presiding officer. The president pro tempore, on the other hand, is chosen by the party majority of the Senate and functions as a party leader. The lieutenant governor has the same rôle in state senates that the Vice President has in the United States Senate, though some states give him a little more power. State senates choose a president pro tempore to serve when the lieutenant governor is absent or when the office is vacant. In the states which have no lieutenant governor, the senate chooses its own president, and his position is very similar to that of the speaker of the lower house.

In city councils the presiding officer is sometimes the mayor, sometimes a council president elected by the voters, and sometimes a president chosen by the council itself. When the mayor serves as presiding officer, he generally has no vote in the council except in the case of a tie, and the same is true of the council president elected by the people. When the council chooses its own president, he is an elected member of that body and has a vote on all measures.

The legislative staff. The number of officers and employees on the working staff of the legislature varies according to the size of the legislature and the volume of business it transacts. In bicameral legislatures each house has an assisting staff of its own, and there may be some who serve both houses. Members of the legislative staff are never elected members of the legislature. Many of them are appointed for a single session only; others are appointed for terms of two or four years; and a few have permanent appointments. Appointments are made in various ways—by the presiding officer, by vote of the chamber on recommenda-

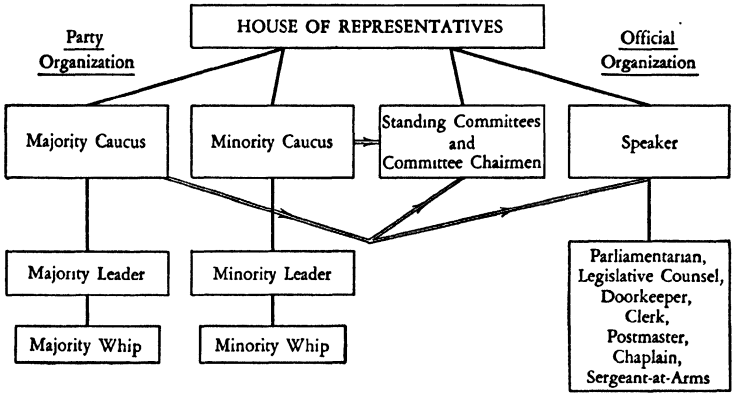


Chart 11. The Organization of the House of Representatives

tion of a committee, by the presiding officer or by vote of the chamber on recommendation of the civil-service commission, and in some other ways.

Each legislative chamber has a secretary or clerk, who is in charge of the records of its proceedings, looks after its financial transactions, prepares official copies of bills, reports, and other documents, and takes care of other matters of routine business. Also there is always a sergeant-at-arms, who maintains order, summons absent members, serves supoenas on witnesses, and, if necessary, makes arrests. Sometimes the sergeant-at-arms is also the chief doorkeeper and has a staff of assistants who guard the doors to exclude unauthorized persons from the floor, but in some legislatures there is a separate job of chief doorkeeper. Either the doorkeeper or the sergeant-at-arms usually has charge of the pages who serve on the floor as messengers and errand boys and the clerks employed in the filing and document rooms. Attached to the office of secretary or that of sergeant-at-arms is usually a clerk who looks after

the mail of the members. Large legislative bodies often appoint a special postmaster for this purpose. It is customary in most legislative bodies to appoint an expert parliamentarian to assist the presiding officer, and some appoint a legislative counsel to assist members on legal matters.

Both houses of Congress have a permanent chaplain, whose duty is to invoke the Divine blessing on its labors, at the beginning of each day's proceedings. Some state legislatures appoint a chaplain for each session, some invite various ministers to serve in the capacity of chaplain for a day or a week, and some apparently get along without the Divine blessing. City councils seldom make any special provision for seeking Divine aid. Large legislatures and legislative chambers usually employ one or more skilled draftsmen to assist members in drawing bills, and small bodies often employ a lawyer to do this work on a part-time basis. Congress, quite a number of the state legislatures, and a few of the larger city councils maintain large reference libraries, and employ a librarian and a staff of assistants to operate them.

The committee system. It is customary in all American legislatures, except the very small city councils, to rely upon standing committees to do most of the work of scrutinizing, analyzing, discussing, and assembling information about legislative proposals prior to formal consideration and vote. It is now the rule in most of our legislatures that no measure may come to a vote or even be debated on the floor unless it has first been referred to an appropriate committee and reported back from the committee. Each house provides in its rules for a number of permanent or standing committees, and it is the practice to have such a committee for each important subject of legislation. Under the Congressional Reorganization Act of 1946 the standing committees of the Senate were reduced from thirty-three to fifteen, of the House from forty-eight to nineteen. The Senate committees had thirteen members each (except for the Appropriations Committee), and the House committees ranged from nine to forty-two members each. In the state legislatures each house usually has from thirty to forty standing committees, and the average number of members to a committee is between ten and twenty. Standing committees in the larger city councils usually number from ten to twenty, and the size of each committee ranges from five to nine members.

Committee members are usually chosen in one of two ways—appointment by the presiding officer or election by the house itself. In both houses of Congress standing committees are elected by the chamber itself. Custom usually dictates that committee assignments shall be made on the basis of party membership and seniority of service. In a private caucus of the members of each party a committee on committees is selected. The rules determine the number of members for each com-

mittee, and conferences of party leaders decide how many places on each committee shall go to each party. Armed with this information, a committee on committees makes up a slate of nominations for each committee. These are then presented to the main body and ratified. In making up its slate the committee on committees is governed by three considerations: (1) that a member who has served on a particular committee in a previous session is by courtesy entitled, if he wishes, to be assigned to that committee again; (2) that members shall take rank on a committee in the order of their continuous service as majority or minority party members of that committee; (3) that, in making new assignments, preference shall be given to members in the order of their continuous service in the chamber. The majority member of longest service on a committee becomes its chairman. If the presiding officer appoints the committees, as is the practice in some state legislatures and many city councils, he is usually guided by party considerations and to some extent by the seniority principle.

In addition to the standing committees every legislative body has from time to time a varying number of temporary, special, or "select" committees. These are usually established for a single purpose and go out of existence when that purpose is accomplished. Such committees are usually appointed by the presiding officer.

The committee system has some great advantages and some equally great drawbacks. Let us first consider the advantages.

It is obviously impossible for any legislative body as a whole to look into the details of all legislative proposals. Reference to a committee gives a small group of members a chance to make a special study of a proposal and become far more familiar with it than would be possible for the entire membership. Then, by reporting its findings and conclusions to the whole body, the committee can give it all the benefit of its special examination of the bill and its problems. Of course it would be possible, as is the custom in social clubs and various other organizations, to have a special committee for each particular legislative proposal, but in a legislature this would tend to hinder rather than expedite the progress of business. A fresh committee for each piece of legislation would not only mean that scores of new committees would have to be formed all the time, but that each new committee would be likely to be composed of members unfamiliar with the subject matter of the bill and not prepared by reason of background and experience to give it expert consideration. Everything would be held up while the members of the committee prepared themselves for their job.

It is very different with a standing committee which receives all bills dealing with a given subject and has a continuity of membership from

session to session. The members of a standing committee on patents, for example, acquire a vast amount of special knowledge on that general subject, and, when a new bill on patents is referred to them, they do not have to start from the beginning. By virtue of their expert knowledge and past experience they not only can handle the bill more rapidly than a committee of novices, but can usually do a better job. A legislative body with a standing committee for every important subject of legislation is provided with a panel of experienced and expert legislators to do the preliminary work of sifting and investigation on almost any bill which may come before it. Great confidence can be placed in the work of such committees because many of their members are eminently qualified specialists in their particular branches of legislation.

Now let us turn to the disadvantages of the standing committee system.

Each committee tends to become a little legislature functioning within a larger one. A committee on patents, to recur to the example used above, devotes itself narrowly and intensively to legislation on that subject. Its members concentrate on patent legislation, often to the neglect of other legislative duties. They learn a great deal about one subject and very little about others. They practically make the decisions for the entire chamber on patent bills, and they in turn allow other committees to make the decisions for them in fields in which they have not specialized. They furnish the information, the wisdom, and the leadership on measures in their field, and every other committee does the same in its field. Thus, instead of one legislative body acting as a unit, there are a score or two of semi-independent little legislatures, each of which is inclined to view public policy through the colored lenses of its own field of specialization. And there is little that can be done to correlate the work of these fractional legislatures effectively.

Standing committees enjoy great power. Much of their power is given to them by the rules, but they would be able to wield most of it regardless of the rules. Some legislatures allow committees full discretion as to whether they will report out measures which have been referred to them. In these legislatures committees have the power of life or death over all bills coming into their hands. Some legislatures require committees to report out before the end of the session every bill referred to them. This requirement does not reduce the power of committees as much as might be expected. Committees can be forced to report, but they cannot be forced to make "on the level" reports. If the committee wishes a bill to pass or fail, it can frame its report accordingly; and, even without making a specific recommendation, it can almost seal the fate of the measure by placing it in a good or bad light. Some legislatures allow a

bill to be taken from a committee and brought up for consideration by means of a petition signed by a certain number of members. This rule is not often invoked. Members are reluctant to expose themselves to retaliation by signing such petitions.

Each committee chairman naturally becomes the overlord of a tiny legislative domain. In that domain he and his committee colleagues are "the works." Chiefs of the dozen or so most important committees are recognized as the outstanding leaders of the legislative body. But they are leaders of parts and not of the whole membership. Unified leadership, responsible for the legislative program as a whole and capable of coördinating all committees, is difficult to develop. Sometimes the presiding officer, if he is an elected member and is included in the party organization, can exercise such leadership, but to do so calls for a concentration of power which tends to make the presiding officer a legislative czar. It was a reaction against this sort of power that led to the revolt of 1910 in the national House of Representatives which resulted in taking the power to appoint committees from the speaker. The same thing has happened in other legislative bodies. One result of the lack of unified leadership in legislative bodies has been that the public has come to expect the chief executive more and more to supply the over-all leadership which the committee system has discouraged within the legislature itself.

Unofficial organization. In Congress, the state legislatures, and many city councils there is always an unofficial party organization which is just as important as the officially provided organization. The official organization operates in connection with all legislation. The unofficial organization operates only in connection with legislation involving party issues and party rivalries, but, when the unofficial organization goes into action, the official organization very often does nothing more than ratify what the unofficial organization has decided. The unofficial organization, though distinct from the official, is at many points closely related to it. In fact, certain parts of the official and unofficial organizations always overlap.

The caucus. The cornerstone of the unofficial organization is the party caucus. This is simply an unofficial, usually private, and sometimes secret gathering of all of the legislators belonging to one party. There is a caucus for each party, and, in bicameral legislatures, one for each party in both houses. Each party caucus is governed by such rules as it may choose to adopt, and is responsible to no one but itself. Caucus meetings are held at such times and places as the caucus itself may determine. In Congress the caucus plays so large a part that special caucus rooms have been provided in the House and Senate office buildings. In

state legislatures and city councils it is customary for caucuses to be held in large committee rooms or in the legislative chamber before or after the regular hours of the legislative sessions.

The caucus is an invitation affair; members of doubtful party regularity are not likely to receive bids. The call for the caucus meeting and the invitations to attend are issued by a caucus chairman or committee chosen at the last preceding caucus. Each caucus decides for itself to what extent its decisions shall be binding on the participants. If it votes itself a "closed" caucus, that vote means that, unless some exceptions are made, every member of the caucus is bound to cast his vote on the floor of the chamber in accordance with the decisions of the caucus. Any member who disobeys will incur not only the displeasure of his fellow members, but will find it hard to get important political favors when he needs them. But, on the other hand, if it votes itself an "open" caucus, that vote means that the decisions of the caucus are advisory only.

A meeting of each party caucus is always held prior to the election of officers and committees at the beginning of each session. Regular meetings may or may not be held after that. Once the caucus has chosen its leaders and made its controlling decisions, it usually is not summoned again unless a matter of extraordinary importance arises. The chief purposes of the first meeting of the caucus are fourfold: (1) to agree upon party candidates for presiding officer; (2) to choose a committee on committees and pass upon the slate of nominations made by this committee; (3) to select the party floor leader, whip, steering committee, and other leaders; (4) to determine the stand of the party on prospective legislation. When these tasks are performed, the leaders selected by the caucus can usually take over and manage party matters without calling the caucus very often. As a rule the leaders prefer it that way, for they are individually more influential when they are not too closely dependent on the caucus.

Party leaders. When the presiding officer is elected by the legislative chamber itself, he is in fact elected by the caucus of the majority party. He is expected to be not merely the official presiding officer but an unofficial party leader of great importance. His powers as presiding officer not only enable him to further the interests of his party in many ways but to do favors for every individual legislator of his party. He can do as much as anyone to promote harmony and solidarity in the ranks of his party, and he clearly understands that the majority caucus expects him to assume the mantle of party leadership.

The majority caucus also chooses a floor leader and possibly one or more assistant floor leaders, a party whip and perhaps one or more assistant whips, and a steering committee. The minority's candidate for

presiding officer usually becomes minority floor leader, and the minority caucus usually elects a whip. The chairman of the rules committee and the chairmen of four or five other leading committees are also outstanding personages in the party organization, and the ranking minority members of the same committees have similar standing in the organization of the minority party.

The steering committee is the board of strategy of the majority party. It is a committee of the majority caucus, not a committee of the legislative chamber. The presiding officer, the majority floor leader, the majority whip, the chairman of the rules committee, and a few other leading majority members (usually committee chairmen) constitute the steering committee. The majority floor leader very often is chairman of the steering committee. It is the business of the steering committee to manage the legislative program of the majority party to the best advantage possible, and particularly to select the bills which are to be put through with party sponsorship and to see that they are opportunely advanced to consideration.

The floor leaders are the managers for their respective parties on the floor of the chamber. It is their duty to direct the strategy of their party after a measure comes out of committee and is up for debate and consideration on the floor. As the chief parliamentary tacticians of their parties they more or less direct the course of debate and are responsible for dealing appropriately with all motions made from the floor. When a motion is made from the floor, the measure under consideration being a party measure, the members of each party are expected to support their floor leader and vote according to the word passed out by him.

The party whips are responsible for having the full strength of their parties present for voting when needed. Few members in a large legislative assembly spend a great amount of time continuously on the floor. They have other interests and other work to do. After a quorum is announced at the opening of the day's session, they are accustomed, unless matters of direct concern to them are on the calendar of the day, to retire to the lobbies, return to their offices or committee rooms, or proceed elsewhere as their interests and inclinations dictate. But they must be on call all the time. It is the whip's job to keep track of them and be able to reach all of his own party on a moment's notice. For this purpose he keeps a daily register of the whereabouts of each member of his party every hour of the legislative day. He has a staff of assistants to help him round them up when their presence is needed for a vote. Some legislatures have a call-bell or buzzer system communicating with the lobbies, offices, and committee rooms, but many absent members can only be reached by telephone or by personal messenger.

Transacting Legislative Business

Rules of procedure. All legislative bodies carry on their business under more or less elaborate rules of parliamentary law. These, in the main, are self-imposed regulations adopted by the legislative body itself, though some of the rules may be necessitated by constitutional or charter requirements. Since no legislative assembly can bind its successors, the rules of procedure have to be adopted anew at the beginning of each term of office for which the legislature was elected. As a matter of practice, the rules of the preceding legislature are generally readopted with very little change. One of the first committees to be appointed after a legislative body completes its official organization is a committee on rules. The first job of this committee is to propose a code of parliamentary law to govern the legislative body during its coming sessions. The rules committee usually proceeds at once to bring in a recommendation for the adoption of the rules of the previous session, with or without modifications, and this recommendation is generally approved without much opposition. The committee may propose new or modified rules at any time throughout the session. Any member of this assembly may also move to modify the rules, but such motions are commonly referred to the rules committee for consideration before being voted on by the chamber as a whole. The rules of the United States Senate and House of Representatives have served as models for the rule-making committees of state legislatures and city councils.

The ideal purpose of parliamentary rules is to facilitate the transaction of legislative business in an expeditious, orderly, and equitable manner. This ideal is not always realized. In some legislative bodies the rules have become so elaborate, so inflexible, and so technical that they complicate and obstruct the work of the legislature rather than dispatch and effectuate it.

The introduction of bills. This is the first step in transacting legislative business. In simple assemblies proposals are almost always initiated by a direct motion from the floor, but it has been found advisable in nearly all legislative bodies, in order to avert the danger of hasty and ill-informed actions, not to allow proposals for the enactment of law to be presented directly from the floor. Various modes of formal introduction are therefore made obligatory. Years ago it was customary to require a member to get leave to introduce a bill or to give notice of intent to introduce one a certain number of days prior to the actual presentation of the measure. Most American legislatures no longer insist upon this procedure, but permit a measure to be introduced simply by filing a copy of the bill with the clerk or secretary of the chamber or dropping it in

a box or "hopper" on the clerk's desk. When thus officially filed, the bill is given an identifying serial number and sent to the printing office. Printed copies of the bill are then distributed to every member. In American legislatures any member has the privilege of introducing any bill he pleases, and committees are often authorized to prepare and introduce bills.

First reading and reference. The second step in the progress of a bill ordinarily is first reading and reference to a committee. It is a traditional requirement that a bill must be read three times before passage, and formerly this meant that the clerk read the bill in full in the hearing of all members present. Not until the bill had been read the first time could it be referred to a committee. Since it is now possible to place a printed copy of the bill in the hands of every member, the first reading is greatly abbreviated. Sometimes only the number and title of the bill are read, and sometimes first reading and committee reference are combined as one operation, the presiding officer merely announcing that bill Number So-and-So is on its first reading and is referred to such and such a committee. The rules of some legislative chambers state that a bill is to be deemed to have had its first reading when it is filed with the clerk at introduction.

There are various ways of referring bills to an appropriate committee. Reference is made by the presiding officer in his discretion in some legislative bodies; in others the presiding officer is rigidly bound by rules requiring him to send certain bills to certain committees; and in some the rules govern the matter of reference so completely that the clerk is allowed to distribute bills to their proper committees without any formalities on the floor.

The committee stage. Various things may happen to a bill in the committee stage, depending on the powers vested in the committee. The committee may lay the bill aside and do nothing more about it. Thousands of measures meet a quiet death in this way. If the committee decides to consider the bill, steps will be taken to study it and perhaps to hold public hearings on it. Certain members of the committee, or perhaps a subcommittee, will be asked to investigate various phases of the measure and report back to the main committee. Important committees usually have a staff of clerical and technical assistants who take over much of the work of detailed investigation.

If the committee decides that its own deliberations need to be supplemented by public hearings, it will fix dates for such hearings and will invite interested persons to appear and give testimony. Scores of persons, both private citizens and public officials, may be heard. At the conclusion of the hearings the committee reconsiders the measures and

makes any changes it sees fit. If, then, it decides or is obliged by the rules to report the measure out, the committee chairman in coöperation with other majority members will prepare the report of the committee. Dissenting members, if any, may prepare and file a minority report.

The calendar stage. Ordinarily there are two ways of reporting a bill from the committee. The usual way is for the chairman of the committee to send the bill, with reports attached, to the clerk with a request that the bill be taken up in due order. Some committees, however, are privileged to report from the floor at any time, the chairman of the committee making the report. A bill reported in this way may be taken up out of its regular order. When a bill is reported from its committee, the bill and the accompanying report are generally printed and copies distributed to every member.

Customarily, after a bill is reported from the committee, it takes its place on an appropriate calendar. Only by a suspension of the rules may it be taken up without passing through the calendar stage. A legislative calendar is simply a list of bills classified according to subject matter. Certain hours of the day or days of the week are set aside for the consideration of bills on each list. When the time arrives to consider, for example, bills listed on Calendar A, the chamber proceeds with the first bill on that list, and then, if there is time, goes on to the second bill, and so on. The following day, perhaps, it will take up Calendar B in the same way, and a day later Calendar C. Such procedure is usually known as the "regular order." Each bill, having been placed at the bottom of its calendar, must wait until every preceding bill on that calendar has been taken up, and such bills are only taken up at the times regularly assigned to that calendar. Such is the regular order of procedure. A good example of the calendar system is found in the national House of Representatives, where there are five calendars. These are: the so-called Union Calendar, for all revenue and appropriation bills; the House Calendar, for public bills not raising revenue or appropriating money; the Private Calendar, for private bills and claims; the Consent Calendar, for bills taken out of their regular order by unanimous consent; and the Calendar of Motions, for motions to discharge committees.

A great many bills never get past the calendar stage. They are so far down on the list that they cannot come up for consideration before the end of the session unless taken up out of their regular order. Only bills of outstanding importance from the standpoint of either party politics or public policy have much chance of being considered out of their regular order.

Second reading and consideration on the floor. When taken from the calendar a bill usually has its second reading. Some legislative bodies

require a full reading at this point, but others, deeming the printed bill sufficient, permit the reading of the number and title of the bill to pass for the second reading. The second reading brings the bill to the floor for general consideration. One of two forms of procedure may be followed at this point. The chamber may go forward under its regular rules or it may resolve itself into a committee of the whole. There is a decided preference in some legislative bodies for committee-of-the-whole procedure, for this dispenses with the regular rules and the regular record of votes. Sometimes the rules make it mandatory for certain bills, notably finance bills, to be considered in the committee of the whole.

The bill now being before the main body, may be debated; amendments may be offered; motions to lay on the table, recommit, postpone consideration, and so forth are now in order. All of the parliamentary skill of the floor leader and committee chairman in charge of the bill will be exerted to keep it intact and carry it through to a final vote, and the opposing party leaders naturally will do all they can to block it, delay it, or secure modifications. It is a test of generalship on both sides. The minority may have no hope of defeating the bill, but they can often raise so many obstructions that the majority will make concessions to induce them to "lay off."

Engrossment and third reading. When debate on the bill has been terminated and all amendments have been adopted or rejected, the presiding officer puts the question whether the bill shall now be engrossed and read a third time. A negative majority on this question defeats the bill as completely as a negative vote on its final passage, for the chamber by this vote has refused to let it come up for final passage. If, however, the vote is favorable to engrossment and third reading, the bill is taken in hand by an engrossing committee which reëdits it and puts it in final form, incorporating all amendments which have been approved and deleting such portions as may have been changed by amendment or otherwise modified. Upon completion of engrossment, the bill is read a third time. This reading usually is in full. Then the bill is ready for passage.

Passage. When the third reading is finished, the presiding officer puts the question whether the bill shall now pass. The vote may be taken in various ways. The presiding officer may call for a *viva voce* vote and decide by the volume of sound whether the "ayes" or the "noes" have it. He may call for a rising vote and decide according to the number standing or sitting. He may, and usually must if requested, call for a division of the house, and appoint tellers to count the members as they divide and file between the tellers appointed to count the "ayes" and the "noes." He may, and under some circumstances is obliged to, call

for a yea and nay vote. When this is done, the clerk calls the roll and records every member's vote as he answers "yea" or "nay." This method of voting is the only one that puts every member permanently on record. The Constitution of the United States, many of the state constitutions, and also many city charters provide that a certain number of members (often one-fifth) may at any time demand a yea and nay vote.

Action by the other chamber. Upon its passage a bill is signed by the presiding officer and is usually countersigned by the clerk. Then, in a bicameral legislature, it goes to the other house. There it is treated as a regularly introduced bill and is referred at once to an appropriate committee. In the second house it may go through to passage by virtually the same stages as in the house of its origin, or it may in various ways be lost in the second house. If it passes the second house in exactly the same terms as in the first, it goes at once to the executive for his consideration. Should the second body change it in any way, it goes back to the house of its origin with a request that the first chamber agree to the amendments made by the second. If the first body accepts these changes, it signifies its approval, and the bill goes to the executive. But if the first body refuses to approve the amended bill, it will do one of two things: (1) notify the other house of its refusal and demand that it accept the original bill; or, (2) request the other house to appoint a conference committee on the measure. On important bills the second course is more likely to be followed. In the event that a conference committee is agreed upon, each house appoints a number (usually three) of conferees or managers. The members of this conference committee then meet and endeavor to compromise the differences between the two houses. It is a general rule that nothing new may be introduced in the bill by the conference committee without reference back to each house for approval. Failure of the conference committee to come to an agreement means the defeat of the bill, but, if the conference committee reaches an agreement, this is reported back to both houses. The question is then put in each as to whether the house will accept the report of the conference committee. If the vote in both houses is in the affirmative, the bill is duly signed and sent to the executive. But if the conference report is rejected by one or both houses, the measure is dead. It can only be revived by a proposal accepted by both houses for a new conference committee.

Action by the executive. In the national government, forty-seven of the states, and many cities, the chief executive has a limited veto power. A legislative enactment may not become a law without his signature, and, if he wishes to disapprove it, he refuses to sign it and returns it to the

house of its origin. Along with the vetoed measure he may send a message stating his reasons for disapproval. However, the executive veto is not absolute. By an extraordinary majority the legislature may pass the bill over the executive veto and thus put it into effect regardless of executive disapproval. This process starts in the house of the bill's origin. If the requisite majority (usually three-fifths or two-thirds) can be secured there, the bill goes to the other house. If repassed there by a similar majority, it becomes law without the signature of the executive. The details of the veto process have been described in preceding chapters (see pp. 183–185).

Criticisms of American Legislatures

The common scapegoat. When anything goes wrong in American government, public wrath falls more heavily on the legislative than on the other two branches of government. Never do the executive and judicial branches come in for the withering fire of criticism that is leveled upon our legislative bodies. Legislatures are blamed not only when they deserve it but are just as fiercely lashed when the fault lies chiefly at other doors. After the surprise attack on Pearl Harbor on December 7, 1941, the American people made Congress the chief target of their indignation. In vain did members of Congress protest that the management of foreign policy and the command of the Army and Navy are not their constitutional responsibility. In vain, also, did they point out that Congress had not failed to give the President everything he had asked for. The public did not want to hear "alibis." It wanted to kick and kick hard, and Congress, deservedly or not, was made to feel the public boot.

That the people should hold Congress responsible for what Congress apparently could not help may seem quite irrational; but it is not utterly without justification. The legislative branch of government in a democracy is more than just the people's servant; it is the people's closest instrumentality of political action. The people expect their legislatures to do more than represent them; they expect them to be the people's overseers of public policy and administration. If things do not go to please the people, they blame the legislature as much for not foreseeing and averting the trouble as for directly bringing it about.

The people are always more disappointed with the legislature than with the other branches of government. The reason is not merely that legislatures are often inefficient and sometimes unworthy of public confidence, but also because the people expect legislatures to be better than it is possible, under the circumstances, for them to be. The people gen-

erally have a feeling that legislatures have a fairly simple job which they should be able to perform satisfactorily without much difficulty. Scientific students of government realize that this opinion is a great mistake. They understand that the job of the modern legislature is far different from the job a legislature had to do a century ago, and their criticisms of our legislative mills emphasize not their failures but the particular features of structure, organization, and procedure which make such failures almost inescapable.

Weak points in American legislatures. There is a widespread feeling that American legislatures are not truly representative. In one sense this feeling is not justified. It has been demonstrated by many analytical studies that the men and women found in our legislative bodies are typical of the American people. Very few of them are outstandingly intelligent and able, but almost none are subaverage in those respects. Very few of them are crooks, nor are many of them paragons of virtue. They are just the kind of people one would meet in large numbers in traveling over the United States. Their success in gaining legislative seats is due in almost every instance to the wide popular appeal of their personalities, attitudes, and ideas. Their constituents like what they represent and hence choose them as representatives.

But just what do they represent? Not a unified group of people, but an arbitrary segment of the population lumped together for electoral purposes by reason of residence in a particular area. Oftentimes that area is not a community in any sense at all, but a wholly artificial slice of the map. The legislator chosen by such a constituency supposedly represents not only its local interests but all of its diverse and unintegrated social and economic interests. There may be occasional political geniuses who can perform such contortionistic feats of representation, but the average legislator, however well-intentioned, simply cannot do it. Some portions and some people of his constituency he truly represents; others he represents only when subjected to organized pressures which he deems it unwise to resist. But surrender to a pressure group is not representation and doing its bidding is not legislation. In doing those things the legislator is merely serving as the obedient tool of selfish interests. The average citizen, though often bitterly aware of the results, is seldom fully conscious of their causes, and continues, therefore, to be satisfied with the present system of representation.

If we are to have better legislatures in this country, we must thoroughly overhaul our system of representation. As yet, Americans have not given this problem much attention. Easy generalization to the effect that it can be solved by proportional representation, occupational representation, better methods of geographical representation, or some

other panacea are frequently advanced, but certainly it would be wiser and more scientific to study the disorder more thoroughly before prescribing a remedy. It might be discovered, for instance, that no system of representation is equally suited to all needs and conditions.

One of the most obvious weaknesses of American legislatures is their intricate and largely archaic organization and procedure. It is often said that many of them are too large. But the real difficulty is not so much one of size as of the way they are organized and the way they do business. A large legislature, particularly a bicameral one, cannot proceed as informally as a small one. But there is no inherent reason why a large legislature cannot be so organized as to conduct its business with efficiency and dispatch. And certainly there is no justifiable reason for clinging to obsolete and obstructive rules of procedure. Nor is there any sound reason why initiative and ability must be thwarted by a seniority rule or unified leadership prevented by an overelaborate committee system. There is no excuse for the slipshod methods which give us our annual crop of freak laws, and no irremovable obstacle to the elimination of pork-barrel appropriations. Everywhere in the world today the cry is for dynamic government, and legislatures all over the world, having failed to measure up to this demand, have humbly allowed the executive to take over the major functions of legislation.

Has this been necessary and inevitable? Is it impossible to have dynamic legislatures? Who knows? It has never been tried. No country has ever had a legislature designed to work with the utmost speed and efficiency. There have been a good many tinkering improvements in legislative organization and methods, but the really streamlined legislature remains unborn.

Legislative Reforms

Proposals for legislative reform in the United States are of two general kinds—those which merely aim to correct certain glaring weaknesses by patchwork methods and those which aim to do away with the present type of legislature altogether and replace it with a very different type.

Patchwork reforms. One of the best examples of patchwork reform is the substitution of the unicameral for the bicameral legislature without making any drastic changes in underlying basis, internal organization, and legislative methods of the surviving house. Certain gains undoubtedly result from this reform, but they are only partial gains. The same thing is true of laws to regulate or suppress lobbying. You can require lobbyists to register and give full publicity to their activities; you can

even forbid lobbying altogether; but you cannot be sure that you have accomplished anything. Lobbying is almost impossible to regulate and is as difficult to eradicate as bootlegging. The hordes of professional and semiprofessional lobbyists who seek to influence legislation are sometimes referred to as the third house of the legislature. This term is very significant. The lobby represents forces which ought to be adequately represented in the legislature but are not, and it gains its power from the fact that its members do represent important interests and large blocks of voters more effectively than they are represented in the legislature. Moreover, the highly paid lobbyist is usually an able man who knows all of "the ropes" and is something of an expert in his particular field. In other words, the lobby exists because it fills a certain need better than the legislature itself. It will always exist in some form so long as that need exists. Obviously, therefore, the only certain way to eliminate lobbying is to build a kind of legislature which will make the lobby not only superfluous but ineffective.

By the introduction of the executive-budget system, whereby the chief executive prepares and submits to the legislature a complete program of revenues and expenditures, it has been hoped to counteract the evil of pork-barrel appropriations and other imprudent financial practices. But here again the success of the reform has been only partial. Somewhat better financial planning has been achieved and certain economies, but pork-barrel appropriations have not been drastically curbed. Legislatures have retained the power to amend and revise the executive budget, and executives have frequently been inclined to use the budgetary power for political bargaining. More than one executive has been known to submit a budget heavily freighted with "pork" for the legislature in order to gain legislative support for expenditures greatly desired by the executive. The executive-budget system as used in the United States ordinarily does not concentrate financial responsibility exclusively in the executive or eliminate the basic causes of financial waywardness in the legislature.

The establishment of legislative reference libraries, drafting bureaus, and other technical services has provided aids which legislatures sometimes have used very profitably and sometimes have largely neglected. The value of expert auxiliary assistance always depends upon the legislature's readiness to use it and rely on it not only in matters of technical detail but in matters of fundamental policy. American legislatures, regardless of willingness, have been unable to take the best advantage of expert aid and advice in matters of basic policy because they have generally lacked the central arrangements necessary to correlate such services effectively in relation to the entire legislative job. In a piecemeal

way, expert services have contributed much to the betterment of the legislative output, but their aggregate contribution has been disappointing.

The legislative council is a device which has been adopted in Kansas, Nebraska, Illinois, Kentucky, Virginia, Connecticut, Michigan, and some other states for the purpose of enabling the state legislature to transact its business more intelligently and efficiently. The council is a small body, seldom composed of more than twenty-five members, elected from the legislature. Each house is entitled to elect a certain proportion of the council's membership, and the council usually chooses its own chairman and other officers. The principal function of the council is to work during the interim between legislative sessions, preconsidering and preparing measures to be submitted at the next session. During the sessions of the legislature it acts as an advising and recommending body. Between legislative sessions the council holds stated meetings, sometimes at the state capital and sometimes in different sections of the state. It hears requests for legislation, studies proposals submitted to it, gathers information on subjects likely to come before the next session, prepares recommendations, and sometimes drafts tentative bills.

The results of the legislative council, though not revolutionary, have been generally good. It has tended to overcome to some extent the unfortunate consequences of bicameralism. It has made for more careful inquiry and preparation in advance to meet the problems of an approaching legislative session, and thus has relieved to some extent the high-tension labors of the regular sessions. It has tended to provide the legislature with a continuing leadership of members enjoying the confidence of their colleagues. In states which give members of the legislative council additional compensation, thus enabling them to devote practically all of their time to legislative work, it has given the state virtually a full-time legislature, able to work leisurely during the long intervals between the annual or biennial sessions and make good use of the expert technical services, and thus to provide the regular session with information and guidance by which it can proceed more speedily and intelligently with its work.

Drastic reforms. The specifications of the ideal legislature have not yet been drawn, but there have been a good many proposals looking toward radical reconstruction. Most of the drastic proposals favor a unicameral legislature. Many of them would wholly change the system of representation and the mode of election. The single-member territorial constituency would not be continued. Some of the reformers favor the Hare system of proportional representation with large plural-member constituencies. Some want to try occupational representation or some other

scheme of giving representation to social and economic groupings without much regard to strictly local concerns. Nonpartisan plans of nomination and election are usually included in all of these drastic proposals.

Sweeping changes in the internal structures and procedures of legislatures are proposed. Some of the plans would do away with the now prevalent standing-committee system. Special committees for limited and temporary services might be continued, but the sublegislature type of permanent committee would be discontinued. In order to avoid the necessity of having such committees, the legislature would be made small enough to deal directly with nearly all items of business and would be amply supplied with a staff of experts to carry on the long-drawn-out processes of inquiry and analysis prior to consideration on the floor of the legislature. The huge flood of petty special, private, and local bills which composes so large a part of the task of present American legislatures would be short-circuited by procedural devices. Members might be allowed to introduce such measures just as freely as now, but they would be immediately referred to a quasi-judicial board of experts (not members of the legislature) and would not be allowed to come before the legislature for consideration until they had been examined and approved by this body of experts. By this method it is believed that pork-barrel legislation might be almost entirely eliminated.

It is further proposed to deprive the legislature of all forms of political patronage. Not only would the legislature be shorn of all power to confirm or interfere with executive appointments; it would also lose the right to handpick the personnel of its own staff agencies. This change would be accomplished by creating a legislative secretariat under the merit system of civil service. The office of secretary or clerk of the legislature would become a full-time professional job. The secretary would be chosen under the merit system and would have permanent tenure. Subject to civil-service regulations, he would appoint all experts, technicians, attorneys, clerks, sergeants-at-arms, and other legislative employees. No legislator would be able to hand out jobs of any kind or have any influence on appointments other than those in his own office.

Most of the radical proposals also favor the creation of a legislative council to function much as do the legislative councils now found in a few of our states, but they generally propose to make the council a stronger body than it has yet become. Some propose that the chief executive be made a member of the legislative council, and some would even make him chairman of the council. This, theoretically, would result in continuous contact and coöperation between the legislative and executive branches of the government. The chief executive, prior to legislative sessions, would be able to consult with the leading members

of the legislature, submit proposals to them, and have the benefit of their counsel and criticism. The legislature, on the other hand, would have a constant check on the executive and would be enabled to have its interests and proposals effectively presented to the executive. Executive leadership and legislative leadership might join hands and work together as partners in a common enterprise of good government.

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CHAPTER 15

THE ADMINISTRATIVE PROCESS

The Province of Administration

The function of administration, strictly speaking, is to administer—that is, to use money, men, and materials in carrying on whatever operations may be necessary to achieve the results contemplated and commanded by acts of legislation. In theory, therefore, administrative discretion is a subordinate sort of discretion. It is supposedly the business of the legislature, not the administration, to determine what the public policy shall be; and it is the duty of the administration to carry out the policy declared by the legislature and not to substitute its own policy for that of the legislature.

Administrative discretion. The theory of subordinate administrative discretion is much easier to state than to realize in actual practice. It is universally conceded that some freedom of decision must be given to the administration. No legislature can figure out everything in advance and provide by law the answer for every question that may arise in transforming policy into action. Suppose, for example, that the legislature appropriates funds for the construction or purchase of bombing planes. If the administration is to construct the planes itself, one of two courses must be taken. Either the legislature must itself enact minute and complete plans for construction plants and plane designs (which no legislature is competent to do), or it must in general terms authorize the administration to build the necessary plants and design and construct the desired planes. In the latter case the legislature necessarily must leave to the administration a good deal of leeway in deciding precisely what steps are to be taken. On the other hand, if the administration is to purchase the planes, the legislature is confronted with a similar choice. It can enact into law purchase specifications so detailed as to leave no doubt at all as to what is wanted, or it must leave all but the most general matters to the decision of the administration.

Legislatures all over the world have become increasingly aware of their lack of omniscience, particularly in technical matters. They no longer try to write into the law all of the particulars necessary to the execution of public policy. The common practice of modern legislatures is to enact a law outlining a policy as fully as the legislature deems

necessary to describe its purposes, and it is then left to the administration to fill in the details. This practice unavoidably enhances the power of the administration, for the details are by no means trivial. If the administration is filling in the details of a law authorizing the construction or purchase of bombing planes, its decisions on matters of detail, even more than the legislature's on general policy, will determine whether good or bad planes are provided. In a word, administrative decisions and actions may make or break the legislative policy.

Executive leadership. Nor is this the whole story. Legislatures have come to be almost as dependent upon administrative knowledge, experience, and resourcefulness prior to the enactment of legislation as subsequently. In order to act intelligently on questions of public policy they have to call upon the administration for information and advice which only the vast and varied practical experience of the administration can supply. Administrators in carrying on the routine operations of everyday government become experts. They have both the "know how" and the "know why" which legislators seldom have an equal chance to acquire. The administration is therefore largely called upon to furnish much of the advice upon which public policy is shaped. This has enabled the administration to assume a rôle of leadership in the formation of public policy which has provoked serious questions about the future of democratic government.

In authoritarian governments, particularly of the Fascist and Communist types, the administration is the government and the chief executive is a dictator. The legislature has no function but to applaud and approve the policies and acts of the dictator and his administrative subordinates. Executive leadership has been transformed into executive absolutism. Does the rise of executive leadership in the democracies portend the same result eventually in democratic countries? Unless the problem of controlling administrative power can be satisfactorily solved, it may mean just that.

Legislative control. Parliamentary democracies have endeavored to keep the administrative process properly subordinated and controlled by the principle of ministerial responsibility. The prime minister and his cabinet not only are required to be elected members of the legislature and thus subject to direct control by electoral constituencies, but are made collectively responsible to the legislature, losing their ministerial offices when they lose their parliamentary majority. This system of control has worked best in Great Britain and the British Dominions. It has not prevented executive leadership; sometimes it has not prevented executive ascendancy; but it has never failed, in British political society, to prevent permanent executive supremacy. The parliaments of both Great Britain

and her Dominions, even in the shadow of defeat and invasion, have asserted and exercised their right to turn a ministry out of office and install a new one. In other than British countries the parliamentary system was almost equally effective in keeping the administration in subordination, and that subordination is one of the reasons why Hitler and Mussolini, as soon as they got controlling majorities in their respective parliaments, proceeded to abolish the principle of ministerial responsibility and to destroy parliamentary government.

The American problem of controlling administration is peculiar to our tripartite form of government. The executive branch, save in cities under the commission and manager plans, is independent and coördinate. Neither its powers nor its personnel are directly subject to legislative or judicial control, yet it may be extensively checked in various ways by both of the other branches of government. Its basic administrative powers are derived directly from constitutional provisions, but if it exceeds or abuses these powers it may be amenable to judicial restraint by lawsuit and to legislative curbs by impeachment. Full discretion as to the conduct of administration is constitutionally vested in the executive branch. It cannot be compelled to exercise this discretion; it is compellable only in the performance of ministerial duties which involve no exercise of discretion. For refusal to exercise its constitutional discretion and for mistakenly and wrongfully exercising such discretion, the executive is politically accountable to the electorate but not to the other branches of the government. Only when mistaken and wrongful action exceeds the bounds of discretion—is merely a pretense of discretion to hide deliberate perversion of authority—does the executive have to answer in a tribunal of law for its conduct.

In addition to its constitutional discretion, the executive enjoys a wide range of discretion delegated to it by the legislature. The subject of the delegation of legislative power has already been discussed (see pp. 181–183). We learned that full legislative discretion may not be delegated, but that subordinate discretion may be. This subordinate discretion is often more subordinate in legal theory than in actual fact, for the legislature cannot always stand over the executive and keep it in due subordination. The truth is that when the legislature delegates discretion to the executive, it is almost invariably discretion which the legislature is incapable of exercising itself, and is, accordingly, discretion which the legislature cannot very easily control. Of course it may withdraw the discretion, but so doing usually defeats the legislative purpose entirely because it altogether forestalls the carrying out of the law.

Indirect control. Since the means of direct control over the administration by the other branches of government are so few and so intermit-

tently available, American legislatures have largely striven by more indirect means to achieve some degree of control over the administration. The first of these expedients is control over administrative organization. Under the principle of separation of powers the administration does not have authority to fashion its own organization. That fashioning can be done only by law—by legislation. Unless set up by the constitution itself, all administrative departments, offices, boards, commissions, and the like must be created by legislative enactment. This requirement gives the legislature an opportunity to mold the administrative structure according to its own fancy. The legislature giveth and the legislature taketh away—organization units, jobs, ranks, functions, powers, and all the paraphernalia of bureaucracy. Thus has the legislature obtained a large degree of control over the administration, though, as we shall later see, it has not always been control wisely and adequately used.

The second expedient of legislative control is to stipulate as minutely as possible all of the procedures to be followed by the administration in carrying a law into effect. Oftentimes legislatures not only write into the law every step to be taken in putting it into effect but even include sample forms of all instruments and documents to be used. As the law-making authority, the legislature has a perfect right to do these things. Naturally it brings the administration under extensive control by narrowing the bounds of administrative discretion. However, in the enactment of elaborate and technical legislation, legislatures have found it both inadvisable and impossible to stipulate administrative procedure very closely. Legislatures cannot foresee and anticipate all contingencies, twists, and turns well enough to be sure of accomplishing the control they seek without at the same time gumming the administrative process with an inordinate amount of unnecessary red tape.

The third expedient for legislative control is the exercise of the inquisitorial function of investigation and report. Legislatures have a constitutional right to inquire into the conduct of administration. It is a common legislative practice for one or both houses to appoint a committee to investigate the operations of a given department, office, or agency, or to inquire into the enforcement of a certain law. Such committees have authority to summon administrative officials to appear and give testimony, to produce books and papers, and to explain their activities in this, that, or the other particular. Even were there a constitutional right on the part of the executive to refuse to respond, as in some instances there is, the damaging publicity incidental to such a refusal is a thing the administration usually wishes to avoid. Refusals are rare, and legislative investigations are many. Administrative officials are always sensitive to the possibilities of a legislative investigation.

The fourth expedient of legislative control is financial. All funds for the support of the administrative establishment and the conduct of administrative operations must be appropriated by the legislature. Nor may an administrative agency disburse any funds for any purpose whatsoever without legislative authorization. This requirement means that the legislature, if it chooses to itemize its appropriations sufficiently, may control every penny which passes through the hands of the administration. It goes without saying that control over administrative expenditures also means control over administrative operations. Legislatures have made large use of this power. In fact, many students of public finance are of the opinion that there has been too much rather than too little legislative control of this kind.

Administrative Powers

The power of appointment. The power to appoint subordinates is one which chief administrative officials must have if they are to be held responsible for results and have authority commensurate with their responsibility. Under the common law such appointment was one of the inherent powers of the Crown in England and of the royal governors in the colonies. One of the constitutional changes wrought by the American Revolution was a general transfer of power from the executive to the legislature. The state constitutions of 1776–1780 located sovereignty in the legislature and left the governor with no powers save those expressly conferred by the constitution or granted to the governor by the legislature. The appointing power of the governor, which in colonial times had been far-reaching, was included in this shift, being given to the legislature or to a council of appointment composed in part of members of the legislature. The state courts soon evolved the doctrine, which prevails today, that the governor's appointing powers (in fact, all of his administrative powers) are to be strictly construed. Under this doctrine it was not permissible to imply the existence of any power in the office of governor unless the implication could be based on some express provision in the constitution or statutes of the state. Silence as to the method of filling administrative positions could not, therefore, be taken to mean that the power was inherent in the executive branch of the state government.

Well aware of this rule, the framers of the Constitution of the United States expressly provided that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not

herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they may think proper, in the President alone, in the courts of law, or in the heads of departments." [1] The practical effect of this provision was to oblige Congress to give the power of appointment to the President, the heads of departments, or the courts. Upon creating an office, Congress must determine whether it is an inferior office. If so, Congress must provide that its incumbent be appointed either by the President alone, by the heads of departments, or by the courts. If it is not an inferior office, the appointment must necessarily be made by the President and Senate. Congress has conferred very few appointments on the courts. Practically all of the inferior offices are appointed by the President alone or the heads of departments. Since the heads of departments are themselves appointed by the President and Senate, they necessarily exercise their appointing power under Presidential control.

No such concentration of appointing power is customary in state and local government. In the states the appointing power is divided between the governor and the independently elected departments and agencies. The legislature has usually given the governor a large proportion of the executive appointments, but does not extend his appointing power to departments headed by elective officials. Since there is no chief executive in county government, there is no concentration of appointing power. Each elected official is usually given authority, under statutory regulations, to appoint his own subordinates. In city government in recent years the appointing power has been very largely centered in the hands of the mayor, city commission, or city manager. However, there are still a good many cities in which the council and various independent agencies have a large number of appointments under their control.

The power of removal. The power of removal from office has undergone a curious evolution in the United States. In colonial times it was generally agreed that the power to remove was incidental to and went along with the power to appoint, even though there was no express authorization to that effect. Was this principle reversed by the American Revolution? In the states it apparently was. Consistently adhering to the position they had taken with reference to the power of appointment and other administrative powers, the state courts generally ruled that the removal power could not be implied but had to be explicitly granted either by the constitution or by statutes. Save for the power to remove by impeachment, the Constitution of the United States was silent on the subject of removals from office. In the first session of Congress the bill

[1] Article II, Section 2.

establishing the Department of State expressly provided that the Secretary of State should be removable by the President. Immediately several members raised the question of whether or not the concurrence of the Senate (which had to confirm the appointment of the Secretary) was not also necessary. If the power to remove was merely an incident of the power to appoint, it would seem logical that the concurrence of the Senate should be as necessary to remove as to appoint. On the other hand, if it was necessary that Congress expressly give the President power to remove, the concurrence of the Senate need not be also required, because in that case it was apparent that appointment and removal were two separate powers. After a long and learned debate on the subject, the clause giving the President power to remove the Secretary of State was deleted from the bill. Nothing at all was said about removals from office, but it was tacitly understood that the President would have the power to remove *without the consent of the Senate.* This was an illogical conclusion, though a very practical one. It was a rule of usage rather than one of law.

For seventy-eight years this usage was followed. The President, and other appointing officers as well, exercised the power of removal with little question. But in 1867 Congress, for the purpose of checkmating President Johnson's attempt to remove Secretary of War Stanton, passed over the President's veto the famous Tenure of Office Act. Among other things, this law provided that the consent of the Senate should be necessary for removals in every instance where the confirmation of the Senate had been necessary for the appointment. A bitter controversy arose over the constitutionality of this law, and Johnson's refusal to abide by it was one of the grounds for the attempt to remove him from office by impeachment. The storm subsided after Johnson's retirement from office, and in 1887 the Tenure of Office Act was repealed. In succeeding years several cases arose in which the President's power to remove was questioned, but none squarely raised the point of whether the power had to be conferred by Congress and whether it could be limited by legislation.

Such a case came before the Supreme Court in 1926. The President in 1920 had removed from office a postmaster. This office had been created by Congress with the stipulation that postmasters "shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." The postmaster in this case had not served out his four-year term and the Senate had not consented to his removal. He protested that his removal was illegal and brought suit in the Court of Claims to recover the salary due

him to the end of his term. The Supreme Court, denying his claim, said in part: "The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal. . . . A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously weaken it. It would be a delegation . . . to Congress of the function of defining the primary boundaries of another of the three great divisions of government." [2]

This decision seemed to clinch the contention that the removal power was exclusively vested in the President and could not be restricted by Congress. However, in 1935 another case came before the Supreme Court on a slightly different set of facts. The President had removed before the end of his term and against his will a member of the Federal Trade Commission. The removed commissioner had sued in the Court of Claims for the unpaid balance of his salary, alleging that he was illegally removed. In creating the Trade Commission Congress had fixed the term of office at seven years and had provided that a commissioner might be sooner removed by the President for "inefficiency, neglect of duty, or malfeasance in office." This commissioner had been removed simply because the President did not like his political views. The Supreme Court held that the removal was not valid. The Court said that the Trade Commission was much more than just an executive agency; it also had duties of a semilegislative and semijudicial character, and was intended to be an independent agency rather than a mere subordinate unit of the executive branch of the government. "We think it plain under the Constitution," the Court said, "that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control, cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime." [3]

From these two cases it may be deduced that the present rule as to

[2] *Myers v. U.S.*, 272 U.S. 52 (1926).
[3] *Rathbun v. U.S.*, 295 U.S. 602 (1935).

removals in the national government is that the President's removal power is absolute in respect to strictly administrative offices, but that Congress may determine the conditions on which the members of quasi-legislative and quasi-judicial agencies may be removed. In state and local government, unless there is some constitutional or charter provision to the contrary, the removal power is fully subject to legislative regulation. It is not regarded as inherent in the power to appoint. Some state constitutions require the consent of the senate for removal wherever it is required for appointment. Some provide modes of removal other than executive removal, such as removal by joint address of both houses of the legislature. The tendency, however, is to enlarge the removal power of the governor, though keeping it subject to statutory control. In city government there has been a pronounced tendency to increase the removal power of the mayor or city manager, though not so much in small communities as in the larger ones. In county government, except for a few states which give the governor power to remove county sheriffs, elected county officials are not subject to executive removal at all. Appointed county officials are usually made removable by the county board or by the elected official who appoints them. In towns, townships, and special districts the power of removal is generally given to the governing board of the local unit.

The power of administrative direction. This is the power of command—the power to issue instructions and orders to administrative subordinates which it is their legal duty to obey. It is recognized that this power is inherent in the very nature of executive authority. The federal courts have held that the Constitution, by vesting the executive power in the President and requiring him to "take care that the laws be faithfully executed," impliedly gave him the power of administrative direction. Thus it becomes the subordinate's legal duty to obey his chief, regardless of his own private opinion that the chief may be acting improperly or even illegally. In following the orders of his chief, he is proceeding in the line of duty; the legal responsibility for all of his acts in the line of duty fall upon the chief, not upon the subordinate. But when the subordinate intentionally departs from the directions received from his chief, no matter how lofty his motive, the chief is relieved of responsibility. Refusal or failure to carry out the orders of the superior is always considered a breach or neglect of duty, and almost invariably justifies removal from office.

All of the state constitutions place the executive power in the office of governor, and most of them enjoin the governor to take care that the laws be faithfully executed. The state courts, too, have held that the governor derives the power of administrative direction from these

sources, but they have not always construed this power as broadly as have the federal courts. It does not give the governor the power of command over the elected state officials, and in most of the states it does not give the governor as much leeway as the President has to use his discretion, independently of legislative authorization, in choosing the steps to be taken in seeing that the laws are faithfully executed. Mayors and other local executives also have the power of administrative direction, but it is based on municipal charters or legislative acts which are not always liberally interpreted in favor of the executive.

Despite the fact that the power of administrative direction gives the superior officer a legal right to exact obedience from his subordinates, it is not very effective unless reinforced by the power of removal. When subordinate officials have permanent tenure, as under the merit system, the superior officer's power of removal is much curtailed—so much, in fact, that responsible executive heads often complain that their power of administrative direction is badly crippled. This situation has given rise to one of the difficult problems of public personnel administration.

The ordinance, or rule-making, power. This power might also be called the ordaining power. It is the power to issue proclamations and decrees and to make rules having the effect of law. The power to make law by proclamation and decree has always been one of the most conspicuous powers of the executive in countries whose legal systems derive largely from the Roman law. Just the opposite has been the rule in Great Britain and in the United States. The supremacy of Parliament in Great Britain and the separation-of-powers principle in the United States have made it necessary that executive proclamations and decrees, in order to be legally binding, have some statutory authorization. The executive is usually very careful to cite some legislative enactment as authorization for proclamations and decrees which are to be enforced as law. The many conventional proclamations of the President, state governors, and mayors of cities designating holidays and other days of special observance are not usually intended to be legally enforced, and are generally nothing more than polite formalities. An excellent example in point is President Franklin D. Roosevelt's attempt by executive proclamation to shift forward the customary date of Thanksgiving. Congress had not authorized such action and there was no legal force behind it. About half of the states paid no attention to it. Entirely different, however, are executive proclamations and decrees sanctioned by previous legislative authorization. These have the full force of law, as many Americans have learned by experience with the rationing orders for rubber, sugar, and other essential war commodities.

It is sometimes stated that the executive has power in emergencies to

make law by proclamation and decree. As an actual fact most emergency proclamations and decrees put out by American executive officials have at least pretended to be based on legislative authorization of some kind. When President Roosevelt issued his bank-closing proclamation in 1933, he cited as authorization certain legislation which had been enacted by Congress during the First World War. This authority was cited in order to be on the safe side, for Mr. Roosevelt was aware that the courts in this country have not given the executive full clearance to make law on its own initiative even in emergencies. Although they have not said that summary lawmaking by the executive in emergencies is under all circumstances forbidden, they insist that the emergency must in fact be of such a nature as to justify the kind of summary action taken, and they do not hesitate to reverse the executive if they find him wrong on the facts.

In making of subordinate rules and regulations American executives have a great deal more latitude than in issuing proclamations and decrees. The power to make rules and regulations to direct and control administrative subordinates is an integral part of the executive power. Such rules and regulations are legally binding on administrative subordinates, but usually do not touch the general public. However, the executive also is given large authority, by delegation from the legislature, to make suitable minor rules and regulations for carrying into effect legislative enactments. These also have the force of law, provided they do not exceed the scope of the authority delegated, and are binding on the general public as well as the administrative personnel. We are daily becoming more familiar with this kind of lawmaking. Administration of a detailed and technical character bulks so large in the work of modern government that legislatures are in the habit of enacting laws outlining a policy in general terms but not going into the innumerable details of enforcement. These are left to be filled in by rules and regulations framed and promulgated by the executive. The rights and obligations of millions of Americans are now determined by Social Security Board regulations, Wage and Hour Administration regulations, National Labor Relations Board regulations, Securities and Exchange Commission regulations, state welfare department regulations, state highway department regulations, city plan commission regulations, and rules and regulations put out by scores of other administrative agencies, national, state, and local. Possibly a half or more of the law which touches us most closely in our daily lives is imposed on us by administrative authorities.

The licensing power. In making rules and regulations the executive makes a determination applicable uniformly to large numbers of persons. Executives are also widely authorized to make particular determinations,

applicable to a single individual or situation. This is commonly called the licensing power. It is the power to grant or refuse and also to revoke a permission of some sort. Legislatures regulate many occupations, businesses, and other activities by forbidding persons to engage in them without first securing official permission. It is usually stipulated that in order to secure such permission the applicant must meet certain requirements, and must abide by certain conditions in order to retain it. The power to receive applications, determine whether the requirements have been met, grant or refuse the official permission, and later revoke it if the conditions are not carried out is almost always delegated to some administrative agency.

Under our constitutional system legislatures do not have authority to give administrative officials unlimited discretion in exercising the licensing power. They must always surround the licensing power with restrictions and guides which will prevent arbitrary action. But, if the law sets up sufficient guides and restrictions, the legislature may delegate to the licensing officers a wide range of authority to use their own judgment. The applicant or licensee always has the right, however, to appeal to the courts on the question of whether the legislature has properly limited the authority of the licensing officials and on the further question of whether they have abused the discretion conferred upon them. The courts will then review the matter and decide whether the licensing power has been correctly exercised. The courts have power to invalidate laws which do not properly delegate the licensing power, and to overrule improper actions by licensing officials.

The examining power. This is the power to conduct inquiries and investigations. To some extent this power is an inherent part of the executive power, but it also is largely conferred on administrative officials by legislative delegation. But no matter what its source, it cannot be effective unless there is some sort of compulsion behind it. Administrative officials can investigate until the cows come home, but if they do not have power to make searches, to take possession of books and papers, and to make people testify, they are not likely to turn up much information. The question of whether administrative officials have or can be given compelling authority to wield the examining power has caused American courts a great deal of trouble. The importance of the examining power is beyond dispute; in many instances the executive is almost helpless without it. Yet our state and national governments are founded on the principle of separation of powers, under which the courts alone are supposed to have authority to authorize searches and seizures and to compel the giving of testimony.

It is entirely proper for the legislature to enact a law making it a

criminal offense to refuse to produce books and papers or to testify before an administrative agency. The violator can only be punished after conviction in a court, and this sort of law satisfies all of the constitutional requirements. But it is an inefficient method, because it is slow and uncertain. Very often it gives the violator ample opportunity to destroy the only evidence on which he could be convicted. To avoid such possibilities of evasion, legislatures have often attempted to give administrative agencies authority to issue a subpoena to the person whose records or testimony is desired, and, in case he fails or refuses to comply, to impose on him a summary penalty for contempt. The courts have uniformly said that legislatures cannot give such authority to an administrative official or agency. The power to punish for contempt is a judicial power, and the legislature has no power to bestow it on a nonjudicial organ of the government. Some of the state constitutions contain provisions expressly authorizing administrative agencies to punish for contempt, but this is entirely in accord with the rule. It is all right for the constitution to disregard the principle of separation of powers, but not for the legislature. Although administrative authorities cannot be directly invested with the power to punish for contempt, the same result can be accomplished indirectly. The courts have upheld laws authorizing administrative authorities to invoke the aid of the courts. In such a procedure, if a person refuses to testify or produce documents at the request of the administrative authority, that authority may ask the court to issue a mandatory order to the same effect. Disregard of this order is contempt of court.

Administrative officials are not permitted to employ the examining power for any purpose they please, nor has the legislature power to authorize them to do so. There must be some public purpose behind the use of the examining power. It may be used to discover definitely alleged violations of law but not to conduct general "fishing expeditions" in the hope that unsuspected violations may be disclosed. It may be used to secure information for legislative and administrative guidance, but not to secure information just to satisfy private or even official curiosity. And it may be used more freely in dealing with businesses like public utilities, which are said to be specially affected with a public interest, than in dealing with ordinary private businesses.

The power of administrative review. This is the power of the chief executive and the heads of administrative departments to hear appeals from decisions made by their subordinates and make final determinations of the issues involved. In exercising their various powers administrative officials have to decide innumerable questions of fact. Is the person who claims that he is entitled to an old age pension actually sixty-five years

of age? Is the person who applies for a driver's license actually able to see and hear as well as the law requires? Is the person who is about to be deported as a nonquota alien actually an alien or a citizen? Thousands of purely factual questions of this kind confront administrative officials in this country every day. The purpose and meaning of the law are not in doubt, but it is not possible to carry out the law without first deciding whether the facts are this way or that. Legislatures have to leave such decisions to administrative officials. It is not permissible, under the principle of separation of powers, for legislatures to authorize administrative officials to decide questions of law—that function belongs exclusively to courts. However, when the issue is solely one of fact, not only the power to make decisions but even the power to make final decisions may be delegated to administrative officials.

Minor administrative officials are not usually given the power to make final decisions. They are empowered to decide the question in the first instance, but the legislature usually provides that an appeal may be taken to a superior administrative officer and ultimately to the head of the department or the chief executive. However, on pure questions of fact, there is no constitutional right to appeal to the courts. The decision of the highest administrative authority is just as final as that of a court. Both the state and federal courts have many times held that a person is not deprived of any constitutional right merely because he must be content with an administrative rather than a judicial decision on a question of fact. In the leading federal case, in which a man claiming to be a native-born American citizen was denied admission to this country on the ground that he was not in fact born here but in China, the Supreme Court said that it was just as proper for the department head to be given authority to make final decisions on the fact of citizenship as on any other fact and that with regard to such matters "due process of law does not require a judicial trial." [4]

This does not mean that administrative decisions on questions of fact can never be challenged. There are several grounds on which the courts will overthrow an administrative decision on a strict question of fact. If the administrative decision was made without proper authorization or was in excess of the authority conferred, the courts will not uphold it. If the procedure in making the administrative decision was arbitrary, prejudiced, not in good faith, or fraudulent, the courts will not approve the decision. If the administrative decision was not based on substantial evidence, but on flimsy evidence that a reasonable mind would regard as insufficient to support the conclusion, the courts will not sustain it. If there is a mixed question of law and fact, and the courts cannot sepa-

[4] *U.S. v. Ju Toy*, 198 U.S. 253 (1905).

rate the one from the other, they may correct the mistake of law even if it means overruling the administrative decision on the question of fact. Many administrative decisions are appealed to the courts on one or more of these grounds. When such appeals come to the courts, they insist that it is their duty, not to substitute their own determinations for those of the administrative authorities, but to decide whether or not the administrative authorities have made their determinations in accordance with the constitutional requirement of due process of law. Administrative officials often complain, however, that judicial pronouncements on due process are so vague and ambiguous that it is difficult for them to know in advance how to comply with such requirements in a way to satisfy the courts.

Summary powers. The ordinary procedure of administrative officials in dealing with law violators is to take the necessary steps to bring them before the courts for trial. If conviction follows, the courts then inflict the penalties prescribed by law. In some instances, however, administrative authorities are empowered to inflict immediate and summary penalties without a trial of any sort. Making an arrest without a warrant is a summary seizure of a person. It is permissible only under conditions which call for instant action and allow no time for obtaining a warrant. Summary seizure of property is also permissible under similar conditions. Examples are the seizure of property to insure the payment of taxes or to prevent its employment for illegal purposes. Under extraordinary conditions the summary destruction of life and property are also permissible. Examples are the shooting of an escaping prisoner or a person resisting arrest, the razing of buildings to prevent the spread of fire, and the smashing of gambling apparatus. Summary action making entrance on property for the purpose of securing passage, clearing obstructions, or abating nuisances is likewise permissible under conditions which leave no other reasonable alternative. Examples are forcible entry of buildings to remove fire hazards or conditions dangerous to public health, forcible entry to remove dangers to traffic such as overhanging trees or signs, and forcible clearance of dams obstructing navigation. Summary revocation of permits and licenses of various kinds is very common. Examples are summary revocation of the mailing privilege and summary revo cation of liquor licenses. The courts have always held, however, that recourse to summary action must be justified by exceptional circumstances which are such that public interest can be protected only by summary procedure. The administrative officer restoring to summary action always takes a risk. If he unnecessarily and unjustifiably resorts to summary action, the courts will hold him liable and persons injured by his action may recover damages from him.

The Administrative Procedure Act of 1946. This enactment of the 79th Congress was sponsored by the American Bar Association. Its obvious purpose, consonant with the opinion of most American lawyers, is to bring the administrative processes of the national government under judicial surveillance and control to a greater extent than in the past. Lawyers especially object to the way administrative agencies exercise their rule-making, licensing, examining, reviewing, and summary powers. The procedure of administrative agencies is unlike that of the courts. Lawyers never feel at home in administrative proceedings. They sometimes feel that the rules of the game are prejudicial to their interests and those of their clients, and they point to many alleged abuses of power on the part of administrative authorities. Whenever rights of person and property are at stake, lawyers think that judicial procedures should be followed and that final decisions should rest in the hands of the courts.

The Act of 1946 is an attempt to subject all federal administrative agencies to procedural requirements more in line with judicial standards. Among other things, the act makes "hearing officers" (those who conduct administrative hearings) virtually independent of the agency in which they serve; requires notice and hearing for the formulation of multitudes of administrative rules and regulations which formerly could be put out by simply announcing them and declaring them in effect; decreases and standardizes the forms of administrative action; stringently regulates the procedure of administrative adjudication; makes subject to judicial review many administrative determinations which formerly could not be appealed to the courts; and places curbs on the application of various administrative penalties and sanctions without approval by the courts.

It will take a long period of experience to prove the wisdom or unwisdom of this measure. Members of the legal profession generally are in sympathy with its purposes, and expect it to offset the evils of irresponsible bureaucracy. On the other hand, various specialists in the field of public administration have expressed the apprehension that it will destroy the versatility and adaptability of administrative operations, and thus so greatly enfeeble the administrative branch of our national government that important public policies will be jeopardized. This conflict of opinion shows how far we are in this country from solving the problem of administrative control. The need for surer and better control is generally recognized; also the need for more flexible administrative processes. But when it comes to devising improved methods of control, we fall back on the ancient check-and-balance principle which too often means obstruction as well as control. Experience with the new administrative procedure act may show us a better way. There is surely a better way of controlling administration than hamstringing.

Administrative Organization

Principles of organization. The basic purpose of any administrative organization, whether in government or in private affairs, is to perform the innumerable and complex activities of daily operation and management with the highest possible speed, efficiency, and economy. Experience has fully demonstrated, both in public and private affairs, that some kinds of organization are superior to others in the furtherance of this purpose. Superior administrative organization has been found, in every instance, to rest on adherence to certain principles which are not followed in poor administrative organization. In the following paragraphs we shall briefly examine those basic principles.

Unity of command. The first essential of good administrative organization is unity of command. This principle has long been recognized as indispensable in military affairs. It is equally important in civil administration. Headless administration is always chaotic and inefficient, and plural-headed administration is almost as bad. An army with two or more commanders of equal authority is not likely to win many battles, and an army commanded by a board or a committee cannot be expected to do much better. Everyone understands the vital importance in warfare of promptness of decision and energy of action. Unfortunately, not everyone realizes equally well that these two requisites are just as vital in civil as in military administration. We find headless administration in American county government, division of commanding authority in state and city government, plural headship in the form of boards and commissions in many cities and special districts, and incomplete concentration of command in the federal administrative system. The trend, however, is definitely in the direction of a single chief executive armed with adequate authority to direct and control the entire administrative organization. This unity is a notable feature of the city-manager plan. A few of the states have lately reorganized their administrative machinery on the same principle, and the recent reforms in the administrative structure of the national government have materially increased the centralization of administrative authority in the hands of the President.

Functional organization. A second principle of good administrative organization is that the various units of the organization should be set up on a functional basis. This principle is one which is followed in every well-conducted business. In a department store, for example, one finds a grocery department, a hardware department, a jewelry department, a men's clothing department, a women's clothing department, and so on. The idea is to group similar merchandise in one department and to

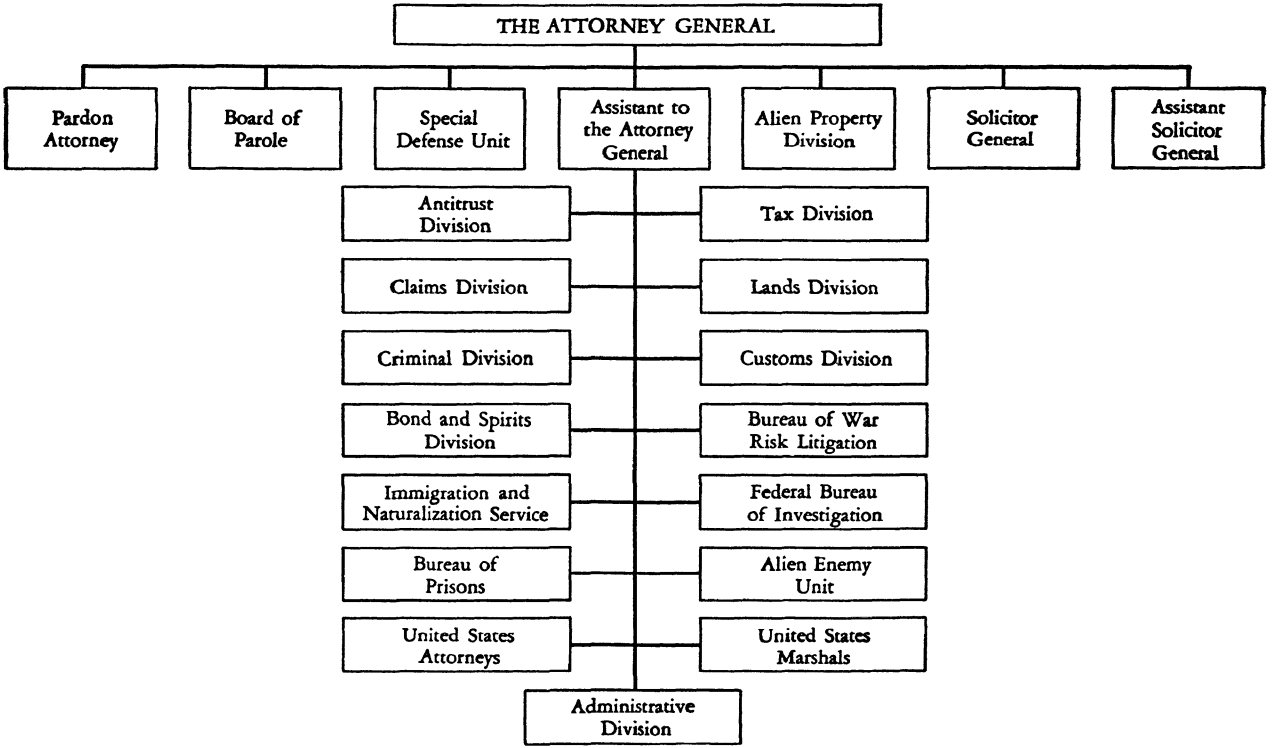


Chart 12. Functional Organization, Department of Justice

employ in that department sales people particularly trained and experienced with that one line of goods. By grouping like merchandise and like duties together in a single organization unit, greater efficiency can be achieved both in buying and selling. The same principle applies equally well in public administration. We do not assign police functions and finance functions to the same department of city government, nor highway functions and educational functions to the same department of state government, nor postal functions and foreign-affairs functions to the same department of the national government. Roughly, the principle of functional organization is generally observed in American administrative organization; but it is not fully and consistently applied. On all levels of public administration in this country one can find many instances of unlike and incompatible functions grouped in a single unit of organization, and of like functions dispersed among several different units. Regrouping according to function is a widely needed reform.

Staff and line. Closely related to the functional principle is the staff-and-line principle. Here again we encounter a principle derived from military experience. The services of the line in an army are those employed in actual combat, whereas the staff services are those employed in planning, providing supplies, maintaining communications, and other behind-the-line duties for the benefit and aid of all line services. Military experience has shown that there is a gain in efficiency when line and staff services are not carried on in the same unit of organization. Each service requires specialized training and experience, and each has its special problems of operation. Commingling of the two probably is unavoidable in small organizations which cannot bear the cost of many specialized units, but in large organizations it is no more costly and much more efficient to keep them separate. In public administration there are numerous services (such as purchasing, personnel management, accounting, and legal work) which are essentially staff services and should be set apart in separate organization units. In a great many instances this has been done, especially in the federal government and some of the larger states and cities; but there is still much room for progress, most of all perhaps in county government.

Pyramidal structure. Fourthly, we come to the principle of pyramidal structure. According to this principle, the chief executive forms the apex of a pyramid of subordinates grouped by units each of which has a definite place and rank in the pyramidal structure. Immediately under the chief executive are the major units of organization, usually called departments. At the head of each department is a secretary or director responsible immediately to the chief executive. Each department is divided into units of second rank, which are usually called bureaus. At

the head of each bureau is an official directly responsible to the head of his department. Each bureau in turn is divided into units of third rank, which may be called divisions, sections, or offices. At the head of each third-rank unit is an official directly responsible to the chief of his bureau. Third-rank units may also be divided into fourth-rank units under the control of the head of the division, office, or section.

The pyramidal principle results in centralization of authority and power from top to bottom, and makes for better coördination through-

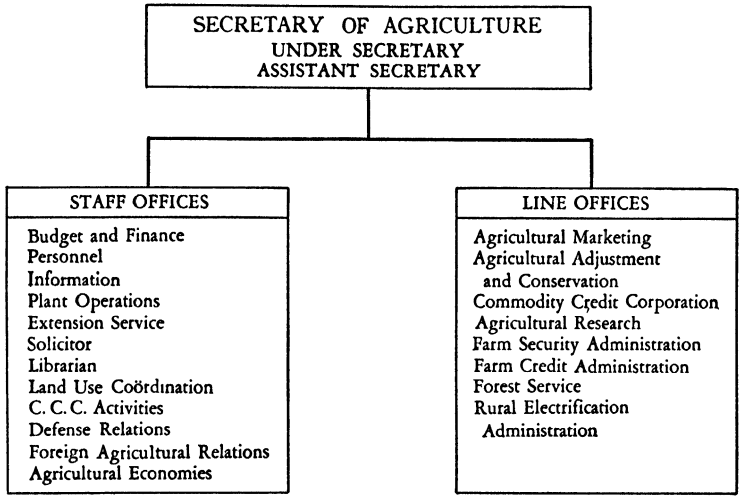


Chart 13. Staff-and-Line Organization, Department of Agriculture

out. It is another principle of military organization which experience has shown to be sound in civil administration. The man at the top cannot personally supervise every individual and operation in a vast organization. There must be regularly established channels through which he can project his authority downward and through which matters of importance can be brought upward to his attention. Normally, in pyramidal organization, only department heads deal directly with the chief executive. Even if it were desirable, he would not ordinarily have time to deal directly with officials of lower rank. The normal procedure of transmission downward is from department head to bureau chief to division head to section or office head; and the procedure of transmission upward is, of course, just the reverse. Although this sequence often results in a great deal of formality and delay, it avoids the chaos which would occur if the chief executive were to try to deal directly with

every subordinate and every subordinate could go directly to the chief executive with his business.

One difficulty with pyramidal organization has arisen in administrative agencies having quasi-legislative and quasi-judicial duties to perform. Not only are such duties best performed by boards and commissions, but the agencies performing them must be able to act independently of superior administrative control. When bodies having such duties as making public-utility rates or deciding whether injured workmen are entitled to compensation are under the control of administrative superiors charged with the enforcement of law in those fields, they cannot be assured of freedom to act impartially and disinterestedly. Pressure is likely to be exerted on them by superior officials who want rulings and decisions in line with the steps being taken to enforce the law. To resist this pressure is difficult; to yield to it is to place the administrative department in a position to act as both legislator and executive or as both prosecutor and judge. This dilemma is one of the reasons why so many independent boards and commissions have been created in this country. Yet it is a fact that a large part of the work of these boards and commissions is mere routine administration (involving no quasi-judicial or quasi-legislative duties) which, for the sake of efficiency, should be properly coördinated with other administrative processes of the same kind and placed under central supervision. To do this, of course, is impossible when the board or commission is totally independent of all overhead administrative control. The way out of the dilemma seems to be to include such boards and commissions in the organization of the regular departments for administrative purposes but at the same time to give them complete legal and political protection from departmental authority and influence when acting in a quasi-legislative or quasi-judicial capacity.

The pyramidal principle is largely, though not strictly and completely, followed in national, state, and city government. In town and county government it is not widely prevalent.

Organizational changes. Except when established by constitutional provisions, administrative machinery is created by legislative enactments. Subsequent modifications of organization are made in the same way. Under the principle of separation of powers, it is not permissible for the executive to fashion its own organization completely. For the executive to do that would be to exercise legislative power. Of course it is possible for the legislature to delegate to the executive a certain amount of authority to modify existing administrative agencies and set up new ones, but such delegated authority must always be restricted by the controlling and guiding terms of broad legislative enactments.

American legislatures have not been generous in delegating such subordinate authority to the executive. They have usually preferred to keep the entire business of making and altering administrative machinery in their own hands. While this has enhanced legislative control over the executive, or at least legislative ability to checkmate the executive, it has worked against the progressive improvement and adaptation of administrative organization as needs and circumstances change. Even though legislative wisdom may be adequate for the task of devising sound administrative organization and keeping it up to date—an assumption not always justified by the facts—legislative action is usually so slow and uncertain, so beset with factional and party politics, and so fragmentary that the problems of administrative organization seldom receive proper attention and consideration. A number of departments and subunits are originally set up. New ones are created from time to time and additions made to the old ones. New functions are assigned to old administrative agencies as temporary convenience happens to dictate. Gradually the administrative structure takes on the appearance of a rambling and uncultivated bramble patch. All principles of sound organization are neglected—sometimes deliberately violated. Administrative organization has become as obsolete as a 1910 airplane. The only remedy is almost complete reconstruction, which, by legislative methods, is very difficult to bring about.

Such conditions, according to modern students of public administration, could be largely avoided if the chief executive were given adequate power to revamp administrative organization by executive order. It is not contended that the executive head should have unlimited power to create, abolish, and reassemble as he sees fit, but that he should have enough power to keep the administrative system from falling into disorder and disrepair and to make the necessary internal adjustments to keep it abreast of current problems and needs. Acting by executive order, he would be able to make changes promptly and swiftly. He would be likely to have a more intimate and practical knowledge of the changes needed from time to time than a legislative body, and he would be unhampered by the embarrassing political pressures and entanglements which so often paralyze the legislature. He would probably make mistakes, but he would be able to correct those mistakes easily and quickly. In order to satisfy the principle of separation of powers, the legislature would have to lay down certain broad policies of administrative organization to control and guide him; but these need not seriously limit his power to reshape the administrative structure as needed. In order to prevent abuses of power on the part of the chief executive, the legisla-

ture might retain the right to disallow executive orders making administrative changes.

Reorganization by executive order. American legislatures, as has already been said, have not embraced this idea with great enthusiasm. Nevertheless, a beginning has been made. In cities under the commission plan, the power to make changes in administrative organization not fixed by charter or statute belongs to the city commission. The commission, of course, is both city council and chief executive, the principle of separation of powers being ignored. Whether, in making administrative changes, it acts as legislature or executive cannot be determined. Some cities under the manager plan give the city manager considerable freedom in making minor changes in internal administrative organization. Here again, to be sure, the principle of separation of powers is not a factor, since the manager is a fully controlled appointee of the council. Although a majority of the state legislatures have enacted rather comprehensive administrative reorganization measures since 1920, very few of them have given the governor much authority to make changes, even in the administrative agencies which have been placed entirely under his control.

The question of giving the President greater power to reorganize the administrative structure has been before Congress for a long time. During the First World War Congress enacted the Overman Act which gave the President large power to make needed changes of administrative organization for the duration of the war and six months thereafter. When this power lapsed, it was not renewed. In 1932, under pressure for economy, Congress authorized the President to initiate proposals for administrative reorganization, which should become final upon approval by Congress. President Hoover presented eleven proposals to Congress, and all were disapproved. In 1933 Congress passed an act empowering the President for a period of two years to make sweeping changes in the administrative system by executive order. The President's orders did not have to be affirmatively approved by Congress, but could be disapproved by a majority vote in both houses. It was now up to Congress to take definite action to disapprove rather than up to the President, as under the previous law, to secure the approval of Congress. President Roosevelt issued several orders making important administrative changes, and none was disapproved. However, when the law expired, the power was not renewed.

In 1939 Congress passed the so-called Reorganization Act, which gave the President power to prepare and put into effect by executive order comprehensive plans of administrative reorganization. The act

did not allow the President to abolish an existing department or create a new one, and it enumerated twenty-one agencies which might not be included in any reorganization plan. The President was authorized to conduct extensive studies of administrative organization and to prepare complete and detailed plans for making transfers, consolidations, and abolitions. Each plan was to be transmitted to Congress with an explanatory message, and no plan should take effect which was not submitted to Congress before January 21, 1941. If, at the end of sixty days Congress had not disapproved the President's plan, the executive order should take effect. Under this law President Roosevelt submitted to Congress five reorganization plans, each of which was approved and went into effect. The Act of 1939 expired at the end of two years. Congress in 1945 passed a new reorganization act, to continue until 1948. The Act of 1945 was generally similar to its predecessor of 1939, though differing in the number of exempted agencies, the congressional procedure for disapproval, and limitations on the discretion of the President. Three reorganization plans submitted by President Truman in 1946 were allowed to go into effect.

Administrative Personnel

The problem of administrative personnel is everybody's problem, but not everybody realizes it. We are all rapidly coming to understand that government is not an abstract something which occasionally enters into our personal affairs. If the Second World War has done nothing else, it has driven home the fact that government is a large and concrete factor in our personal affairs all the time. Not only that; it has also made us increasingly aware of the fact that government touches us chiefly through the medium of living men and women. It seems sometimes that every other person one meets is engaged in some kind of government service, and we know from much experience that these public servants are people like ourselves and perform their duties in about the same way. When they are able, qualified, and devoted, they do good work—just as correspondingly able, qualified, and devoted persons do in private affairs. When the reverse is true, they do bad work—just as in private affairs—and we have inferior government. The problem of administrative personnel is simply the problem of how to get the best results in hiring, managing, or (if need be) firing public servants. It is everybody's problem because it vitally affects everybody. Everybody pays in money, privation, inconvenience, and injustice for the incompetence and wrongdoing of public servants.

From the spoils system to the merit system. Although the idea of a spe-

cially selected and skilled body of civil servants on permanent tenure is not new, although it seems so to many Americans. Just about the time that European countries were taking the first steps to eliminate the spoils system, we, who had previously avoided it, became persuaded that it was an essential ingredient of democracy. In the early years of our republic, owing to the prevalent property qualifications for office-holding and the colonial tradition that public office was a vocation for the upper classes, changes of party control did not result in a general turnover of all public jobs. On assuming the Presidency in 1801, Thomas Jefferson mildly complained that of the incumbent Federalist office-holders few died and none resigned; but he did not conceive it to be proper for him to make wholesale replacements. Changes were made in important posts at the top, but the minor jobholders were not extensively disturbed.

This attitude continued until 1829, when Andrew Jackson came roaring into office with a "new deal." Swept into power by the revolt of the masses against the superior social and political pretensions as well as the economic privileges of the old aristocracy, Jackson, thoroughly imbued with the equalitarian spirit of the frontier, was easily persuaded to "clean house." Proclaiming the watchword "To the victor belong the spoils," Jackson instituted a general purge of all jobholders who were not loyal Jackson men. Thousands of long-established civil servants were thrown out and "deserving Democrats" took their places. In defense of this unprecedented housecleaning the Jackson people advanced the principle of rotation in office. Long tenure of office, they maintained, was incompatible with democratic institutions. Permanent jobholders always had, and naturally always would, tend to form an aristocratic and irresponsible bureaucracy, indifferent to the interests and needs of the common man. In order to keep the government close to the "grass roots," there should be a frequent rotation in office, allowing men fresh from the people to take over and run the government from top to bottom. Special qualifications of education and experience were said to be of secondary importance. There was no public job too difficult for a man of intelligence and common sense to learn quickly and easily.

The spoils system strongly appealed to the universal office hunger of the masses and the rotation principle provided a plausible rationalization. Not only in the federal government but in state and local government as well public employments of all kinds came to be regarded as legitimate prizes of party warfare and were parceled out as rewards for political service with little regard to the fitness of the applicant for the job. Public administration sank to incredible depths of demoralization, inefficiency, and corruption. During the Civil War, Abraham Lincoln

repeatedly complained that jobseekers gave him more trouble than the rebellion, but admitted that political necessities forced him to bow to the spoils system none the less. Congress had made a half-hearted attempt in 1853 to mitigate some of the most glaring evils of the spoils system by passing a law requiring preservice examinations for clerkships in certain administrative departments. This law was of no help to Lincoln because it was full of loopholes and could not be effectively administered. In 1871 the evils of the spoils system impelled Congress to try again, but the results were no better than before. It took the assassination of President Garfield in 1881 by a disgruntled office seeker to shock the country to a realization of the urgent need for civil service reform. After long debate, Congress in 1883 passed the Pendleton Act, which instituted the merit system in several branches of the federal administrative service. Carried along by the same wave of public opinion, the New York legislature in the same year enacted a similar law applicable to the administrative service of that state. Massachusetts fell into line in 1884, and was followed by several of the larger cities.

The drunkard did not quickly give up his grog. Further progress came, but much more slowly than had been hoped and expected. Even today a large portion of the public service remains untouched by the merit system. Approximately two-thirds of the positions in the federal administrative service have been placed under the merit system, but more than 300,000 are still gambits of the spoilsmen. Partial introduction of the merit system has been accomplished in about a third of the states, in most of the major cities, and in a few scattering counties and other local units. Not yet placed under the merit system, however, are more than 150,000 state jobs, 240,000 city jobs, and 260,000 county jobs. Thus it is evident that plenty of fruit still remains on the political plum tree, and that political victory may still bring an abundant harvest of spoils.

Elements of the merit system. The main features of the merit system are: (1) the selection of administrative officials and employees strictly on the basis of merit as disclosed by required preëntrance examinations, tests, education, or experience qualifications; (2) permanent tenure for merit appointees so long as they continue efficient and behave themselves properly; (3) protection of merit appointees against removal, discipline, discrimination, and interference on political grounds; (4) merit appointees forbidden to engage in political activities; (5) merit appointees to be advanced in rank, responsibility, and compensation by merit tests similar to those employed for original selection; (6) administration of the merit system by an independent, nonpolitical agency. American civil service laws embody most, if not all, of these fundamentals. Progress in

the perfection of the merit system in this country has been slow but continuous.

The classified service. The first step in putting the merit system into operation is to determine which positions are to come under that system and which are not. That problem might be simply solved by placing all administrative positions under the merit system, but American opinion has not been ready to go that far. Heads of departments, members of major boards and commissions, and heads of government corporations and other principal agencies are always exempted from the merit system. It is customary also to exempt principal subordinate officials, confidential secretaries and assistants, and various special appointees. Unfortunately, it is also customary to exempt large numbers of minor officials and employees.

The usual practice is for the legislature in enacting the civil-service law to divide the administrative service into two major categories, known as the classified service and the unclassified service. Positions in the classified service are under the merit system and those in the unclassified service are not. This is the chief difference between the two, though the classified service takes its name from the fact that its positions are supposedly classified by title, rank, duties, and compensation regardless of the department or other agency in which they are placed, whereas those in the unclassified service are not so treated. The decision as to whether a position or group of positions is to go in the classified service is usually made either by legislative enactment or executive order. In the federal government, Congress often places positions in the classified service by so declaring in the law creating them. Congress may also pass laws extending the merit system wholesale to all positions of a certain description. A good example is the Ramspeck Act of 1940, which provided that about 200,000 employees of the temporary government agencies should be under the merit system provided they passed noncompetitive examinations. The federal civil-service law also authorizes the President by executive order to transfer existing positions of various kinds to and from the classified service. Such transfers may not be overruled by Congress.

State and local civil-service laws seldom give the chief executive the same degree of power. In many instances the civil-service law as originally enacted includes provisions which attempt to describe and define the characteristics of positions to be placed in the classified service so fully as to leave little room for discretion. The civil-service commission is then authorized to make a study of all administrative positions and make a list of those which under the terms of the law belong in the

classified service. The legislature, if it approves this list, formally declares that it constitutes the classified service. Another common practice is for the legislature to make an arbitrary designation of positions to be included in the classified service, following no particular principle of differentiation. New positions are placed in the classified or unclassified service by the legislature at the time of their establishment. Occasionally the chief executive is given limited authority to place positions in the classified service.

Here we encounter a point of weakness in the merit system found in the United States. Nowhere does the classified service include all of the positions which should be nonpolitically filled and administered. Nor has there yet been evolved a generally acceptable principle of inclusion and exclusion. Ardent civil-service reformers insist that all administrative positions save that of chief executive should be under the merit system. Opponents of civil-service reform would confine the merit system to minor positions of a routine nature. Between these two extremes are the moderates, who believe that all administrative positions save those involving responsibility directly to the chief executive and those of a highly personal or confidential nature should be under the merit system. Our actual practice usually is a compromise between the second and third views—between the Antis and the Moderates—and, as a result, multitudes of jobs which clearly ought to be under the merit system are still bandied about as spoils of political warfare.

Induction into the classified service. Vacancies in the classified service are filled by applicants who have successfully passed some kind of merit test. As far as practicable competitive examinations are used. All applicants are required to take the same examinations (physical, educational, psychological, and otherwise) and are held to the same standards. Those who pass are ranked according to the grades made on the examinations. For a good many positions, however, competitive examinations are not feasible. For these, noncompetitive (sometimes called unassembled, because the applicants are not assembled for examination at one place) examinations are used. Noncompetitive examinations may include a personal interview and always require the applicant to submit authentic proof that he possesses the special kinds of education, training, experience, and occupational competence requisite for the position. For unskilled labor jobs only a physical examination and an inquiry as to moral character may be required. Applicants for such jobs are sometimes exempted from any form of required examination and are appointed on the basis of priority of application.

Examination procedure is virtually the same in federal, state, and local merit systems. Public notice of forthcoming examinations for cer-

tain positions is given, and persons desiring to take these examinations are required to file application papers supplying various items of information about themselves. If the examination is to be competitive, the time, place, and other important facts are also announced. At the appointed time the applicants assemble at the designated place and take the prescribed examinations under the supervision of a civil-service official. If the examination is to be noncompetitive, the applicant is supplied with elaborate blank forms and questionnaires which he must fill out and return, is required to give the names of references who may be consulted by the examining officials, and is sometimes asked to submit copies of books, articles, or papers that he has written. Very often special investigators conduct extensive inquiries as to his past career.

Applicants are graded and given ratings in accordance with their showing on the examinations. Then a list of eligibles is prepared. Rank on the eligible list is usually determined by the order of rating on the examinations, except in the case of war veterans. The federal civil-service laws and those of most of the states and local governments give a preferential rating to war veterans. Under the federal law, for instance, five points are arbitrarily added to the grades of disabled veterans. Veterans with continuing service-connected disabilities must be placed first on their respective eligible lists. Height, weight, and other physical requirements may be waived for war veterans, and closed examinations may be reopened to them. Special consideration is also given to the wives and widows of war veterans.

Success in getting one's name on the eligible list, even at the head of the list, does not insure an appointment. Appointments are made only when vacancies exist, and eligible lists are usually kept alive only for a year or two. Should no vacancy occur during the life of the list, nobody on that list can expect an appointment. Sometimes names are carried over from old lists to new ones, but this is not a universal practice. If, however, a vacancy does occur, the procedure of appointment usually is for the appointing officer to request the civil-service authorities to certify to him the names of those eligible. Some civil-service laws require that only the name of the person at the head of the list be certified; some require the certification of the three highest; and some require the certification of all eligibles in order of rank. The appointing officer must make his selection from the names of certified eligibles. Some civil-service laws require him to appoint the person standing highest on the eligible list; some require him to choose one of the three highest; some allow him to choose whom he will from the eligible list; and some provide that if he does not wish to appoint the highest person or one of the three highest, he may request another certification of one

or three, and so on until he finds the person he wishes to appoint.

Abuses in connection with examination, certification, and appointment are not uncommon. Cheating, false marking, personation, and other methods of "beating" the examinations occasionally occur, and dishonest certification is not unknown. Where the appointing officer can demand a new certification, juggling the eligible list to bring up the name of a personally or politically preferred individual quite frequently occurs. The civil-service laws very often provide for temporary appointments without examination, and this practice has resulted in serious abuses. Temporary appointments periodically renewed have served as a device to pack the classified service with political appointees.

The administration of the merit system. The law usually provides for either a civil-service commission or a department of personnel to administer the merit system. The commission is more popular in the United States. The federal law calls for a bipartisan commission of three members appointed by the President and Senate. State and local laws providing for a commission follow much the same pattern. In the states the members of the commission usually are appointed by the governor and confirmed by the senate; in cities the appointments are generally made by the mayor, though in some instances civil-service commissioners are chosen by the council or elected by the voters. When a single-headed department is used instead of a commission, it is presided over by a director of personnel appointed by the chief executive; and there is usually also a board, of which the director is a member, for the purpose of making rules and hearing appeals.

Under the commission type of administration, an elaborate organization is set up under the civil-service commission. A secretary or executive director is appointed to direct this organization under the general supervision of the commission. Under the secretary there is a staff of examiners, investigators, classification experts, rating experts, and so on. Much the same sort of specialized organization is found in the single-headed department of personnel, but is administered under the authority of one man rather than three or more.

A bipartisan civil service commission is seldom an unpartisan body. The purpose of the bipartisan requirement is to prevent one party from gaining complete control and using its power to undermine the merit principle. The presence of commissioners of more than one party is supposed to make for vigilant criticism of any moves by the majority to debauch the merit system. Sometimes it does and sometimes it decidedly does not. There have been instances in which the minority member or members, in consideration of special personal or political favors, have conspicuously neglected their watchdog rôle. The bipartisanship require-

ment very often results in the choice of strong party men, more concerned in looking after the interests of their party than in promoting the merit principle. Such men, when it comes to a choice between rigorous administration of the merit principle or favoring the spoils system, are likely to feel that "live and let live" is a good enough policy as between parties. If there is any branch of the public service which should be made wholly immune from party politics, or politics of any other variety, it is personnel administration. The bipartisan requirement often has just the contrary effect, and the situation is not helped by the fact that civil-service commissioners, as a rule, are appointed or elected by processes which do not exclude party bias and party interest. One of the best things that could be done for the merit system would be to put the civil service commission or director of personnel and all of their subordinates under the merit system.

Merit-system problems. The actual day-to-day management of the classified service involves many problems calling for special training and experience. Examination procedure at best is but a screen to sift out the undesirables. Those who pass the examinations and are inducted into the classified service should be, and usually are, superior raw material. But they are only raw material, which may or may not be fused into a superior organization. Civil service commissions and personnel departments, in order to promote the building of the classified service into a superior working force, have given much attention to the problem of morale and discipline, the problem of efficiency records and ratings, the problem of promotions, the problem of compensation, and the problem of retirement.

If the morale of an organization is good, disciplinary problems are not likely to be numerous or serious. However, it is necessary in large organizations to have rules and see that they are obeyed. The important thing, from the standpoint of morale, is that the rules should be fair and reasonable, and should be honestly and impartially enforced. Rules governing the personnel under the merit system usually are imposed by the chief executive, the heads of departments and other administrative units, and the civil-service commission. Infractions of rules usually bring penalties ranging in severity from an official reprimand to dismissal from the service. Demerits on the service record, fines, curtailment of vacations, demotion, and suspension without pay are other common forms of penalty. Merit-system laws universally forbid dismissal from the service or the infliction of any other penalty for trivial, personal, religious, racial, political, or other reasons unrelated to the good of the service.

Lest superior officers not in the classified service use their disciplinary

authority improperly, it is generally provided that no penalty may be imposed on a classified appointee without notice and opportunity to be heard, and on severe penalties the appointee commonly has a right to appeal to the civil-service commission. If the commission does not uphold the superior officer, the penalty may not be imposed. Appeal to the courts ordinarily is not permissible unless the civil-service commission has abused its discretion. A large part of the difficulties in the administration of discipline arises from the fact that the officials charged with that duty are politically elected or appointed. Their tenure of office is relatively brief, and, whether or not they use their authority over the career appointees for political purposes, they seldom share the latter's interests and sympathize with their viewpoints. This undoubtedly acts as a damper on morale, and often causes the merit appointees to suspect the motives of their superiors.

One of the most important factors in good personnel management, and incidentally in the development of sound morale, is to establish a clear path from the bottom to the top, so that the conscientious and ambitious merit appointee may always have an incentive to do his best. Unfortunately, American civil-service practice is defective in this respect. Many of the most desirable jobs—the headships of divisions, bureaus, and departments—are not included in the classified service. They are reserved for the "big shots" of party politics. The classified appointee can work up to a certain point and beyond that he cannot go. He may be far better qualified for the higher job than the political appointee who has superior authority over him—in fact, he may actually do most of the work that his superior is supposed to do and gets credit for doing—but he can never have the salary and the honor that the political "bird of passage" enjoys. To escape from his blind-alley job, the merit appointee may give up his public-service career and seek more lucrative employment in private business, or he may just settle down in the classified service and accept his lot as a petty official with no other object than to hold his job until death or retirement overtakes him. The British have attempted to solve this problem by a dual arrangement which provides for a political chief and a permanent administrative chief of each department. The political head has a seat in the Cabinet and attends to political matters, while the permanent head actually administers the department.

Most American civil-service systems provide for promotions on the basis of merit, though the range of promotion is limited to the classified service. Promotions to higher positions are sometimes based on competitive examinations alone and sometimes on the service record alone. Usually, however, these two bases of promotion are combined,

with the one which is considered most important being weighted somewhat more heavily. Objective systems of keeping permanent records and establishing fair ratings of each appointee's service efficiency have been widely introduced. All of these systems take account of such factors as punctuality, regularity, misconduct, ability to get along with others, accuracy, initiative, judgment, quality of work, quantity of work, and individual development. The ratings are not made by one person, but represent a composite judgment of various individuals in a position to know of the appointee's efficiency. Much progress has also been made in working out equitable systems of compensation, basing salary schedules upon the character of the job and establishing uniform salary rates throughout the entire classified service for the same kind of work.

The retirement of superannuated appointees is essential to the success of the merit system. It is a violation of the merit principle to retain employees in service after they have passed the age of fitness for efficient work. Retirement systems have been in vogue in some branches of municipal and state civil service for many years, but not until 1920 did the federal government make provision for the retirement of civil officials and employees on pensions. This system has been gradually extended to include all permanent appointees and many not on a permanent basis. Under most of the civil-service retirement systems a fund is accumulated through contributions from the public treasury and deductions from the compensation of employees. At a stated age, usually 65 or 70, the appointee is automatically retired and draws a pension from the accumulated fund. The amount of the pension may be a sum fixed in advance or a stated percentage of his salary at retirement or of his average salary throughout his entire term of service. The management of these retirement funds is itself a big problem. They must be conducted on the same actuarial principles that are used in building up the reserve funds of life-insurance companies, and must be so invested and managed as to avoid material loss or shrinkage. Unfortunately, in some instances, pension funds have been so unwisely managed that retired employees have had to take reduced pensions or none at all.

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CHAPTER 16

THE JUDICIAL PROCESS

The American Legal System

Law, to many persons, is a profound and perilous mystery, and the processes of legal administration are viewed with mingled awe and uncertainty. While it is regrettable that this should be so, it is easy to understand. The United States has perhaps the most complex legal system on earth. If American legal institutions could be described in a single word, that word would be "diversity." Flourishing under the American flag are so many distinct and largely independent bodies of law that expert lawyers do not pretend to have more than a superficial knowledge of more than one or two of them. There is a system of law for the federal government, one for each of the forty-eight states, one for the District of Columbia, one for each of the several territories and dependencies of the United States, and one for each semiautonomous municipality and each other local unit with powers of local self-government. No two of these many bodies of law are identical, though all have certain common principles and characteristics due to basic kinship. All rest upon much the same foundational structure and have developed as many similarities as differences. By disregarding the differences and concentrating on the broad similarities, it is possible to get a composite view of American law as a whole.

Backgrounds of American law. Though the great bulk of American law today is of legislative origin, the underlying principles nearly all go back to English law. Exceptions may be noted in a few sections of the country which have been exposed to French and Spanish influences, but even there Anglo-American legal concepts have tended to crowd out the earlier precepts of the Roman law which were inherited through France and Spain.

English law, as transplanted to America in the seventeenth and eighteenth centuries, was the product of an evolutionary process that had been going on since the Angles, Jutes, Saxons, and other Teutonic tribesmen left the forests of Germany and descended on the British Isles nearly a thousand years before. These early progenitors of the English people brought with them family and tribal usages, customs, and traditions which had been handed down by word of mouth for no one knows how many generations. These could scarcely be regarded as law in the modern sense.

They were simply a part of the folklore of the Anglo-Saxon peoples with which everyone was presumed to be familiar. When disputes and differences arose, a council of elders or an assembly of fighting men, deeply respected by all and thoroughly versed in tribal lore, would hear the controversy and decide how the tribal customs applied. Thus it seemed to these untutored tribesmen that the rules governing their social relations were not commands from a ruling power but venerable precepts of social justice which had existed from time immemorial.

The common law of England. The Anglo-Saxon conquest of Britain was a piecemeal affair. One band of marauders gained a foothold in one locality, another in a second locality, a third elsewhere, and so on. There was no united and uniform subjugation of the whole area. Finally, however, the Britons were driven out of what we now know as England, but at first there was no united government of England. Instead, there sprang up a large number of tiny Anglo-Saxon commonwealths, such as Northumbria, East Anglia, Mercia, Wessex, and Sussex. Collectively these became known as England, but, of course, England was a region and not a state.

As each band of raiders settled down and built up its own government, and as civilization advanced among them, the customs and usages brought from the homeland gradually developed into more or less formal law. Soon there were as many bodies of Anglo-Saxon law in England as there were petty states. These legal systems differed in many particulars, but had many features in common, as was bound to be the case among peoples so closely related by blood and historical background. It became customary, therefore, to speak of the legal rules and practices which were common to all of the Anglo-Saxon commonwealths as the common law of England. It was the law which all people in England had in common, though it was administered by separate governments. After many years of conquest, confederation, and alliance, the petty Anglo-Saxon states of England were welded into a united kingdom under one government. Thus England was transformed from a region into a state, and the common law became the basic law of that state.

After the Norman Conquest in 1066 the process of building up the common law went forward very rapidly. The Norman kings, having a passion for uniformity and centralization, assumed the prerogative of administering justice throughout all of England. Soon royal judges, sheriffs, coroners, and other officials (often even the king himself) were traversing the land, interpreting law and meting out justice. The result was to give the common law a definite formality which it had not previously possessed.

Among the judges there arose a rule known as *stare decisis*. According to this rule, a decision on a point of law became a binding precedent for

future judges dealing with the same point. The rule of *stare decisis* brought consistency into the common law and also rigidity. Eventually the time came when judges were so fettered by past decisions that they could not easily adapt the law to situations. Judicial decisions were recorded in annual volumes known as yearbooks. Every judge, before making a decision, had to search the yearbooks for precedents. Finding one, he had to follow it as an authentic and binding rule. Nor was his predicament much better if he could find no precedent. Then he must either throw the case out of court because the common law had no rule applicable to it, or he must take the chance of trying to construe the facts to fit an established rule—often a very risky and difficult thing to do. There were stereotyped rules and procedures on contracts, conveyances, land titles, wills, civil wrongs, crimes, and many other subjects. If the case before the court could not be made to fit any of these fixed patterns, the litigants could not find justice in a common-law court. The common law had become so largely petrified that other avenues to justice had to be found in multitudes of cases.

Collateral bodies of English law. Some areas of human affairs did not come into the province of the common law. One of these was the business of the church. The property of the church, its clergy, and most of its operations were under canon or church law, which was administered by ecclesiastical tribunals entirely separate from the common-law courts. Canon law was largely derived from Roman law. Another area that lay beyond the authority of the common-law courts was the law of the sea. The jurisdiction of the common-law courts ended at low tide, and they would not take cognizance of such things as collisions at sea and other maritime affairs. Among navigators, shippers, and seafaring people there grew up a body of rules and usages which came to be known as admiralty or maritime law. Common-law courts would not enforce this law, so special admiralty courts were created for that purpose. The same thing happened in the field of commerce. Many of the practices of trade guilds and merchants were beyond the pale of the common law, so they fell back on their own "law merchant"—a body of established rules and practices enforced by special guild courts or mercantile tribunals.

These collateral bodies of law were of great service to the special groups able to benefit from them, but they did little to moderate the severities of the common law for the average man who was not a churchman, a navigator, or a merchant. When he had exhausted his remedies at common law, his only means of further relief was to appeal directly to the king. In legal theory the king was the source and fountain of all law and justice, and therefore had authority to set aside the decisions of the common-law courts and order the case to be settled on the basis of equity

regardless of technical rules of law. In doing this, the king was said to administer equity, rather than justice in the strictly legal sense.

Equity. So many disappointed litigants were constantly beseeching the king to do equity for them that it became necessary for the monarch to delegate this task to someone less burdened with other responsibilities. The official selected was the lord chancellor. The lord chancellor was a clergyman, the king's private confessor, and was sometimes called "the keeper of the king's conscience." He was supposedly closer to the king than anybody else and advised him on moral and spiritual matters. At first the chancellor merely administered equity in the name of the king, following the dictates of abstract justice. But chancellors were churchmen, trained in the Roman law and accustomed to the workings of the canon law. In making decisions of equity it was natural for them to turn to legal principles with which they were familiar, and for succeeding chancellors to be guided by precedents established by their predecessors. Thus the rule of *stare decisis* found its way into the administration of equity and led to the gradual development of a body of definite rules known as the law of equity. A special system of courts with the lord chancellor at its head—courts of chancery, they were called—was created to administer equity.

For many years common law and equity stood side by side as separate systems of law administered by separate courts. So long as a litigant had a remedy at law, he could not get a hearing in chancery. If a man appealed to a court of chancery, he was obliged to show first of all that his case was not one for the common law courts. This done, the equity courts would take jurisdiction and handle the case according to the rule and maxims of their system of law. There were many things they could do which a common-law court could not. Having behind them the mandatory authority of the king, they could issue orders in a summary fashion and get them obeyed regardless of technicalities. If they deemed a contract inequitable, though it might be a good contract at common law, they could order it dissolved. If the parties refused to obey the order, they could be thrown in jail for contempt of court without a jury trial. Equity courts did not use the jury system. The chancellor was both judge and jury. If the chancellor decided that money damages (the only remedy at common law for breach of contract) was not just compensation for the injured party, he could order the defaulting party, on the penalty of going to jail, to perform specifically what he had agreed to do. If the chancellor became convinced that irreparable damage might be done before the common-law courts could get around to settle the issues of a controversy, he could issue a mandatory injunction restraining one or both parties from disturbing the existing state of affairs until the issues could be fully tried in court.

Statute law. The English parliament, at first with the consent of the king and later on its own authority, added greatly to the complexity of English law by enacting statutes which created new law or restated in authoritative terms the existing law. Statutes enacted by the national legislature might apply to any and all bodies of law, and always supplanted the law based on judicial decisions. Certain monumental statutes, such as the Statute of Frauds and the Statute of Limitations, came to be fully as important as the older judge-made rules of the courts. As time went on, parliamentary enactments, or statutes, became the chief source of law.

The unification of English law. As a result of a long series of reforms, the several independent bodies of English law were merged in 1876 into a single system of law administered by a unified judiciary. Many of the old terms, forms, and uses were retained, but this survival did not prevent a thorough consolidation. It is important to note that this consolidation occurred in 1876, a century after the American colonies had declared their independence from England. American law might be less chaotic in many respects if the consolidation of English law had taken place before our separation from the Mother Country.

The development of American law. Each of the American colonies took over as much of the English law as was suited to colonial conditions and proceeded to add to it. Colonial legislatures enacted statutes supplementing or modifying the English law, and colonial courts interpreted and applied not only colonial statutes but also English common law, equity, admiralty law, mercantile law, and so on. The separation between the different bodies of law was followed in some colonies more strictly than in others. After independence, each state fashioned its own law and legal institutions after its own ideas, though English models and precedents were largely followed. The adoption of our present Constitution in 1789 did not materially restrict the freedom of the states in shaping their own law and legal institutions. The Constitution delegated to the federal government full lawmaking power in certain fields (thus laying the foundation for a system of national law in addition to the legal systems of the states), but did not deprive the states of their general lawmaking powers.

Gradually in almost every state the inherited as well as the newly added elements of the legal system were fused into a single system of state law. This, as time went on, was enlarged and modified by judicial interpretation and statutory enactment, and was administered by state judicial machinery quite independently of what other states were doing. Though each state went its own way, all traversed the same broad road. Seven states still have separate chancery courts to administer equity. Twelve provide that common law and equity shall be administered by the same courts, but under different procedures. In the remaining twenty-nine the

distinction between common law and equity has almost disappeared. Principles lifted from the canon law and the law merchant have been woven into the fabric of the general law of the states. Admiralty jurisdiction, by a provision in the Federal Constitution, has been delegated to the United States. State legislatures have enacted thousands of statutes altering old rules of law, adding to them, and treating subjects not covered by the older principles of law. Congress has done the same thing in the province assigned by the Constitution to the federal government. Both Congress and most of the state legislatures have enacted elaborate codes, which are designed to reduce to written form all of the law on a given subject.

In all of the states nevertheless there remains a large amount of unwritten law, which for historic reasons is still called common law. Americans now think of the common law as the unwritten law rather than as the particular body of rules which was called common law in England. In every state, and sometimes in federal judicial proceedings, when a point arises that is not covered by any provision of the written law or by any previous decision of a court of that jurisdiction, the judge usually makes a search of the precedents established by courts in England and in other American jurisdictions. If he finds something which applies to the case at hand, he may assume that it is a recognized principle of Anglo-American law, and therefore properly applicable to the case before him. In so doing, he is following what he regards as the common law of his own as well as of other states.

Systems of law in the United States. American law, viewed from the standpoint of jurisdiction, may be classified under five headings: (1) federal law, embracing the Constitution of the United States, the statutes and treaties made under the Constitution, and a certain amount of common law introduced by judicial decisions; (2) state law, including the Federal Constitution (which is a part of the law of every state), the state constitution, state statutes enacted under the federal and state constitutions, and the common law as interpreted and applied by the courts of the state; (3) territorial or colonial law, consisting of the Constitution of the United States in so far as it extends to territories and dependencies, statutes enacted by Congress for the government of territories and dependencies, the statutes enacted by territorial and colonial legislatures under authority granted by Congress, and the common law as interpreted and applied by the federal and territorial or colonial courts; (4) the law of the District of Columbia, including the Constitution of the United States, acts of Congress for the government of the federal District, and the common law as interpreted and applied by the courts of the District; (5) municipal and local law, composed of the ordinances and by-laws en-

acted by city councils and other local legislative bodies under the authority of state and territorial governments.

Viewing each of these from the standpoint of subject matter, we find that each is made up of two fundamental varieties of law—criminal law and civil law. Criminal law is law which defines and describes offenses against the public, prescribes penalties for their punishment, and determines the procedure to be followed in the enforcement of such penalties. Civil law is law which regulates relations between private persons, and relations between private persons and the public, which do not involve public offenses.

Criminal law. There are federal crimes, state crimes, municipal crimes, and crimes for every unit of government having lawmaking power. Although the federal government does not have power to define and punish crimes in general, it has criminal power in connection with the regulation of interstate and foreign commerce, the levy and collection of federal taxes, the coining of money, the issuance of currency, the operation of the postal system, the granting and protection of patents and copyrights, the regulation of immigration, the conduct of war, the management of foreign relations, the enforcement of bankruptcy laws, and the various other powers delegated to it by the Federal Constitution. Because of the expansion of federal functions, there are now scores of federal crimes. All federal crimes are statutory crimes, that is, they are crimes created by acts of Congress. According to the view widely entertained among lawyers, there can be no common-law crimes under federal jurisdiction because the Constitution presumably delegated no common-law authority to the federal government.

The general power to define and punish ordinary crimes was reserved to the states. Such power resided in the state governments before the Constitution was adopted and has never been taken from them. State legislatures have broad power to enact statutes defining and punishing crimes, and can even go so far as to make violations of federal law also punishable as crimes against the state. However, there would be state crimes even if the state legislatures should never enact any criminal statutes; for, according to legal theory, every state has inherited as the basis of its legal system the underlying principles of the common law. Anything that was a common-law crime would be a crime against the state even though it was not specifically made so by action of the state legislature. Very few strictly common-law crimes exist today. All the states have taken the common-law crimes as the basis of their criminal codes, but have greatly elaborated and modified them by statute and have added many new ones. The traditional common-law crimes included as-

sault, battery, kidnaping, mayhem, rape, homicide, burglary, arson, robbery, larcency, and forgery.

Criminal law in the several territories and colonial dependencies is based on enactments by Congress supplemented by enactments of the local legislatures. Sometimes Congress enacts a criminal code for United States territory not yet admitted to the Union, and sometimes it delegates all or a portion of that task to the legislative body which it sets up to make local law therein. Congress is the sole legislative authority for the District of Columbia, and the criminal law of the District is enacted by Congress.

City councils, town boards, and other minor legislative bodies have authority to make petty criminal enactments. Violations of such laws usually are ranked as misdemeanors. Serious crimes, which carry heavy penalties (such as death, imprisonment for more than six months or a year, and fines in excess of $100) are called felonies. For the violation of local sanitary ordinances, traffic laws, and the like, municipal and other minor legislatures may inflict penalties of the misdemeanor class. National and state legislatures, of course, may define and punish felonies as well as misdemeanors.

That portion of the criminal law which defines crimes and provides for their punishment is known as the substantive or basic law of crimes. That which deals only with the procedure of arrest, indictments, pleadings, evidence, juries, and other modes of enforcement is known as the adjective, or procedural, law of crimes. Both substantive and adjective criminal law are found in every legislative jurisdiction in this country.

Civil law. Civil law, like criminal law, is found in every governmental unit in this country, and, also like criminal law, it is derived from two main sources—the common law and statutory enactments. The following branches of the civil law are mainly of common-law origin: the law of real property, the law of personal property, the law of contracts, the law of sales, the law of bills and notes, the law of civil wrongs (torts), the law of domestic relations (marriage and divorce), the law of inheritances and wills, and the law of admiralty and maritime jurisdiction. Except for the last named, these branches of the civil law belong almost exclusively to the state governments and their local subdivisions. Only in the District of Columbia and the territories and dependencies does the national government have jurisdiction over such matters. The following branches of the civil law are largely of statutory origin: the law of corporations, the law of bankruptcy and insolvency, the law of mining, the law of irrigation, the law of fisheries, the law of education, the law of public utilities, the law of taxation, the law of immigration, the law of naturalization and citizenship, and administrative law. Constitutional law, also a part of the civil

law, is in a class by itself. It is nothing more than judicial elaboration of the federal and state constitutions.

Civil law is both substantive and procedural, and is much more diversified and technical in many of its branches than criminal law. Although lawyers still speak of the distinction between law and equity, the fact is that equity has been fully absorbed in the civil law. It is now merely a special aspect of civil law, with somewhat different forms, procedures, and remedies.

Judicial Powers and Organization

Judicial powers. The powers of the judicial branch of government are very different from those of the legislative and executive branches. A court has very little authority to act on its own initiative. A legislature is a self-starting political mechanism, and so to a large extent is the executive. If a legislature wishes to act on any matter, it proceeds to do so; if the chief executive wishes to make an appointment or a removal or to issue a rule or an order, he proceeds on his own volition to do so. A court, however, ordinarily has no power to act on anything until steps are taken, either by private persons or administrative officials, to bring the matter before it in proper form for judicial action. When an issue of fact or of law is presented to a court, the court may then bring its various powers into play. The principal functions of courts are to hear both sides of the controversy, to inquire into the facts, to evaluate the evidence, to interpret the law, to make decisions, and to issue orders for putting those decisions into effect. Upon the issuance of orders for the disposition of the case, the powers of the court come to an end. No court has power to carry out its own orders.

It is apparent, therefore, that judicial powers are essentially the powers of an umpire. These powers are not employed in umpiring abstract controversies or general questions, but in deciding actual issues between actual persons. Even in the interpretation of law, this is true. The courts have no authority to make general interpretations of the law, but only to say what the law means in relation to the particular facts of the particular case before it. Should a court, in applying the law to a particular case, go beyond the limits of that case and make a sweeping generalization on the meaning of the law, only those pronouncements which are necessary to the decision of the case before it have binding legal force. Extraneous judicial pronouncements are called *obiter dicta*—sayings beside the point—and do not have the force of law, though lawyers often accord them respect on account of their guidance value.

We should remember, however, that under the rule of *stare decisis* a particular interpretation of law in a particular case will be followed in

subsequent cases of the same kind and probably also in closely similar cases. So what the courts say is law in one case they will in all probability say is law in later cases which they think sufficiently analogous to the first one to come under the same rule of interpretation. In this way the courts actually do establish general rules of law, but their way of doing so is very different from that of the legislature and the executive. Legislatures enact law in general terms to apply to anticipated facts which are broadly described but have not yet occurred. Executives use the ordinance power in the same way. A court, on the contrary, finds that a general rule of law applies in a certain way to a fact-situation that has already occurred, and later that it applies in the same way to a second, to a third, and to other fact-situations as they occur. It is sometimes said that courts stretch the law to fit the facts, whereas legislatures and executives endeavor to fit facts to law.

The difference is not quite so simple as that. Legislatures and executives endeavor to shape and control future facts by requiring conformance with legal enactments. In this they are largely successful, for many of the facts which later come along do fall into the established patterns. When the courts find no discrepancy between the law and the facts, no problem of legal interpretation confronts them. There is no doubt as to the meaning of the law in regard to those facts. But there are frequent cases in which there is doubt. The facts and the law do not squarely jibe, and yet the disagreement is not so complete and irreconcilable as to warrant the conclusion that the law could not have been intended to apply to those facts at all. Shall the courts throw the case out, saying that the law does not apply to it at all? They are justified in doing this only when it is clear beyond any doubt that the law was not intended to apply to such facts. If they are not sure on this point, it is their duty to consider and explore every reasonable implication of the law. Suppose they find implications which convince them that the law *could* have been intended to apply to the kind of facts before them and then declare that in their opinion it *was* so intended. Have they stretched the law to fit the facts or have they merely ascertained and given effect to the full meaning of the law? The former they have no right to do; the latter is a duty which they have no right to evade.

It is true that in giving the law what they consider to be its full meaning the courts may give it a meaning which others may not have supposed it to possess. For that reason courts in the United States are often accused of covertly exercising legislative power. As compared with the courts of other countries, our courts certainly do seem to have lawmaking power. We should remember, however, that under our constitutional system the judicial power is given exclusively to the courts. That limitation means that the sole power to try and decide lawsuits and the sole power to de-

termine the meaning of the law in connection with lawsuits belongs to the courts. Not only does this power belong to the courts exclusively; it also belongs to them independently. No other branch of the government has any constitutional right to control or even to question the discretion of the courts in deciding lawsuits. In other words, when a matter comes into the judicial sphere of authority, the discretion of the courts is just as complete and absolute as the discretion of the legislature in its proper sphere and that of the executive in its sphere. If a question of the meaning of law properly arises in the judicial sphere, the courts have a perfect constitutional right to decide that question without any reference to legislative or executive opinion. Even Americans, who should fully understand the principle of separation of powers, sometimes criticise our courts for not strictly heeding interpretations placed on a law by the legislature which enacted it. Who should know better, it is asked, what a law means than the legislature which made it? What right have the courts to substitute their opinion for that of the legislature? They have this right: that in the sphere of lawsuits the principle of separation of powers requires an absolutely independent judicial interpretation of the law. Legislative or executive interpretation has no place in the sphere of lawsuits unless voluntarily adopted by the courts.

Courts have various auxiliary powers to enable them to perform their judicial functions effectively. These include the power to issue warrants for the arrest of persons charged with violation of the law, the power to compel the attendance of witnesses, jurors, and litigants, the power to require the production of books and papers, the power to impound property needed for evidence, the power to inflict summary punishment for breaches of order in the presence of the court, and the power to issue various mandatory writs such as the writ of mandamus, the writ of habeas corpus, the writ of injunction, the writ of quo warranto, and the writ of certiorari.

Judicial organization. A court consists of one or more judges sitting sometimes with or sometimes without a jury. In addition to these, the court is not completely staffed for work without a clerk, a sheriff or marshal, one or more bailiffs, a commissioner, and attorneys to conduct both sides of the case before it.

In the lower courts in this country there is usually a single judge. Plural-judge courts with us are almost always appellate courts. Whether or not a jury is employed will depend on the character of the court and the character of the proceeding. Juries are never used in appellate courts. In courts of first instance they are not used in equity proceedings, and in other proceedings they may sometimes be dispensed with by the consent of the parties to the litigation.

The clerk of the court is the keeper of its dockets and records. He also prepares many of its writs and orders. Courts of record also have an official reporter who takes down all proceedings in shorthand and makes authentic transcripts of the same. The county sheriff is the executive officer of the state court of first instance in his county. It is his duty to serve papers and to execute orders for the court. The United States marshal is the executive officer of a federal district court, his functions being much the same as those of the county sheriff. Bailiffs are officers whose chief duty is to keep order in the court room and perform various routine duties for the judge. Court commissioners are officers appointed to take testimony out of court, which will later be used as a basis for judicial action. In all judicial trials there are attorneys for both sides. In criminal trials the public prosecutor represents the state, and in federal courts the United States district attorney represents the national government. The defense is represented by attorneys either employed by the defendant or appointed by the judge to appear in his behalf. In civil trials the plaintiff and defendant choose their own attorneys.

In 1939 Congress established the Administrative Office of the United States Courts. This office is placed in charge of a director and an assistant director appointed by the Supreme Court of the United States. The Administrative Office, under the supervision and direction of the conference of senior circuit judges, exercises administrative control over the clerical and administrative personnel of the circuit and district courts, examines the state of the dockets of these courts, investigates the way in which they transact business, supervises the disbursement of money for the work of these courts, has charge of the purchase and use of equipment used by them, provides accommodations for them, and audits their accounts.

This innovation has not yet been taken up by any of the states, but nearly half of the states have established a state judicial council similar to the federal conference or council of judges which was created in 1922. The judicial council is usually composed of one or more judges designated by the governor from the supreme, intermediate, and county courts. Sometimes one or more practising lawyers are included in order to give representation to the bar as well as to the bench. In some states the judicial council is purely an advisory body, but in others it also has power over the assignment of judges from one court to another in order to care for crowded dockets, and in some states it also has rule-making power. Congress has given the Supreme Court of the United States authority to make rules of procedure for all federal courts, and several of the states have given similar power to their supreme courts.

Judicial Procedure

All laws are largely self-enforcing. If it were not so, government could not be carried on. Judicial procedure is invoked only against the very small minority who must be punished for violating it, and is invoked in civil cases by that relatively small number of people who become plaintiffs and defendants in lawsuits. If every criminal law had to be judicially enforced against every citizen and every controversy between private persons had to be tried in court, it would not be possible to have enough judges, juries, attorneys, and the like to do the job. Most people obey the law, live up to their contracts, and otherwise avoid the need of coming into contact with the judicial process. In discussing judicial procedure, then, we are talking about the methods used to enforce and carry out the law only when self-enforcement has failed.

Criminal procedure. Before the judicial process can operate on a criminal offender he must first be apprehended and brought under the jurisdiction of a court competent to deal with the offense involved. The first step, therefore, is the arrest of the accused.

Arrest. A venerable principle of Anglo-American jurisprudence, embodied in both state and national constitutions, forbids unreasonable encroachment on the physical liberty of the individual. Hence it is a general rule that no person may be arrested and detained against his will except upon written process (warrant), issued for a good cause which is stated in the instrument, and issued by a competent court or magistrate. Such a warrant may be issued on the complaint of a private individual or of a duly authorized public official. It states the name of the alleged offender, the acts for which he is to be arrested, and commands the sheriff or police officer to whom it is issued to take him into custody.

Arrests without a warrant are permitted in certain conditions. A police officer may make arrests without a warrant for felonies, misdemeanors, and breaches of the peace committed in his presence. He may also make such an arrest to prevent a breach of the peace in his presence, and for a past felony not committed in his presence when he has reasonable ground to believe that the person arrested actually committed the felony. In some jurisdictions even a private citizen is authorized to make an arrest to prevent a felony in his presence. However, both the police officer and the private citizen are taking a chance. An arrest with a proper warrant is always lawful, but an arrest without a warrant is lawful only under the special conditions described above, and it is up to the one making the arrest to be sure that the facts are actually in conformity with the rule as to exceptions. For making a wrongful arrest both a police officer and a private citizen are liable for damages in a civil action for false imprisonment. In

such an action for damages, if the fact of the arrest is established, the arresting officer or citizen then has to prove that the arrest was justified by the circumstances, and the courts scrutinize those circumstances very closely. Despite the strictness of the law and the courts, wrongful arrests without a warrant are by no means uncommon, yet damage suits for false imprisonment are not numerous. Persons unlawfully arrested often do not dare to sue for damages for fear of bringing out other facts about themselves which they do not wish to have known. Sometimes they are unaware of their right of redress or do not have the means to press a suit to conclusion. Still more often, perhaps, they do not press the matter because, even if they were successful in getting a judgment, the defendant has no money or property which could be levied on to satisfy the judgment.

Preliminary examination. Persons arrested on minor charges may be taken before a justice of the peace or police magistrate and tried immediately, but those arrested on felony charges must be tried in a court of record. Such a court may not be in session at the time of the arrest or may be so busy with cases already scheduled that it cannot immediately proceed with a new case. However, the charges are so serious that the accused should have an immediate opportunity to question the propriety of his arrest and detention. The preliminary examination serves this purpose. The accused is at once taken before a justice of the peace or police magistrate for a hearing to ascertain whether there is reasonable ground to hold him for further proceeding. The officer making the arrest testifies as to the grounds on which the arrest was made; witnesses who can give information as to the probable connection of the accused with the crime may also testify; and sometimes the prosecuting attorney appears and makes a statement. The accused may testify in his own behalf if he wishes, may have an attorney to represent him, and may have witnesses on his own side. The proceeding is not a trial of his guilt or innocence, but a hearing to ascertain whether there is reasonable justification to hold him for such a trial at a later time. Should it appear that the case against the accused is too flimsy to warrant a trial, he will be released. On the contrary, if the hearing develops evidence indicating that a formal trial ought to be held, the accused will be held and "bound over." This decision means that he continues under arrest and will be turned over to the prosecuting attorney or a grand jury for further proceedings. The accused may now apply for release on bail, offering to pledge property or put up an approved bond as security for his appearance in court when wanted. As a rule, the law forbids release on bail in certain cases and permits the committing magistrate to fix the amount and terms of the bail in others. If not released on bail, the accused is held in confinement. If he is released on

bail and then fails to appear when his case is called, he forfeits his bail and also may be subject to arrest both on the original charges and on the additional charge of being a bail jumper.

Indictment or information. The accused cannot be brought to trial without definite charges against him officially made in a formal manner. There are two ways of making these charges—indictment by a grand jury and the presentation of a bill of information by the prosecuting attorney. In federal procedure and many of the states the grand jury method is required. A grand jury is a body of citizens chosen to hear the charges against the accused and decide whether he shall be brought to trial and on what specific questions he shall be tried. The common-law grand jury was made up of twenty-one persons, whereas the trial jury was made up of twelve. So in the original Norman-French terminology of the English courts the two were called the *grand* (or large) jury and the *petit* (or small) jury. American grand juries now usually consist of fewer than twenty-one persons and are often the same size as the trial jury.

If, after hearing the evidence against the accused (it never hears the evidence in his favor), the grand jury decides that the evidence is sufficient, if unrebutted, to convict him of the crime, it votes a "true bill" and orders him brought to trial. Otherwise, it votes "no bill" and orders him released. The "bill" referred to in these phrases is a formal bill of indictment or list of precise charges against the accused. In this document he is alleged to have violated the law in this, that, and the other particular, and is ordered to be tried on each. The particular charges in the indictment are usually known as "counts." An accused person must be tried on each count of his indictment, and may not be tried on anything not included in one of these counts. He may, of course, be convicted on one count and acquitted on another.

The information system is like the grand-jury system except that it dispenses with the grand-jury proceedings and places the entire responsibility in the prosecuting attorney. That official, after investigating and hearing the charges against the accused, prepares a bill of information and files it with the court before which the accused is to be tried. The bill of information, like the bill of indictment, is a formal list of charges against the accused and orders him brought to trial on these charges.

Arraignment. At this stage the accused is brought into court and the bill of indictment or information is read in his presence. Then he is given an opportunity to enter a plea in answer. Previously, of course, he has been allowed to consult a lawyer and he or his attorney has been supplied with a copy of the bill. In his answer he may plead guilty or not guilty. If he pleads guilty, he admits the charges, and no trial is necessary. He may be dealt with just as though he had been proved guilty in

court. If he pleads not guilty, he denies the charges and this makes it necessary to have a trial. The court will appoint the time for the trial.

In some instances he may enter other pleas than guilty or not guilty. One of these is to demur or file a demurrer, that is, to contend that even if the charges against him were true, they would not afford correct legal grounds for the prosecution. This plea raises questions of law which must be settled before further steps can be taken. The prosecutor and the defense attorney argue these questions before the judge. The judge may sustain the demurrer or overrule it. If he sustains it, the proceeding is at an end and the accused is released; for the judge has held that even though the charges are true they are not adequate to sustain a conviction. If the judge overrules the demurrer, the plea is thrown out and the trial must proceed. Another special plea of the same nature is a plea in abatement, in which the accused attacks the legality of his indictment on a technical ground such as that the grand jury was illegally constituted or that the indictment was not in proper form. The judge rules on the validity of this plea.

Trial. The purpose of the trial is to ascertain the truth or falsity of the charges contained in the indictment or information. All else is excluded. If a man is on trial for murder, it is not proper to introduce evidence unrelated to that charge even though it might prove him guilty of some other crime. In other words a trial is not a general inquisition, but a limited inquiry as to the truth or falsity of certain specific charges. Under our federal and state constitutions a person has a right to a jury trial on criminal charges. He may waive this right if he wishes and be tried before the judge alone. In trials for misdemeanors this is commonly done, but in felony trials it is very rare. The theory of the jury system is that a trial before a jury of ordinary citizens like the accused himself is a safeguard against abuses of power by prosecutors, judges, and other officials professionally concerned with law enforcement. The jury, of course, has authority only to pronounce judgment on the facts of the case; all questions of law are decided by the judge.

The principal stages of a jury trial are as follows: (1) the selection and swearing of the jury, (2) the introduction of evidence, (3) the addresses to the jury, (4) the instruction of the jury, (5) the deliberations of the jury; (6) the decision of the jury; and (7) the final orders in the case.

A special jury is chosen for each trial. Prior to each term of court, the sheriff, the clerk of the court, a jury commission, or some other duly authorized official or agency makes up a jury panel. This panel is a list of names, taken from the voting registers or tax rolls, of citizens called for jury service at the next term of court. These persons are notified to be in attendance at the next sitting of the court and to be in readiness for jury

service if selected. When a trial is called, the first step is to empanel a jury. The clerk of the court, by some method of choice by lot, draws a name from the panel. The person named steps forward to the jury box and is examined by the judge and the lawyers on both sides. This examination is to determine whether he is qualified for service on that particular jury. He is required to answer all sorts of questions designed to bring out whether he has any affiliations, interests, or fixed ideas which would make it impossible to hear and decide this case impartially.

Each side has the privilege of challenging the right of the prospective juryman to sit in the particular case. Challenges are of two kinds—peremptory and for cause. A peremptory challenge is the right, without giving any reason, to refuse to accept a certain person as a juror. When a peremptory challenge is made, the judge has no alternative but to excuse the challenged person from service. The number of peremptory challenges is limited by law, but the defense is usually allowed a larger number than the prosecution. There is no limit to the number of challenges for cause. The judge rules on the sufficiency of the reasons given, and may order the person seated regardless of the challenge. This procedure of drawing, examination, and acceptance or rejection continues until twelve persons have been chosen. The twelve are then sworn in as jurors. In some states they are sworn in individually or in groups of four as selected. The law in many states requires the selection of a thirteenth juror to sit and hear the case as an alternate. The alternate participates in the jury deliberations only if one of the original twelve becomes incapacitated. In hard-fought cases it is sometimes very difficult to get a jury satisfactory to both sides. More time may be consumed in getting a jury than for the actual trial itself. It is the privilege of lawyers to ask the court for a change of venue (transfer of the case to another county or judicial district). When the judge believes that it is impossible to get an impartial jury in the jurisdiction of the crime or that for other reasons an unbiased trial cannot be had in his own court, he usually will grant the request for a change of venue.

As soon as the jury has been sworn in the prosecutor steps before the jury and makes an opening statement. First he has the indictment or information read to the jury and then he outlines for them what he proposes to prove and how he expects to prove it. He is followed by the defense attorney who likewise makes a preliminary statement denying the charges against the accused and summarizing what he expects both to prove and disprove. The actual trial is now ready to proceed.

Introduction of evidence. The task of the jury is to decide what the evidence introduced in court shows: whether the defendant is guilty or not guilty. The more common forms of evidence are weapons, instru-

ments, and other articles alleged to have been used in committing the crime; letters, documents, and other writings supposedly having some bearing on the case; photographs, drawings, and diagrams disclosing facts pertinent to the charges; and the testimony of witnesses having personal knowledge of facts related to the charges. All evidence must be properly introduced and connected with the charges. The prosecution presents its evidence first, and as each item of evidence is introduced it must be turned over to the other side for examination. The same procedure is followed with the evidence introduced by the defense.

With witnesses the procedure is somewhat more complex. The witness is first sworn in, taking an oath to tell the truth, the whole truth, and nothing but the truth so help him God. Then he takes his place on the witness stand and the attorney who called him as a witness proceeds to ask him questions. This method of examining the witness is designed to elicit answers which will bring out the facts the attorney wishes to establish and no others. If the witness were allowed to tell his own story in his own way, he might stray far from the points involved in the case and might even give testimony damaging to the side for which he is testifying. When the direct examination of the witness by the lawyer placing him on the stand is ended, the opposing lawyer has the privilege of cross-examining him. This examination is conducted by the same method of question and answer, the object, of course, being to break down or to discredit his testimony on the direct examination.

The rules of evidence are very strict and highly technical. The witness may not give hearsay evidence; his testimony must be relevant to the case; it must satisfy various other exacting requirements. It is always the privilege of an attorney who thinks his opponent is asking a question not permissible under the rules of evidence to object and ask the judge to rule the question out. The judge will inquire as to the basis of the objection and hear the arguments of the lawyers about it. Then he will either sustain or overrule the objection. If he sustains it, the question is ruled out. If the judge overrules the objection, the objecting attorney may say, "I except." This means that he is formally taking exception to the judge's ruling on the ground that it is erroneous. The exception is entered in the record, and may later be used as a basis for an appeal.

Addresses to the jury. After all of the evidence is in, the witnesses on both sides having been fully examined and cross-examined, comes the oratorical feature of the trial. The lawyers on both sides are permitted to address the jury. The prosecution makes the opening speech, the defense follows, and the prosecution is allowed to make a closing rebuttal. The purpose of these speeches, in legal theory, is to give the lawyers on each side an opportunity to review and sum up the evidence and place their

interpretation of it before the jury. In practice however, they are often used for the opposite purpose—to befuddle and mislead the jury by emotional oratory appealing to their sympathies and prejudices. Judges have power to some extent to curb and control this torrent of oratory, but they do not always use it.

Instructions to the jury. It is the duty of the judge, before the case goes to the jury, to instruct the jury as to the law applicable to the case. Except in the federal courts and a few of the state courts, he may not comment on the evidence or say anything to influence the jury in its finding of facts. It is merely his duty to tell the jury what the law is and what it means in relation to the evidence which has been brought out in the trial. If he transgresses these limitations and endeavors to sway the jury in any way, he commits an error which may result in the reversal of the case on appeal. The judge usually reads his instructions to the jury and provides a written copy for use in the jury room. Any time during their deliberations the jury may ask the judge for further instructions. Clear and concise instructions are of great value to the jury, but there are judges who lack the ability to write such instructions.

Jury proceedings. After receiving the judge's instructions, the jurymen retire to a locked and guarded room and take the case under consideration. Their first procedure usually is to elect a foreman to preside over their deliberations. Then, generally without preliminary discussion, they take a vote. Should this reveal that they are substantially of one mind, a decision may soon be reached. But if the vote discloses substantial differences of opinion, they proceed with discussions for a while and then take another vote. This process goes on until they reach a decision or find themselves in hopeless disagreement. In criminal cases a unanimous vote is necessary to convict, and one or two stubborn jurymen can easily "hang" a jury. A "hung" jury may be dismissed by the judge. The case may then be dropped by the prosecutor, or he may have it retried before a new jury.

If the jury comes to an agreement, the foreman notifies the judge. The court is then convened, the accused is brought in, and the jurymen file into the jury box. The judge then asks the foreman if a verdict has been reached. The foreman answers affirmatively and is told to announce the verdict. Thereupon the foreman declares that the jury has found the defendant guilty or not guilty of the charges against him. The judge may then poll the jury, asking each juryman if the verdict as announced is his verdict. If the answer in each case is affirmative, the trial is at an end.

Post-trial proceedings. A verdict of not guilty frees the defendant from the toils of the law except in a few states where the prosecution is allowed to appeal. A verdict of guilty may have one of several sequels. If

the defendant decides not to contest the matter farther, the court may pronounce judgment on him and impose such penalties as he is required or allowed to do by law. Sometimes the judge has a good deal of discretion as to the terms of the sentence imposed and sometimes he has little or none. But in many cases the defendant decides to fight on. His attorney may move for a new trial on the ground that the verdict is contrary to the evidence, or he may give notice of intention to appeal to a higher court alleging that there were errors in the proceedings of the trial court. The judge has discretion to grant a new trial or an appeal. New trials are not often allowed but appeals almost always are. Should the judge refuse to grant an appeal, a higher court might order the case sent up anyhow. Appealed cases are tried in the appellate courts on the basis of the records kept by the trial court. The appellate court is furnished with a transcript of the evidence and proceedings, and the opposing attorneys file briefs and make oral arguments designed to prove that the action of the trial court was either correct or incorrect. Pending a new trial or the decision of the appellate court, the defendant may be released on bail. But if he cannot give satisfactory bail, he may be kept in jail. If the appellate court upholds the trial court, the case goes back to the trial judge for the imposition of the sentence; but if the appellate court overrules the trial court, it will remand the case to that court with instructions as to the further steps to be taken. It may order a retrial, the release of the defendant from custody, or any other legally appropriate action.

Civil procedure. The steps in civil procedure are similar in most respects to those of criminal procedure, but there are certain differences which must be noted. A civil action does not try an alleged public offender, but an issue between parties in dispute over mutual rights and duties under the law. Hence, the proceeding is initiated by a party called the plaintiff. He (through his attorney) files with the clerk of the court a complaint alleging that certain wrongs have been done to him by a person named as the defendant and praying that the court grant him redress in the form of money damages or other relief as prescribed by law. A copy of this complaint, together with a summons to appear on a stated day and make answer, is served on the defendant. If the defendant makes no answer, the case may go by default to the plaintiff. The defendant, through his attorney, may answer by filing a denial of the charges made in the complaint or by making some other form of reply such as a demurrer. The plaintiff then may amend his complaint; if so, the defendant may also amend his answer. This process of complaint and answer develops the issues in the case—in legal phraseology the "pleadings." When the pleadings are completed, the case is ready to go to trial. The pleadings take the place of the indictment or information in a criminal trial; they set forth the specific

questions which are to be decided by the trial. Matters extraneous to the pleadings will not be considered.

A civil case which involves only issues of law is tried before a judge without a jury. If it involves issues of fact as well, it may go to jury on the facts but not on the law. It is always possible for the parties to waive a jury trial, and in equity cases jury trial usually is not permissible. The methods of selecting a jury, presenting the evidence, making the arguments, and instructing the jury are substantially the same in civil as in criminal procedure. The final decision, whether made by the judge alone or by a judge and jury, determines to what extent the facts alleged by the plaintiff are true, to what extent, if at all, the defendant is liable, and what remedial action the law authorizes. This decision is usually known as a judgment or (in equity) a decree.

Proceedings after the trial are similar to those which may occur in a criminal case, both as to retrial and appeal. Final decisions in civil cases are carried out by the executive officer of the court. For example, if the plaintiff has been awarded money damages, the court will issue an order to the defendant to pay such damages. If he fails or refuses to do so, then the sheriff or marshal will be ordered to seize and sell enough of his property to satisfy the judgment.

The Judicial Veto

Several times in previous portions of this book we have commented on the unique power of courts in the United States to declare legislative enactments null and void as being unconstitutional. Because this power is nowhere expressly granted to the courts, some have contended that it is an unwarranted usurpation. Others have insisted that it was not only intended from the beginning that the courts should have this power, but also that it is necessarily and obviously to be implied from express provisions of the fundamental law. This controversy has raged among lawyers, political scientists, and historians for many years. Portly tomes have been written on both sides, but converts have been few.

Basis of the power. We shall not enter into this endless debate. The important truth, for the realistic student of American institutions, is that, regardless of what was intended, the principles of the United States constitutional system are such that it became *possible* for the courts to declare laws unconstitutional and make their decisions effective. The judiciary is an independent and coördinate branch of government, and is given exclusive authority in the realm of lawsuits. The only way that law can be enforced upon individuals, under our constitutional system, is by prosecu-

tion and conviction in court. If the courts refuse to convict, saying that in their opinion the statute is unconstitutional and therefore not enforceable as law, there is no way to compel people to obey it. Violators must be convicted and sentenced by the courts before they can be punished.

Nor can the courts be compelled to convict or be made to suffer for not so doing. Judges can be impeached only for serious misconduct and then only by extraordinary majorities; they are subject to administrative removal only under exceptional circumstances or not at all; when subject to recall by popular vote, the procedure is difficult to invoke and carry through. Moreover, the American people, from the beginning, have approved judicial independence and made it politically dangerous for the legislative and executive branches to attempt to break it down. If the courts have usurped the power to declare laws unconstitutional, it is because the Constitution of the United States and all of the state constitutions gave them the means to do so and the people gave their sanction to the result.

Political aspects of the judicial veto. The question of usurpation is now merely an academic one. The important practical question is not "How did the courts get the power to declare laws unconstitutional?" but, "How do they use it?" Hostile critics of the courts assert that they use it to impose an absolute veto on legislation they dislike. Defenders of the courts, on the contrary, assert that the veto is not judicial but constitutional; that the courts merely give effect to the higher law and that the legislative enactment is rendered invalid by that law and not by the courts. Neither of these extreme opinions is strictly in accord with the facts.

It is undoubtedly true that the courts have often overthrown legislation they did not like, but it is equally true that in almost every instance the judges making the decision were honestly convinced that it was unconstitutional legislation. The trouble is that unconstitutionality is not in many instances a clear-cut and unequivocal fact, but a matter of opinion. The Constitution of the United States and each of the state constitutions as well contain many provisions granting governmental powers and guaranteeing private rights which are couched in language that is more than a little ambiguous. The Federal Constitution, for example, says that Congress shall have power "to regulate commerce with foreign nations and among the several states." In order to ascertain the meaning of this grant it is necessary to know what is and is not commerce, what the power to regulate comprehends, and under what circumstances commerce is "with" foreign nations and "among" the several states. The Federal Constitution likewise forbids both the national and state governments to deprive any person of "life, liberty, or property without due process of law." What is

and is not "due process"? What do life, liberty, and property comprehend?

The courts have to apply these ambiguous terms in lawsuits. For instance, somebody pleads not guilty of violating a law regulating commerce, saying he is not engaged in commerce; or someone seeks to enjoin an administrative official from enforcing a certain law on the ground that it would deprive him of property without due process. Shall the judges say they do not know what these terms mean and therefore cannot decide the case? To do that would be to abdicate the judicial function. Shall they refuse to allow the parties in a lawsuit turning on the meaning of commerce or due process to question the legislative application of those terms? To do this would mean that constitutional powers and rights would be determined exclusively by the legislative branch of government, and no man could defend himself in court on the ground that the legislature had violated rights given him by the Constitution. It is a well-known fact, however, that written constitutions are made to restrain legislatures as well as executives and judges. Shall the courts, then, do the only other thing it is possible for them to do—declare what in their opinion is the constitutional meaning of commerce, of due process, or of any other ambiguous term, and how in their opinion it applies to the case before them? By doing that they can decide the case, if nothing more. And it is their constitutional duty to decide cases. Not only is it their duty to decide lawsuits—the judges also think it is their duty to have an independent opinion on the meaning of the Constitution, and not to close the door on litigants who claim that the legislative opinion is wrong. Does the Constitution enshrine legislative opinion above justice itself?

In some cases legislative opinion and judicial opinion are bound to disagree. If in such cases the disagreement were only a difference on points of law, there would be little criticism of the courts. Unfortunately, however, law and politics are often inseparable. Nearly all legislation in some way touches matters about which there may be a division of interests and attitudes along religious, racial, class, economic, or political lines. It makes no difference what the courts hold with reference to such legislation—whether they sustain it or find it unconstitutional—some groups will be pleased and others offended. That the judicial opinion may have been strictly and honestly based on the court's understanding of the legal principles involved does not alter the popular reaction at all. Those who like the result will continue to be pleased and those who dislike it will continue to be offended. Naturally, therefore, when legislation which is the subject of strong and bitter differences between political parties or powerful pressure groups comes before the courts, the judicial decision, whatever it may be, tends to become a storm center of political controversy.

Political attacks on the courts. Because of their unavoidable involvement in political controversies the courts in this country (particularly the Supreme Court of the United States, which gives the final judgment on major constitutional issues) have been more largely subject to political attacks than the courts of other countries. Time and again in American history eminent political leaders, chagrined by certain judicial decisions, have made furious attacks on the courts and launched proposals to curb their independence and power. Presidents of the United States as renowned as Thomas Jefferson, Andrew Jackson, Theodore Roosevelt, and Franklin D. Roosevelt have been conspicuous in their denunciations of the courts. Prominent members of the United States Senate and House of Representatives and distinguished leaders of organized labor, organized agriculture, and other interests adversely affected by judicial decisions have always been in the forefront of all assaults on the judiciary.

Although none of these antijudicial "blitzes" has succeeded, each has given us a better understanding of the rôle of the judiciary in American government. Especially was this true of the "court-packing" bill sponsored by President Franklin D. Roosevelt in 1937. After the Supreme Court had declared invalid the National Industrial Recovery Act, the Agricultural Adjustment Act, the first Municipal Bankruptcy Act, the first Farm Mortgage Act, and the first Bituminous Coal Act, Mr. Roosevelt and many of his New Deal associates came to believe that the Court was deliberately using its power to destroy the New Deal program. A majority of the members of the Court had been appointed under previous Republican administrations; nearly all were elderly men who had served many years on the Court; and their social and economic views, according to the President, belonged to the "horse-and-buggy" age. Having been reëlected in 1936 by the largest popular and electoral majorities in history, Mr. Roosevelt evidently believed he had a mandate to do something about the Supreme Court.

The court bill of 1937. He did not propose to curb the Court's authority to declare laws unconstitutional. His political intuition must have warned him that the opposition to such a proposal would be too strong to be overcome. His plan was to provide a means for "rejuvenating" the personnel of the Supreme Court and the lower federal courts. The bill provided that whenever a federal judge, having reached the age of seventy and having served ten years, had neither resigned nor retired, the President might appoint an additional judge to the court to which the septuagenarian was commissioned. But the President, by this method, was not to increase the membership of the Supreme Court to more than fifteen, nor to add more than two members to a Circuit Court of Appeals, nor to increase the number of District Court judges in any district to more than twice the

existing number. No more than fifty additional judges in all could be appointed. It was also provided that if any judge of retirement age (seventy years) should die, resign, or retire prior to the nomination of an additional judge, such additional appointment should not be made. The bill also contained various other provisions relative to the organization and procedure of the federal courts.

According to the President the purpose of this bill was to make it possible to infuse new and younger blood into the courts, to prevent the abuse of life tenure by judges no longer competent for efficient service, to provide for additions of personnel when the volume of work was too great to be borne by elderly and enfeebled judges, and to offset the reactionism of the older judges with the progressivism of the younger additional judges. The opponents of the measure saw it as nothing more than flagrant proposal to give the President power to pack the courts with judges who would give him the kind of decisions he wanted. A furious controversy developed. The President's own party split in two on the issue. Public opinion, as the members of Congress promptly discovered and as numerous polls disclosed, reacted strongly against the bill. The President tried to force the bill through by swinging the party lash, but the necessary majorities could not be obtained.

The defeat of the court bill proved that the American people want an independent judiciary. No president ever enjoyed wider prestige and popularity than Franklin D. Roosevelt had in 1937, but the people were not behind him on the court bill. Many who felt that the courts were unduly conservative and sympathized with the political principles and purposes of the President, could not bring themselves to support a measure which might compromise the independence of the judiciary. Later Mr. Roosevelt was able to win a triumph of a very different sort. One by one, after the defeat of the court bill, several members of the Supreme Court died or retired, enabling the President to fill their places with men of his own choosing. Within three years Mr. Roosevelt had a New Deal Court and was able to console himself with the belief that his fight on the judiciary had made this possible. It was, however, a fully independent court with unlimited power to declare laws unconstitutional, and it did not hesitate to exercise that power when it thought the occasion required. Thus, doubtless, the judges in retirement were also comforted with the belief that they had won their fight for judicial independence, even though their successors had different ideas of how judicial independence ought to be used.

Arguments against the judicial veto. There is a school of opinion which holds that the judicial veto is undesirable and ought to be abolished. According to this view, judges are not competent to pass final judgment on

the great social and economic questions which modern legislation strives to solve. Judges, being law-trained and accustomed in their professional experience to hairsplitting distinctions, are said to be unable to take the broad view of things. Moreover, it is said that, by reason both of their education and their experience, lawyers who become judges are likely to be one-sided in their interests and attachments—to give too much weight to property rights as against human rights—and to understand the Constitution in a strictly legalistic rather than in a broad humanitarian way. It is claimed, furthermore, that the courts are farther removed from the plain people than are the other branches of government, and are seldom abreast of current public opinion. Hence, even when they honestly endeavor to function as instruments of popular will, they are always far behind the procession. In a word, say these critics, the judicial veto is necessarily and unavoidably undemocratic.

Arguments for the judicial veto. Believers in the judicial veto answer the foregoing arguments by saying that the courts are the most detached, disinterested, and trustworthy part of our government—less swayed by partisan politics, less influenced by pressure groups, and less susceptible to corruption. Judges as a rule, they say, are men of high education and superior character. That legal education and experience predisposes judges to a bias in favor of wealth and property is strongly denied. Lawyers, it is said, come from all classes of society and work among all classes; neither is their education more narrow than that of any other profession. Why, then, it is asked, is it more undemocratic for a court made up of lawyers to have power to declare that a law violates the Constitution than for a legislature largely made up of lawyers to declare that it does not?

The real point, say the friends of the judicial veto, is whether there shall be any check at all on the freedom of legislatures to follow the Constitution or not as they see fit. If our national and state constitutions are not intended to restrain legislatures, the judicial veto has no place in our governmental system. But, if the opposite is true, the judicial veto is the best possible way to apply such restraints. The courts have no power at all to enact law; indeed, they have no power to act in any way unless somebody, claiming that there has been a violation of law, brings a case before them. And, when their power is thus invoked, it is limited to the decision and disposition of that particular case. For these reasons, the courts are less able than the legislative and executive organs of government to enlarge their own powers and wield tyrannical authority. When the courts exercise the judicial veto, they gain no affirmative power themselves. They cannot build themselves up as a power-exerting agency of government, but only as a power-curtailing agency. Hence, if we do not want our legislatures to play fast and loose with the Constitution, the Courts are the

safest agencies to be entrusted with the power of imposing restraints upon them.

Some results of the judicial veto. There is little evidence to indicate that the American people want their legislatures to have a free hand in constitutional interpretation, and much evidence to the contrary. On the whole, the results of the judicial veto have met with general approval. The fact that no legislative enactment can be regarded as definitive law until it has run the gauntlet of judicial review and received the final sanction of the highest court, has greatly disturbed eager reformers; but the people as a whole have found little fault with this dilatory procedure. The average American seems to think it entirely natural and proper that legislation should be judicially tested. Nor is he outraged by the fact that this results in referring the most important questions of public policy to settlement by lawsuit. Americans are accustomed to that mode of settlement, have made large use of it, and probably have more confidence in it than any other people on earth.

It frequently happens that a law is enforced for many years and that many rights and obligations are incurred under it before it is judicially questioned. When the courts declare such a law invalid, as has frequently happened, serious inconveniences and hardships occur. Illegal taxes in large sums may have been collected; large amounts of money may have been illegally expended from the public treasury; valuable property may be rendered worthless. Although such things are of frequent occurrence, the average American does not get excited about them. The courts have worked out certain mitigating rules as to rights under unconstitutional legislation, and legislatures usually enact measures for the relief of persons who have suffered losses under such legislation.

So long as the courts exercise the power of judicial review and veto with intelligence and restraint, the people of the United States probably will not seriously object to the incidental troubles which ensue. Outcries against the judicial veto arise only when the courts invalidate legislation of great concern to powerful social and economic groups, especially when the courts themselves are closely divided on the question. A long series of such decisions might completely undermine popular confidence in the judiciary, but there is little likelihood that such a thing will ever happen. Judges seem to be well aware of the delicate nature of their responsibility. Not many cases can be cited in which it is clear that the court went out of its way to declare a law void, and the total number of laws invalidated by the judicial veto is much smaller than is commonly imagined. In a century and a half the Supreme Court of the United States has passed judgment on thousands of state and federal statutes. It has nullified fewer than three hundred state laws and fewer than eighty acts of Congress. Even in

the period from 1933 to 1937, when President Roosevelt thought the Supreme Court was deliberately trying to emasculate the New Deal program, the score was decidedly in favor of Congress. Thirty-three cases involving the constitutionality of acts of Congress came before the Court in that period. In twenty-three the Court upheld the law and in ten it held the law wholly or partly unconstitutional.

Nor are the close decisions as numerous as the outcry against them might lead one to suppose. Years may pass without a single close decision in the highest appellate courts, and then several may occur in one term of court. It is no derogation of the courts that such things take place. Legislatures often pass laws by a margin of one or two votes, and administrative boards adopt important rules by equally close margins. On tough questions judges are just as likely to be of divided opinion as are other men. Democracies must often settle issues by narrow margins. There is no other way. Proposals have often been advanced for a two-thirds or three-fourths majority in order to declare a law unconstitutional. In one or two state constitutions such provisions have been introduced. These have had the effect of eliminating close decisions *against* legislation but not close decisions *in its favor*. They have not materially altered the function of the courts in using the judicial veto.

The labor injunction. The writ of injunction is a form of judicial veto. It is an order issued by a court of equity mandatorily forbidding certain specified acts. The injunction may be temporary or permanent. Application for the writ is made to the judge of the court. He has discretion to issue the writ or not as he thinks the situation requires. He may hold a hearing and receive testimony from both sides before granting the writ, or he may hear only the applicant and order a hearing of both sides later. The writ of injunction has been used since the early days of equity jurisdiction and is recognized as one of the most valuable instruments of equity procedure. It is an effective judicial veto which may be used against private citizens or public officials to prevent action which might result in irreparable harm or damage. The person against whom the order is directed must refrain from doing the things forbidden or he will be in contempt of court and subject to summary punishment. Judgments in ordinary lawsuits are remedial in purpose—designed to provide a remedy for the wrong. The injunction, however, is preventive in purpose—designed to keep people from committing wrongs.

The use of the writ of injunction in labor controversies has given rise to a great deal of controversy and to much legislation intended to limit the power of the courts in this respect. In the case of a strike it is usually the employer who seeks the aid of the court and asks for an injunction forbidding the strikers to place pickets around his place of business, to hold

meetings and assemble at certain places, and to use violent or threatening means of dissuading other workers from taking their places. In the past, the courts, acting on the belief that irreparable damage would result if the strikers were not restrained, have freely granted such applications. The issuance of the injunction has generally had the effect of breaking the strike, because it so completely ties the hands of the strikers that they cannot carry on the necessary activities of picketing, protest meetings, and the like without violating the judicial order and being thrown into jail.

For this reason, organized labor has always strongly objected to the use of the writ of injunction in labor controversies. It is the labor contention that injunctive proceedings in labor disputes are very unfair to labor. Even though the judge may not be prejudiced in favor of the employer (labor union men usually think he is), it is said that he is likely to act hastily and without a full understanding of both sides of the matter. Furthermore, it is asserted that judges are inclined to exaggerate the probability of irreparable damage from strike activities and to make injunctive orders so sweeping that the strikers are unable to do anything but sit at home. Labor has also vehemently objected to summary punishment without a jury trial for violations of injunctive orders. Labor's protests have not fallen on deaf ears. The legislatures of many states have enacted laws materially restricting the freedom of the courts in granting injunctions in labor disputes, and Congress has recently placed the federal courts under similar restraints.

The federal courts, and also the courts of many of the states, are now forbidden to issue the writ of injunction in any dispute between employer and employee without a full hearing and finding of facts prior to the granting of the writ. Their discretion in granting the writ is usually limited so that they must base the writ upon overt acts, actual or imminent, for which no other relief is available. A time limit usually is set for temporary injunctions, and the applicant is required by some of the laws to make a substantial deposit for the indemnification of the persons restrained if it later appears that the order was wrongfully issued. Some of the laws also provide that violations of injunctive orders not occurring in the presence of the court shall be punished only after a jury trial.

The Problem of Law Enforcement

The problem of law enforcement is not solely a judicial problem. It involves all agencies of government to some extent. Legislatures bear a large part of the responsibility for laxity in law enforcement, because they enact many statutes which are intrinsically unenforceable and because they do not rectify the conditions which inject politics into law en-

forcement. Administrative officials, particularly police officers and prosecutors, are also largely responsible because of their incompetence and political servility. The judicial aspects of the problem have to do with what happens after the offender is brought to court for trial.

Legal formalities and technicalities. American law is cumbered with formalities and technicalities which often conspire to defeat justice and play into the hands of the professional crook and the crooked lawyer. Ancient practices and procedures, archaic rules of evidence, obsolete forms of action, and unjustifiable special privilèges for the accused have survived in this country much longer than in England, Canada, Australia, New Zealand, and other countries enjoying the same judicial heritage. We have forty-eight states, each of which is a distinct and independent criminal jurisdiction. Some of the states have progressively revised their criminal law and procedure, but many have clung to the ancient ways long after the need for them has passed.

Minor errors, such as the misspelling of a word or the omission of a nonessential word in the indictment, will usually void a criminal conviction in this country. We allow the accused more peremptory challenges in the selection of the jury than the prosecution, for no good reason whatever. We do not allow the judge to comment on the evidence, though he is the only impartial official in the court and better qualified to tell the jury how to evaluate the evidence than any other. We do not allow the refusal of the accused to testify in his own behalf to be considered against him. We give undue importance to trivial errors of the judge in excluding or admitting evidence or in instructing the jury. Our law encourages delays and postponements which enable witnesses to disappear and memories to suffer impairment.

The jury system. The jury system in the United States is open to much adverse criticism. Politics sometimes plays too large a part in the selection of jurors, but even when such is not the case the modes of selection often fail to secure jurors of adequate intelligence and integrity. This condition is particularly bad in large metropolitan areas. Reliance on the voting registers or tax rolls to provide names for the panel is all right, but sound discrimination is not always used in the selection of names from these sources. If the officials making the selection are adherents of a political boss or machine, they are always careful to see that plenty of their henchmen get on the jury panel and they often take equal pains to exclude independent and able citizens who cannot be counted on to respond to political pressure.

The juries drawn by lot from the panel certainly will be no better than the average of the panel, and, under some circumstances, they may be much worse. Even when the drawings are not manipulated (which is

known to happen), peremptory challenges can be used to get rid of anyone who is likely to be more clear-headed and strong minded than the defense attorney wants. Thus it often happens that the trial jury, instead of representing a cross-section of the common sense and honor of the community, is largely composed of persons of inferior mental and moral equipment.

Remedial measures. For the modernization of our courts and judicial procedures and for the elimination from our law of the fossil remains of outmoded technicalities, we must rely very largely on the bench and bar. Legislatures will not be moved to make extensive changes in the judicial system or the rules of practice against the opposition of the legal profession. Fortunately the legal profession, both in public office and in private practice, has begun to take an active and constructive interest in the improvement of judicial organization and procedure. National and state bar associations have had committees working on such problems for many years, and many of the recommendations coming from these bodies have been enacted into law. Judges also have taken an effective part in this movement, both through participation in bar associations and through conferences of judges.

On the recommendation of the Supreme Court, Congress in 1922 enacted a law making sweeping changes in the federal judicial system. Among other things, provision was made for an annual conference of senior judges from each of the ten judicial circuits. This conference is presided over by the Chief Justice of the United States. Its functions are to consider ways and means of improving and expediting judicial business, to recommend needed changes in the rules of practice, and to keep the Chief Justice informed of the nature and progress of judicial business throughout the country. Upon recommendation of the conference, the Chief Justice may transfer judges from one court to another as the volume of work requires. In 1934 the Supreme Court was given power to formulate and prescribe the rules of practice in all federal courts. In 1939 the Administrative Office of the United States Courts was established.

Similar reforms have taken place in many of the states. A great many states have set up judicial conferences or councils, and provision for the transfer of judges is now made in a number of states. As was pointed out above, several of the states have given extensive rule-making power either to the judicial council or the supreme court of the state. The trend, in the states as in the federal government, is in the direction of legislation to give the courts power to regulate their own procedure and introduce business methods in the management of their own affairs.

Steps to improve the jury system are also being taken. The juries in the federal district courts are notably much superior to the average state

jury. In part this is due to the fact that they are drawn from larger areas and reflect a wider range of choice, but the principal reason is that federal panels are more carefully selected, the official charged with this duty being given ample discretion and not being subject to local influences. In federal courts the judge is allowed to aid the jury in the sifting of evidence and to comment in the court room on the value of the testimony introduced. Several of the states have passed laws designed to strengthen the jury system. Typical of these is the recent New York law which provides that no person shall be qualified to serve as a juror who is not a citizen of the United States and a resident of the county, is less than twenty-one and more than seventy years of age, is not the owner of real or personal property to the value of $250, has been convicted of a felony or of a misdemeanor involving moral turpitude, cannot read and write the English language understandingly, is not intelligent and well informed, and is not a person of good character. The law also requires that all lists of prospective jurors shall be checked against the police records before they are accepted.

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CHAPTER 17

THE POPULAR PROCESS

The People's Part in Government

The people's part in democratic government is immeasurably important. If the people fail to do their part well, democratic government can not long remain democratic. Imperfections in the mechanics of democratic government and in the quality of its official personnel can be remedied, but no way to make over a whole people has yet been found. If the people of a democracy are unequal to the task which is theirs in popular government, not much can be done to insure that government against the hazards of corruption and decline. Every collapse of democratic government in history, ancient or modern, has been traceable in the last analysis to the shortcomings of the people themselves.

The people may directly participate in democratic government in two ways: (1) by voting in elections, and (2) by engaging in party activities. These do not seem to be complex or difficult tasks; but they are not as simple as they seem. In fact, they are tasks which very few democratic peoples have learned to perform efficiently and constructively.

It has been well understood in all democratic countries that an illiterate people cannot be expected to perform such tasks intelligently. That is why democratic countries have led the world in providing free public schools and why they have made education compulsory. Illiteracy has now been largely eliminated in most democratic countries; but experience has shown that literacy alone is not enough to produce effective citizenship. Democratic government has failed just as completely in countries with a well-educated population as in countries where illiteracy was common. The fact that the German people were perhaps the best educated in the world did not prevent the downfall of German democracy in 1933; nor did the excellent educational attainments of the French people avert the mistakes which led to the breakdown of French democracy in 1940.

That something more than universal education is necessary if the people are to do their part in government well, has become sharply evident. What that something is, no one has yet discovered. It is not patriotism; for there is no patriotism more fervid than that of the peoples who have made a botch of democratic government. It is not civic idealism; for the

peoples who have made a botch of democracy have not been outstandingly deficient in that quality. It is not anything that can be stated in a word or a sentence. It is not one thing alone, but a multiplicity of things which can be best appreciated by a somewhat detailed examination of the processes of popular participation in government.

The Suffrage

Qualifications for voting. The commonest form of direct popular participation in government is voting in elections. The struggle for democratic government has always revolved around the voting privilege and the objects for which it is to be used. In democratic theory every adult citizen should have the right to vote, and the government should be so constituted that the people by their votes can control all vital decisions. Democratic countries the world over have extended the suffrage to all adult male citizens, and most of them have given women the same voting privileges as men. The qualified voters, in all democracies, elect most of their legislators. In some instances the voters also elect the highest executive and judicial officers, but these are more often appointed by officials directly elected by the people. In some countries the voters are privileged to make nominations for office by direct election, and the further privilege of enacting laws by direct vote and of similarly vetoing laws passed by the legislature has been widely given.

These privileges, carrying the most vital and important of all political powers, have been given to the *qualified* voters. But who *are* the qualified voters? They are the persons who possess the qualifications which the constitution and laws of the country say one must have in order to enjoy the suffrage. It was the practice in former times to hedge the suffrage about with restrictions which enabled very few to qualify for voting. There were property qualifications, taxpaying qualifications, religious qualifications, and many others. The democratic tendency has been quite the opposite. Voting qualifications in democratic countries have been so greatly removed or reduced that virtually the whole adult population may comply. The Bureau of the Census estimated that more than 80,000,000 persons were eligible to vote in the United States in 1940.

General requirements. In this country the control of the suffrage is mainly in the hands of the forty-eight state governments. The Fifteenth and Nineteenth Amendments of the Federal Constitution forbid the states to deny any person the right to vote on account of race, color, previous condition of servitude, or sex. Other than these, the states may set up any restrictions or qualifications they see fit. All of the states deny the right to vote to persons who are not twenty-one years of age, to persons who are

not citizens of the United States, and to persons who have not resided in the state, county, and voting precinct a prescribed period of time. Here uniformity ends. Some states have no other qualifications, but most of them have established one or more additional qualifications. Convicts are usually denied the right to vote; paupers are made ineligible in many states; illiterates are barred in about half of the states; and the payment of a poll tax is required in nearly a third of the states. The age, citizenship, and residence qualifications are rigorously upheld, but many of the states are lax in the enforcement of other qualifications.

The wide extension of the suffrage, which is characteristic of the democracies, rests on one of two assumptions: (1) that practically all of the people are capable of voting intelligently and effectively, or (2) that they should have the right to vote regardless of ability to use it well. The only justification for allowing the people to vote irrespective of ability is that popular suffrage is the only means by which the people may protect their liberties and secure attention to their needs. If such is the fact, in a democracy, it means that the governmental system is so imperfect that it is necessary to take the risk of very inferior popular government in order to avoid the danger of government hostile to the interests of the people. This necessity may be the true basis of popular suffrage, but it is not the professed basis. In our own as well as in other democratic countries the vote has been given to the people more on the ground of merit than of need, and the qualifications required of voters have been set up as tests of merit rather than of need.

The age requirement. The age requirement is essentially a qualification of merit. It assumes that below a certain age human beings do not have the education, experience, and maturity of judgment to enable them to vote intelligently. To this end, the voting age is fixed by law in every state of the American Union. Most of them set the minimum at twenty-one years, though one or two have reduced it to eighteen. Nowhere is there a maximum age limit, either in the United States or in any other country. The theory seems to be that once the qualifying age is reached, ability to vote continues unchanged for the duration of life. It is a known fact, of course, that mental decline usually accompanies old age, and that after a certain age the voter is more likely to follow the encrusted habits and prejudices of a lifetime than to exercise his intelligence. Democracies could afford to ignore this regrettable truth when the number of old people was but a small fraction of the total electorate; but now, with the lower age groups rapidly declining and the upper ones grown so large that they have the decisive voice, it must be faced as a fact of tremendous consequence in the future of democratic government. It may greatly alter the pattern of American politics.

Citizenship and residence. The citizenship and residence requirements are definitely merit qualifications, the idea being that aliens and transients cannot have the loyalty, the understanding, and the attachment to the interests of the nation, state, or locality which are deemed necessary for superior voting. A few well-qualified voters may be excluded by these qualifications, but the number is never great enough to be important.

Literacy requirements. Literacy tests eliminate those who cannot read and write. The number of such persons is small in all democratic countries, and is rapidly growing smaller. This condition has resulted in a tendency to administer the literacy requirement rather laxly except in circumstances where it can be used for purposes not sanctioned by law. In some states in this country arbitrary administration of literacy tests has been an effective means taking the vote away from Negroes and other racial groups, despite the prohibitions of the Fifteenth Amendment. Abuses such as this have cast doubt upon the value of literacy tests. As a screen against the unfit, they probably have a certain value, though not as much as formerly. As a basis for the selection of the most fit, their value is negligible. High selectivity is not their purpose, nor the purpose of any other voting qualifications required in the United States.

Economic requirements. Taxpaying and property-owning qualifications were once quite common in this country. Only the poll-tax requirement has survived, and it is confined to a few state and local governments. The poll tax is a levy of one or two dollars a year collectible from every adult citizen. Denial of the voting privilege as a penalty for nonpayment has been found to be the cheapest and most effective way to induce people to pay this tax. The amount is so small that collection by forcible legal proceedings would cost more than the proceeds of the tax. It is difficult to defend the poll-tax requirement as a voting qualification. Some have argued that it tends to make the voter more conscious of his civic responsibilities, but the weight of this argument is more than offset by the grave abuses which have developed in connection with the administration of the requirement. In some states it has been employed as a device to eliminate the Negro voter, and in some instances it has been found that machine politicians regularly pay this tax for the voters adhering to their organizations.

The problem of voting qualifications remains one of the unsolved problems of democracy. The tendency of democratic government has always been to lower rather than to raise the bars, and to lower them almost indiscriminately. Undoubtedly this widening suffrage has made for government increasingly responsive to the moods and wishes of the masses; but it has resulted also in some exceedingly dangerous conditions. There came a time, for example, in the democratic evolution of ancient Athens when

a major part of the voting population consisted of citizens who were drawing money from the public treasury. Much the same condition existed in the last years of the Roman republic. Historians are agreed that this condition was a potent factor in hastening the bankruptcy and ultimate collapse of those ancient democracies. The voting citizens, having become to a large extent direct pecuniary beneficiaries of the state, had ceased to be voters primarily concerned with good government and had become voters chiefly concerned with government as a source of personal gain. They had ceased to be properly qualified voters, and had degenerated into mere "papsuckers." If there is a lesson here for modern democracies, it is one which they have not yet begun to heed. It is a well-established principle of law that personal interest disqualifies a man for acting as a judge or a juror in his own case; but it has never been suggested that there should be such a disqualification for voting where one's personal interests are involved.

Nonvoting. Qualifications for voting are now so few and so easy to meet that virtually the entire adult population may vote. But the whole adult population never votes, not even in the most exciting elections. According to estimates of the United States Bureau of the Census, there are more than 88,000,000 eligible voters in this country. The actual number of votes cast in the 1944 presidential election was 48,026,170, or about 55% of the eligible voters. Other democratic countries are more successful in getting out the vote. The turnout in the British general election of 1945 was 76%; in the Italian monarchy referendum of 1946 it was 89%; in the French constituent assembly election of 1946 it was 81%.

On the assumption that nonvoting is a symptom of civic apathy, many have expressed the opinion that the continuance of this condition may be disastrous to democratic institutions. In some quarters it has been seriously proposed that voting should be made compulsory, with certain penalties for nonvoting which would serve to bring practically the entire electorate to the polls. We have preferred, however, to rely on persuasive rather than coercive measures to get out the vote. Prior to every election there is a sustained, vigorous, and sometimes highly organized campaign of publicity designed to stimulate all eligible citizens to register and vote. Political parties, civic organizations, farm organizations, labor organizations, newspapers, radio stations, and many other agencies of opinion take part in these drives to get out the vote. But the results, thus far at least, have not been too encouraging. Nonvoting continues on about the same scale as ever.

Causes of nonvoting. This would suggest that perhaps the causes of nonvoting are not well understood. In 1923 a staff directed by Professors Merriam and Gosnell interviewed 6,000 persons who had failed to vote

in the Chicago municipal election of that year. The findings [1] of that study (the most extensive and scientific ever made of the problem of nonvoting) disclosed that apathy was not the sole, nor even the principal, cause of nonvoting in that election. Apathy was found to be the chief cause in approximately 600 cases constituting about 10% of the interviewed voters; the remainder were primarily attributable to such causes as illness, absence from the city, difficulty of complying with registration and other procedural requirements, inability to get away from work during voting hours, confusion as to the issues of the election, and disbelief in voting.

If this sample is a reliable index of the causes of nonvoting in general, the problem is less serious than has been supposed. The wholly apathetic nonvoters number on the average approximately 10% of the total voting population. This might be enough in some instances to change the results of the election; but there is little reason to believe that the apathetic nonvoters would express preferences markedly different from those of the actual voters.

Illness is a cause that cannot be removed. Absence on election day will always cause a certain amount of nonvoting. Most of our states now have absentee-ballot laws; but in order to take advantage of these laws the voter must anticipate his absence and make arrangements in advance. Many voters find doing this either impossible or highly difficult and inconvenient. The registration and other procedural requirements for voting cannot be safely relaxed, but much is being done to lessen the inconvenience of these requirements. They need not be serious deterrents to voting. For a great many persons it is undoubtedly difficult, if not impossible, to get to the polls during voting hours. One must vote in the precinct in which he resides, and often his place of work is so far away that it is hard to find time to get to the polls either before or after work. This difficulty has been lessened by the shortening of the working day; but it cannot be entirely removed without opening the polls earlier and closing them later than is customary. Some countries have met this difficulty by holding elections on Sundays, when the great majority of the people are free.

It is not surprising that many persons should abstain from voting because of confusion and uncertainty. When the voter is called upon to pass judgment on scores of candidates for a dozen or more different offices, and, in addition, is expected to approve or disapprove several constitutional amendments or legislative measures, it is no wonder that he sometimes gives up in despair. The many columns of political material in the press and the endless procession of political speeches on the radio often add to his confusion. The overburdened voter, especially if he is conscientious

[1] C. E. Merriam and H. F. Gosnell, *Non-Voting: Causes and Methods of Control.*

and sincere, may be readily converted into a nonvoter. The solution here is to shorten the ballot and simplify the voter's task so that he may not develop the feeling of futility which is so frequently apparent.

Disbelief in voting is most largely found among persons who, for divers reasons, have never taken much interest in public affairs. More women than men are found in this category, the principal explanation being that woman suffrage on a large scale dates only from the 1920's, and many women have not yet come to feel that women should take part in politics. There is also a certain portion of the disbelievers, both male and female, whose aversion is based on the conviction that the result, as regards them, will be the same no matter how they vote. Unless there is some issue or personality in the election of direct concern to them, they are of the opinion that it is not worth while to vote. It is regrettable that disbelief in voting should exist for any reasons whatsoever, but it is difficult to see what could be gained by forcing or persuading such persons to vote. They would be unlikely to add anything of constructive worth to electoral results.

Registration. It is now an almost universal requirement in the United States that before a person may vote in an election he must appear before a designated board or official and register as a duly qualified voter. This must be done on or before a fixed date prior to the election. When the voter appears to register, the registering officer asks for certain facts as to his age, residence, nativity, citizenship, previous voting place, and other matters which may be necessary to establish his right to vote. These are entered upon an official record, which in most cases the voter is required to sign.

The chief purpose of the registration requirement is to prevent unqualified persons from voting. The practice in former times was to have the election officials ascertain the qualifications of the voter when he came to the polls on election day. This practice had many bad results. It slowed the voting, caused confusion and controversy at the polls, required hasty decisions with no possibility of checking the facts, and sometimes gave rise to serious frauds and evasions of the law. Registration in advance avoided these difficulties. At each polling place there is now a list of registered voters, and persons whose names are not on the list are not permitted to vote.

Two general plans of registration are now in vogue in the United States. One system requires the voter to register anew for each election. The second plan is called permanent registration. Under this plan the voter registers once, and may vote in all subsequent elections without reregistration unless he changes his residence to another registration area or does something else which cancels his initial registration. The permanent-

registration laws of the different states are not uniform in respect to the cancellation of the original registration.

At one time it was widely believed that the registration requirement was a material deterrent to voting. It was supposed that many persons refrained from voting because of the time and effort necessary to get themselves registered. Permanent registration has been favored because it reduces the difficulties of registration to a minimum, a single registration being good for a lifetime provided the voter does not so change his status as to require re-registration. Permanent registration obviously does have this merit, but experience has shown that it also has some drawbacks. Unless the registration records are frequently purged, they will contain the names of numerous persons who have died, moved away, married, gone to jail, or otherwise deviated from the original status. The continuance of many empty names on the records has been a great convenience to corrupt political organizations. By having their own henchmen vote under those names, such organizations increase their score by the number of obsolete names in the books. Registration anew for every election does not have this drawback, but it does multiply the burdens of the voter and affords more frequent opportunity for fraudulent registrations than does the permanent system.

A third system of registration is now being introduced in a few states. Under this plan registration officials, prior to each election, make a house-to-house canvass, just like census takers, and record the names of all qualified voters. The lists thus made are published, and any voter who has been missed may register in person. This system, which has been successful in several European countries, imposes no burden at all on the voter, keeps the registration records currently revised, and, if properly administered, can be fully safeguarded against fraud and malpractice.

Nominations

Nothing is more important to the voter than the process by which nominations are made. In nearly all elections to choose public officials he is restricted to a choice between two or three persons who have been nominated as candidates of political parties or of nonpartisan groups. If all of the nominees are unsatisfactory to him, his vote in the election becomes a choice among evils. Feeling that all of the candidates are undesirable, he may conclude that it is not worth while to vote at all; or, believing that it is his duty to vote, he may cast his ballot contrary to his real preferences and draw such comfort as he can from the hope that the men for whom he voted are not as bad as their opponents.

The only way to insure the voter an absolutely free choice in balloting

for public officials would be to let him vote for anyone he might want. The laws do not forbid this practice, but they do discourage it. Where paper ballots are used the law generally requires that a blank space be left for the voter to write in the names of persons not formally nominated. Most states also permit the use of stickers containing the names of persons not regularly nominated. These may be attached to the ballot, if the voter so desires. Where voting machines are used, it is more difficult to give the voter an opportunity to supplement the regular list of candidates with names of his own choice. But very few voters take advantage of this opportunity when it is offered. They may not like the formally nominated candidates, but they realize that one whose name does not appear on the ballot or the machine will get very few votes besides their own. So they usually reconcile themselves to a choice between the regular candidates, however distasteful that choice may be.

If it were possible to print a ballot or build a machine large enough to carry the names of all persons for whom every voter might wish to vote for each office, much greater freedom of choice might be enjoyed. But that latitude is not possible; neither would it be desirable. The votes would be so widely scattered that no candidate would be likely to obtain a majority or even a respectable plurality, and no election would ever be really decisive. Restricted nominations have the virtue of narrowing the field so that a decision is possible. The voter's best chance of avoiding the necessity of a choice between evils on election day is to participate as actively and fully as possible in the nominating processes allowed or prescribed by law. The laws of every state in the Union recognize at least one nominating process as official, and a good many sanction more than one. The three most widely approved are: (1) nomination by petition, (2) nomination by convention, and (3) nomination by direct primary election.

Nomination by petition. This method is approved in a number of states as a means of naming candidates for judicial offices and for city, school, and other local offices. It is most commonly employed for nonpartisan nominations. The person desiring to be nominated is required to present a petition signed by a certain number of qualified voters or a certain percentage of those who voted in the last election. If this petition is found to be satisfactory (that is, if it meets the legal requirements), the person named therein is duly nominated and his name goes on the ballot or machine as a regular candidate. Sometimes a filing fee is required in addition to the petition.

This petition method is the simplest and most direct form of nominations. One is surprised that it is not more widely used. It opens the field to any possible candidate who has enough popular support to justify his

nomination, and enables any interested voter or group of voters to get behind the man of their choice and push him for a nomination. Furthermore, it requires no great outlay of money by the candidate, by his supporters, or by the taxpaying public. Unfortunately, it has not found favor with political parties. It opens the field a little too much for those who play the organization game of "picking slates" and "putting them over." Nomination by petition makes it easy to break up the organization slate, and gives the outsider just as good a chance as the insider. One of the arguments used against it is that it brings out too many candidates, particularly those of the type who have no general or important support and are just out for personal gain or publicity. Experience has shown, however, that this result can be prevented by the requirement of a substantial filing fee, returnable in the event that the candidate polls a sizable percentage of the final vote.

Nomination by convention. The convention method is the oldest system of nominations now in use in the United States. It originated in the 1830's and 1840's, when it superseded the then prevalent method of nominations by legislative caucus. The convention method is mainly used for making party nominations, although it can be, and to some extent is, employed for nonpartisan or independent nominations. The laws of all of the states recognize the convention method, and provide for the certification of convention-made nominations to a proper official who sees that the names thus submitted are placed on the ballot or machine. In some states it is the sole or principal method sanctioned by law; in others it is a secondary method, used only for minor parties, new parties, or independent groups.

A nominating convention is in theory a representative assembly of delegates chosen by and acting in behalf of the rank and file of a party or other political organization. If it be a party convention, its function is not only to make nominations for office but also to serve as the chief organizing and rule-making authority of the party. Every convention, in theory, is a law unto itself, so far as party affairs are concerned. It formulates its own organization, rules, and procedure, and chooses its own officers. Within the area which it represents, it is supposed to have full authority to decide all matters of party policy and to make any regulations it sees fit for the management of party affairs. But local conventions do more or less defer to state and national conventions and committees, and state conventions likewise defer to national conventions and committees.

Convention structure. Delegates to party conventions are usually chosen as follows: (1) Delegates to local conventions are chosen by primary caucuses (assemblies of the rank and file of the party) in wards, townships, precincts, or other local subdivisions, or by direct primary election

held in such local areas; (2) delegates to state conventions are generally chosen by the local conventions throughout the state, but sometimes by direct primary elections; (3) delegates to national conventions are most commonly chosen by state conventions, though some states require the use of the direct-primary method. The total number of delegates and the number from each state, county, or other participating area are determined by a system of apportionment prescribed by rules adopted in previous conventions. Such apportionments customarily provide for representation in party conventions on substantially the same basis of distribution that is used in allotting seats in the national, state, or local legislative bodies. There have been vigorous objections to this scheme of representation, on the ground that it takes no account of variations in party strength. A state or county which casts its vote two to one in favor of the party has no more representation in the party convention than a state or county which casts its vote two to one against the party, unless it happens to be more populous and hence has a greater legislative representation. This disparity means that party conventions often represent the sections in which the party is weak more generously than those in which it is strong, and consequently do not faithfully represent the party as a whole. This condition has been notably bad in the national conventions of the Republican Party, because the states of the Solid South, where very few Republican votes are polled, have had representation corresponding with their representation in Congress. In 1916 the Republican national convention adopted a scheme of apportionment which somewhat reduced the representation from the overwhelmingly non-Republican states, and subsequent conventions have gone a few steps farther in the same direction. But the rule of representation in proportion to party strength has not been fully adopted, either by the Republican Party or by any other.

Convention procedure. When a party convention assembles, it has three major items of business to transact: (1) to frame and adopt a statement of party principles (platform), (2) to select candidates for office, (3) to name a new managing committee. Before it can proceed with these matters, it has to get itself organized. The first step is the selection of temporary officers—usually a perfunctory ratification of a slate of names agreed upon in advance by the managing committee. The second step is a roll-call by delegations for the naming of members of four important convention committees—a committee on credentials, a committee on rules, a committee on permanent organization, and a committee on resolutions and platform. The third step is to receive and act on the report of the credentials committee, thus validating the status of all who have presented themselves as duly chosen delegates to the convention. The fourth step is to receive and act on the report of the committee on rules, thus providing

the convention with a code of parliamentary law to govern its proceedings. The fifth step is to receive and act on the report of the committee on permanent organization, which recommends the selection of a chairman, secretary, sergeant-at-arms, and such other officers as the convention may need, and also usually proposes the names of persons to fill these offices. Each of these steps is accompanied by characteristic convention oratory and noisemaking, and each may sometimes be the focus of tremendous struggles between rival factions in the convention.

As soon as its permanent officers are installed (which may be as long as two or three days after its opening), the convention is ready for business. It first proceeds with the report of the platform committee. Tentative drafts usually have been prepared in advance of the convention by members of the managing committee and other party bigwigs. The platform committee makes use of these and of suggestions from many other sources in preparing its report for the convention. Ordinarily the convention adopts the platform as proposed by the committee, but occasionally there is a battle on the floor of the convention over disputed portions or "planks" of the platform.

The convention then takes up the business of nominations. National conventions make nominations for two offices only, but state and local conventions often have to make a half-dozen or more. The customary procedure in making nominations is to begin with a roll-call of delegations, each delegation being permitted, if it desires, to place one or more names before the convention. If a delegation cares to offer a name, a member of that delegation takes the floor and makes a nominating speech. Others may follow with seconding speeches. If, when its turn comes, the delegation has no name to offer, it will yield its place to another delegation farther down in the list. When all of the names have been presented and all of the nominating speeches made for a given office, the convention votes on these names. The customary voting procedure is for the secretary of the convention to call the roll by delegations, and for the chairman of each delegation (having polled his delegation) to arise and announce the vote of his delegation. Conventions may operate under the unit rule, which requires the entire vote of a delegation to be cast in accordance with the majority vote of that delegation; or under the free-vote rule, which requires the vote of each delegate to be counted in accordance with his own wishes. The system to be followed is determined by a party rule adopted by previous conventions or by the vote of the convention itself. In most conventions the candidate who first receives a majority is declared to be the nominee, but an extraordinary majority may be required by party rule or by action of the convention. Democratic national conventions prior to 1940 operated under a rule requiring a majority of two-thirds.

The foregoing procedure is followed in making nominations for each office. When there are several nominations to make and opinion is so divided that it is necessary to have several roll-calls (ballots is the term more commonly used) before a majority can be secured on each, the work of the convention is greatly prolonged. The delegates often become weary and impatient, and sometimes they are willing to agree to almost anything in order to speed the end of the convention.

When the nominations are finished, the convention takes up the naming of a new managing committee, which is to take over and direct the affairs of the party in the interim between the adjournment of the present convention and the meeting of the next. National conventions name the national committee, state conventions the state central committee, county conventions the county committee, and so on. But the actual naming is not done by the convention; it merely ratifies choices made elsewhere. There is a roll-call by delegations, and the chairman of each delegation announces the names of the person or persons who are to be members of the committee from his state, county, or other local unit, as the case may be. National committee members are usually chosen by the state convention, but in some states they must be chosen by direct-primary elections. State committee members are usually chosen by county conventions or by direct-primary elections. County committee members are generally chosen by primary caucuses or by direct-primary elections. The convention delegation merely presents the names of these persons to the convention, which in turn accepts them without question.

Convention weaknesses. In practice the convention system has proved disappointing in many ways. Its basic weaknesses, as shown by experience, are: (1) that conventions, because of the system of apportionment and the mode of choosing delegates, seldom represent the rank and file of the party as faithfully as they should; (2) that all except local conventions are two or three steps removed from the direct influence or control of the rank and file, and hence are not immediately responsive to the opinions and wishes of the great mass of party adherents; (3) that it is so difficult for the average party member to participate effectively in convention arrangements and activities that the general body of party adherents becomes indifferent to and neglectful of these important matters; (4) that, as a result of the foregoing circumstances, the control of conventions generally goes by default to officeholders, officeseekers, and other self-interested politicians; (5) that the organization and procedure of conventions are so complex that it is too easy for unscrupulous politicians to thwart the will of the rank and file by trickery and corruption.

Many states have endeavored to correct these weaknesses by enacting laws to regulate convention practices. Although such laws have been fairly

effective in counteracting the worst species of political knavery in connection with conventions, they have not succeeded in rendering conventions more truly representative of the party or more fully responsive to opinions and preferences of the rank and file. That fact explains why all but three of the states have passed laws permitting or requiring other modes of making nominations. These do not apply to nominations for President and Vice President of the United States, which are still made by national nominating conventions.

Nomination by direct primary election. American election laws recognize two kinds of primaries—primary caucuses and primary elections. The primary caucus, as noted above, is a mass meeting of party members in a precinct, ward, township, or other local unit. Its purpose is to choose members of local party committees and delegates to local conventions. The primary election is a proceeding in which party members go to the polls and vote by ballot for party nominees and sometimes for party committeemen and convention delegates.

The direct primary election did not originate as a reform. It was first introduced by party rule as a substitute for the primary caucus and the party convention in situations where scattered population or other difficulties made it hard to conduct caucuses and conventions. After it had spread quite widely in this fashion, a number of states passed laws authorizing counties, cities, towns, and other local units, at their option, to adopt it as a required method for making local nominations. Reformers were attracted to it because it seemed to offer a means of taking party nomina tions out of the hands of the bosses and giving them to the people. There ensued a vigorous campaign for the enactment of laws making the direct-primary system compulsory, and the first law of this character was adopted in Wisconsin in 1904. Since then the progress of the direct primary has been rapid and nationwide. All but three of the states have introduced some kind of compulsory direct primary, but there is little uniformity as to scope and form or as to the methods to be employed. Some of the states have made the direct primary obligatory for all local, state, and national nominations, and some even require that delegates to national nominating conventions shall be chosen in this way. Some allow aspirants for the presidential and vice-presidential nominations to have their names placed on the primary ballot, and require the state's delegates to the national convention to support the candidates favored by the primary vote. Other states make the direct primary obligatory for state and local but not for national offices. Some make it obligatory for state and national but not for local offices, and some make it obligatory for local offices and not others. Some make an exception of judicial offices, requiring candidates for them to be nominated either by conventions or by nonpartisan pri-

maries. Major parties are always required to use the direct primary, but some states require parties receiving less than a stated minor fraction of the votes to use the convention system.

Direct-primary systems and methods. As to form, there are three general types of direct primary—the closed, the open, and the mixed. The closed primary is closed to any but regular party adherents, and the voter must satisfy some test of party membership or regularity in order to participate. The open primary normally is open to any registered voter with little regard to established party affiliation. The mixed primary contains some features of both the closed and the open systems. The easiest way to understand the differences between these three systems is to review the essential steps of a direct primary election from beginning to end.

Under all three systems, a person wishing to be the nominee of a party for a certain office must take steps to have his name placed as a candidate for that nomination on the ballot or voting machine used in the direct primary election. Some states require him to file with a designated state or local official a petition signed by a fixed or determinable number of qualified voters; other states require him to file a declaration of candidacy accompanied by a stated filing fee. Sometimes a filing fee is also required with a petition. The closed-primary states also require that the papers filed contain evidence that he is an authentic member of the party whose nomination he seeks, and that the signers of his petition, if any, are likewise regular party adherents. The usual method of establishing party membership is to require all persons upon registration for voting to declare their party affiliation. This declaration is made a part of the registration record, and is used to check the party connections of candidates at the primaries and signers of their petitions. A person whose registration record does not show that he is now or was at the time of the last election a duly registered adherent of a particular party is not allowed to seek the nomination of that party in the primaries or to sign a petition for such an aspirant.

On the day set for the primary election the registered voters are privileged to go to the polls as in a general election and indicate their preferences among the candidates who have filed for the nomination for each elective office covered by the primary law. The closed-primary states require that the voter be not only registered, but registered as a member of the party in whose primaries he seeks to participate. A separate ballot is used for each party, and the voter is handed the ballot of the party of which he is a registered adherent. If he is not registered as a member of any party, he may not vote in the primary elections. The open-primary states require the voter to be registered but not as a party member. When he appears to vote, he is handed the ballots of all parties. He then retires

to the booth, votes the ballot of his choice, and returns to the election officials the unused ballots at the time he deposits the marked ballot in the box. Some of the open primary states place the names of all candidates, followed by a party designation, on a single ballot. The voter may mark this ballot as he pleases. He can, if he wishes, help nominate a Democrat for governor, a Republican for lieutenant governor, a Socialist for attorney general, and so on. The mixed-primary states usually do not require the voter to be registered in advance as a party member, but do require him to make a declaration of party affiliation at the polls and give him only the ballot of the party of his choice at the moment.

The vote required to nominate is in most cases just a plurality. Some states insist upon a majority, and provide for a runoff primary, at a later date, between the two highest candidates, if no one has a majority.

Results of the direct primary. The direct-primary system has fallen considerably short of the expectations of the reformers who hailed it as a perfect substitute for the convention system. Arguments against the direct primary are legion, but are not equally applicable to all types. The closed primary has peculiar weaknesses; likewise the open primary and the mixed type. The major weaknesses of the direct-primary system as a whole may be summed up as follows: (1) It is unduly expensive, both to the candidate and to the taxpaying public. (2) The amount of money necessary to secure the publicity essential to success in a primary campaign handicaps the candidate who has little money, has no access to money, or will not tie himself up with special interests which will support his candidacy. (3) So many candidates enter the race for each office that the voters are confused and unable to make a clear and discriminating choice. (4) Nomination by a plurality often means nomination by a minority, thus failing to express the real preference of the voters and weakening the party ticket in the general election. A runoff primary, while it secures a majority nomination in the end, usually leaves so much bitterness in its wake that the party is crippled in the ensuing campaign. (5) Party unity is weakened and party responsibility is destroyed. This drawback is particularly apparent in the open primary, and to a smaller degree in the mixed primary. (6) Personalities have more influence than principles in determining the outcome of primary elections.

Better nomination procedures. It is the opinion of nearly all competent students of American government that both the convention system and the direct-primary system are far from satisfactory, and it is not believed that either can be adequately improved and safeguarded by legislative reforms. For that reason much attention has been given to the problem of better nomination procedures. One aspect of the problem is to make suitable provision for independent or nonpartisan nominations. So large a por-

tion of the American electorate is now devoid of fixed party loyalties and definitely prefers to remain independent that party nominations no longer afford alternatives which will enable multitudes of persons to make a satisfactory choice. Independents very often prefer to vote for an independent nominee, but there is no effective way of making independent nominations. Our nominating machinery, except for the open primary, has been set up primarily for the use of political parties and has been largely fashioned to their particular interests and expediencies. The open primary itself is not essentially nonpartisan. It gives the independent a good chance to get a party nomination, but no chance at all to run as an independent. The laws of many states do provide some means by which an independent may be nominated as an independent, but these are usually difficult to invoke. The need is for a scheme of making independent nominations which will be fairly easy to use, and will at the same time discourage the faddist, the publicity seeker, and other self-pushing candidates. Perhaps the best suggestion for achieving this result is to provide for independent nominations by petition, with a relatively low requirement as to the number of supporting signatures. This procedure could be safeguarded by requiring a substantial cash deposit, returnable only in the event of the candidate's polling from 10% to 25% of the vote cast in the election.

The problem of party nominations is equally vital. Neither the convention system nor the direct-primary system has produced consistently high-grade party tickets. It is desirable to have a consultation of party leaders in the matter of nominations and to have a substantial agreement among them as to the names which should go on the party ticket, but the convention system does not insure any such result. A party convention is no more a place of intelligent conference and consultation than is the cheering section at a football game. It is also desirable that the rank and file of a party should have some means of expressing satisfaction or dissatisfaction with the nominations decided upon by the party leaders. But the direct primary deprives them of the judgment of their leaders and forces them to discharge a most difficult task under the exciting pressures of a multi-ring political circus. Many students of electoral processes have suggested that the problem of party nominations might be solved by a scheme which would allow the responsible managing committee of each party to make up the party ticket. If this were generally acceptable, the nominations would be closed. But, in order to allow the rank and file to pass judgment on the work of their leaders, it would be provided that if a petition, signed by a sufficiently large proportion of the party membership to be important, should be filed in favor of some person not on the committee ticket, then a primary election would be held. In this election the party members would choose between the committee nomination and

the one proposed by petition. Under this system there would be no convention, with its attending follies and absurdities, but a quiet and informal conference of party leaders. They could frame any slate they wished, but they would know that if it gave much dissatisfaction it could be challenged by petitions originating with the rank and file. There would be no primary election, unless there were strong opposition in the rank and file; and then the issue of the primary would be clear and the result decisive.

It would seem that the obvious advantages of better methods both for independent and for party nominations would lead to a widespread demand for an extensive trial of these or other reforms. But the American is a conservative being when it comes to tinkering with his ancient political habits, and often prefers to muddle along with things he knows to be bad rather than to try something of which he knows only by theory.

Elections

The uses of elections. An election is a device or proceeding to enable the qualified voters to express their preferences as to the persons who shall occupy public office or as to the policies or laws which shall be adopted by the government. It is impossible to carry on any sort of human activity which is dependent on the decisions of large numbers of people without resorting to elections of some kind. Elections are used in the management of business corporations, churches, fraternal orders, labor unions, social clubs, and in group activities of every other conceivable kind. Methods of election vary all the way from the simple and informal process of taking an oral vote to the most complex and intricate scheme of voting by ballot or machine.

American government is characterized by an almost uninterrupted succession of elections. More public officials are chosen by popular election in this country, more public questions are submitted to the direct vote of the people, and more units of government are engaged in the conduct of elections than in any other country on earth. We have town elections, village elections, port-district elections, park-district elections, local-improvement-district elections, city elections, state elections, national elections, and others too numerous to mention.

We use elections to nominate party candidates and to choose delegates to party conventions. We use elections to choose presidential electors, to choose senators and representatives in Congress, to choose state governors and many other state administrative officials, to choose members of state legislatures, to choose state and local judges, to choose most of our county officials, to choose mayors and members of city councils, to choose members of school boards, to choose most of our town and village officials, and

to choose the leading officials of countless special districts. We use elections to pass upon legislative measures initiated by popular petition and on acts of legislative bodies referred to the people either by popular petition or by resolution of the legislative body itself. We use elections to adopt city charters, county charters, state constitutions, and proposed amendments thereto. We use elections to authorize the issuance of bonds, the extension of debt limits, and the construction of public works. We use elections to create towns, counties, and cities, and to determine the location of county seats and state capitals. And we use elections to some extent to recall from office public officials whom we have previously elected.

The foregoing enumeration is far from complete, but it gives some idea of the many purposes for which elections are used in the United States. If the extensive and frequent use of elections is a measure of democracy, the United States may be regarded as the most democratic country in the world. But the leading political scientists tell us that the number of elections held, the frequency of their occurrence, the diversity of their uses are less important in the promotion and preservation of democracy than the way they work and the results they give. Let us consider, therefore, how American elections work and what sort of results they produce.

Election law. The law governing elections in the United States is mainly the result of enactments by state legislatures. The Constitution gives Congress the authority to alter state regulations concerning the election of United States senators and representatives and to make regulations of its own, but this power has been sparingly used. The fundamental control of national as well as of state and local elections rests with the states. Many states have given cities and towns considerable freedom to regulate their own local elections, but this local independence is often conditioned on compliance with the general provisions of state election laws. Thus, it becomes clear that we have not one body of election law in this country, but many. There are forty-eight state election codes, and these are supplemented by the enactments of Congress as to Congressional elections and by such varied election laws as the local subdivisions of the states are permitted to make. Since there is no uniform election law applicable to the entire nation, one who would familiarize himself with the law governing any election in which he is interested must consult the election laws of the particular state, county, city, or the like, in which the election takes place.

Although there are innumerable differences of detail between the legal requirements found in the numerous election jurisdictions of this country, the same general subjects are covered by all and the same broad pattern of regulation is followed. The matters universally subject to regulation are: the registration of voters, the form and preparation of ballots, the location of polling places, the control and use of ballot boxes, the use of voting

machines instead of ballots, the selection of election officials, the voting procedure, the counting of votes, and the reporting of election returns. In most of the states certain regular officials of state and local government are designated to administer the election laws. In some states, however, provision is made for special boards, departments, or other agencies for election administration.

Election administration. The basic unit of election administration usually is the county. The law provides that a regular county official (such as the county clerk or the sheriff), an ex officio board made up of designated county officials, or a permanent county board or department of elections shall be charged with the conduct of elections and the administration of election laws throughout the county. For voting purposes the county is divided into smaller units, each containing one polling place. Governmental subdivisions of the county, such as towns, townships, and villages, are sometimes used for this purpose; but the more common practice is to divide the county arbitrarily into voting precincts of substantially equal voting population. It is here, on election day, that the voter comes into direct contact with election administration. The proceedings in each polling place are conducted by an election board of citizens, usually three or five in number, appointed to serve for that day only. These citizens are appointed by the county election officials. Since the law usually states that no more than two or three of the precinct board shall be members of one political party, it has become customary for the county election officials to follow the recommendations of the county chairmen of the major political parties in making these appointments. The cash perquisite incidental to service on the precinct board renders the appointment attractive to many persons, and the party chairmen always see to it that such appointments fall to active and dependable party workers.

The county election officials, subject to the detailed provisions of the election laws, have the duty of establishing the voting precincts, selecting the polling place, providing the necessary furniture, equipment, and supplies for each, and supervising the work of each precinct board. They are also responsible, subject to the requirements of the law, for printing the ballots or arranging the face of the voting machines. It is their duty, after the polls have closed, to receive and tabulate the returns from each polling place in the county, and to report the same to a state official, usually the secretary of state or the superintendent of elections. In most states it is their duty to count absentee ballots. Should there be a contest or any situation necessitating a recount of the vote, this task falls upon the county election officials.

In discharging their vitally important duties the county election officials are not, as a rule, under the close supervision and control of higher author-

ities. State election officials certify to the county officials the data which must go on the ballot or machine in every county and receive and tabulate the returns from each county, but they seldom have any authority to direct the work of the county officials or to overrule them. In elections, to an extent scarcely approached in any other phase of American government, we have almost complete county home rule. This means that election administration is carried on by more than three thousand independent or semi-independent authorities, who interpret and enforce the law without effective superior control.

Election mechanisms. American election laws uniformly provide for secret voting under official safeguards. Two devices to accomplish this result are exclusively or jointly employed by all but three of the states—the Australian ballot and the voting machine (which is actually a mechanical variant of the Australian ballot). Two of the three nonconforming states have ballot systems possessing some but not all of the features of the Australian ballot; the third (South Carolina) still remains wholly out of line with the prevalent usage.

The Australian ballot (so named because it originated in Australia) has four essential characteristics: (1) It is an officially, not privately, prepared ballot, and must be printed at public expense, under official supervision, and in the form required by law. (2) It is a "blanket" ballot, containing the names not merely of the candidates of one party, but of all of the candidates nominated according to the law. (3) The voter can obtain it only at the polling place on election day, and only from duly authorized election officials. (4) It must be marked in the secrecy of a polling booth or compartment, must be there folded so as to conceal the marking, and must be publicly deposited in a locked box or pouch employed for that purpose. This device assures the voter complete privacy and at the same time provides him a ballot as free of snares and deceits as official control will produce.

The use of the voting machine involves the same basic safeguards as the Australian ballot. Instead of the officially prepared ballot, there is the officially approved and inspected machine, set to provide the same voting opportunity as the "blanket" ballot. The machine is placed in a booth which can be used by only one voter at a time, and is so devised that the voter cannot readily leave the booth without automatically recording his preferences and clearing the machine. The use of voting machines is made optional for counties in many states, but a few states have made them obligatory for all counties or for counties of a certain population. The advantages and disadvantages of voting machines have been extensively debated. Most authorities are agreed that the advantages outweigh the disadvantages, but the initial cost of machines plus the innate conservatism

of the public in respect to voting habits has kept them from being generally adopted.

The arrangement and content of the face of the paper ballot or the voting machine are prescribed by law in all states but one. Thirty states use the party-column type and seventeen use the office-group type of arrangement. The party-column type is characterized by vertical columns, one column being assigned to each party. The names of the party candidates appear in the party column under the title of the offices sought by them. The office-group arrangement places the names of all candidates for each office under the title of that office and, except in a few cases, prints the party designation after the name of the candidate. Most of the party-column states provide for straight-ticket voting by means of a box or circle at the head of the party column, but a few have the party column without the opportunity to vote a straight ticket by a single cross in the party column. Most of the office-group states make no provision for voting a straight ticket, but some have a box or circle especially for that purpose. The party-column type seems to make straight-ticket voting a little easier, but does not necessarily render independent voting more difficult. The operation of crossing back and forth from column to column to pick out the desired candidate is no more exacting than going through a long series of office groups and sifting out the desired name.

As to other details, the variations within each of the major groups just described are too numerous and too widely contrasting for treatment here. For further enlightenment, the student should examine and compare the actual ballots used in his own and several other states.

Voting procedure. The voter, having duly registered in advance as required by law, appears at the proper polling place on election day. Entering the polling place, he gives his name and address to one of the election officials. The registration record for that voting precinct is then examined. If it is found that the would-be voter is properly registered as a qualified voter resident in that precinct, he is requested to sign his name on a file card or in a poll book and adjoining his name a serial number is entered. His signature establishes the fact that he has presented himself at the polls, has proved his qualifications, and has been allowed to vote. The serial number corresponds with the number of the ballot given to him or to the number which will be recorded by the voting machine when he uses it. If he is the first person to vote in the particular precinct, he will be recorded as Number 1, and subsequent voters will receive Numbers 2, 3, and other successive numbers in the order that they present themselves. The serial number not only establishes the order of voting, but provides a control by which it is possible to check the registration record against the voting record continuously as the election proceeds and retrospec-

tively, also, in case there should be need at a later time to review the work of the precinct board.

Upon signing his name, the voter is given a ballot and allowed to enter one of the polling booths. If machines are used, he is told that he may enter the compartment housing the machine. While he is in the booth or the machine compartment, he may not be accompanied by another person or communicate with anyone on the outside. If he desires instruction as to how to proceed, he may apply to the election officials. If he is blind or otherwise physically incapacitated so that he cannot mark the ballot or operate the machine, he may request the election officials to help him or assign someone to do it. In the privacy of the booth the voter marks his ballot or manipulates the levers of the machine to indicate his preferences. If he has marked a paper ballot, he must, while yet in the booth, fold it so that his markings will be concealed and the stub containing the serial number will be on the outside. He then leaves the booth, hands his ballot to an election official who tears off the numbered stub and deposits it in a locked receptacle. The voter then deposits his ballot (now rendered unidentifiable) in the locked ballot box or pouch. The election official announces that Number 1, 2, 3, or whatever the number may be, has voted, and a check is entered on the record signed by the voter. If the voter has used a machine, he opens the curtains to leave the compartment and this action automatically records his serial number and clears the machine for the next voter.

The voter's part in the election is now at an end. At the close of the election the officials of the voting precinct proceed with the count. Where machines are used, they merely take the totals from the machines and report them, with due verification, to the county election officials. Where paper ballots are used, they open the ballot receptacles and count each ballot separately, entering the results on an official tally sheet. When all of the ballots have been counted, they make up an official report of the totals and forward this "return," as it is called, to the central election officials of the county. Along with this return they send the counted ballots done up and sealed in an official package. These ballots are not subject to further examination unless, by due legal proceedings, a recount is demanded. If state and national officials have been voted for, the county election officials forward returns for the entire county to the state election officials, and thus in due time the results for the entire state are compiled and announced. Following this comes the issuance of certificates of election to the winning candidates. Victors in state and national elections usually receive their certificates from the state election officials, and the victors in local elections get theirs from the county or city election officials. Under the law in most of the states a defeated candidate may ask for a

recount. This recount may mean merely rechecking the returns from the polling places or actually recounting all of the ballots cast. A court order is always necessary to obtain a recount of the latter type, and the recount is usually under court supervision.

Election problems. It would not be possible to have elections much better safeguarded than they now are in this country. At every stage from the registration of the voter to the final counting of the results we employ protective devices which can and should be the means of preventing every sort of malpractice. If abuses occur (and they very often do), the fault is not with the devices themselves but with the way in which they are administered. In fact, the only really fundamental election problem in the United States is the unfortunate fact that the administration of election laws is commonly entrusted to persons who are more interested in having them fail of their purpose than in having them succeed.

The vital points in our election systems are: the registration of voters, the operation of the polls, and the counting of the votes. The laws provide adequate safeguards at each of these points, but place the administration of these safeguards in the hands of persons who, all too often, are motivated against them. The administration of registration laws is usually given over to elected officials or to political appointees. Not infrequently these officials are faithful henchmen of corrupt political machines, and, when such is not the case, they are more than likely to be party mercenaries of low ethical standards who are accustomed to overlook, or even connive in, violations of the law by their political friends and supporters. Such registration officials make no effort to prevent or prosecute false and fraudulent registrations. Padded registration books are not only tolerated but sanctioned and vouched to be correct. Under such circumstances, officials of the same low order very commonly preside at the polls and have charge of the counting of the votes. In such polling places fraudulent voting by "personation" and "repeating" will be permitted (for the "right" political gang); intimidation of antigang voters will not be suppressed; voting machines will be tampered with and "fixed"; opposition ballots will be defaced and thrown out as invalid; dishonest counts will be made; and false returns will be certified.

The remedy for these abuses is obvious and simple. All officials having to do with the administration or enforcement of election laws should be taken out of politics. They should be appointed on the basis of merit, shown by passing a suitable examination with a high grade; and they should have indefinite tenure of office, being subject to removal only for causes directly involving the good of the service and not for any political causes whatsoever. Election administration in the hands of such officials would closely approach the degree of purity which our election laws have

been designed to achieve, and, but for faulty administration, are fully capable of achieving.

Purity of elections would not mean perfect elections. There are certain inherent limitations on popular participation in government which no system of elections can wholly overcome. No election system can do more than afford the voter an opportunity to choose between a relatively small number of candidacies or propositions submitted on the ballot. The more options the ballot contains, the more likely the voter is to lack the information or judgment necessary to a wise decision. This probability is the basis of the so-called "short ballot" reform, which advocates that the number of elective offices to be filled at any one election and likewise the number of legislative measures to be considered be kept so small that the voter will not have to make more than two or three decisions at a time. A shorter ballot is undoubtedly needed, and would unquestionably result in more intelligent voting; but it would also limit the voter's range of choice. With the shortened ballot, elections can be used to decide only a few matters of major importance. The vast multitude of questions now settled by elections in this country would have to be settled in other ways.

The betterment of election administration and the shortening of the ballot would do much to improve the quality of American elections; but there are two problems of great importance which they could not entirely solve. One is the undue use of money in political campaigns, and the other is the improper use of political patronage in the same connection.

Money in politics. It costs money to conduct even a small campaign, and when the scope of the campaign is state-wide or nation-wide the costs necessarily soar to high altitudes. The use of money to bribe voters and election officials is universally forbidden under the most severe penalties. These laws are often violated, and sometimes with impunity; but the corrupt use of money is no more serious than the excessive use of money in perfectly proper ways. It is both necessary and proper to use money for advertising, for printing, for radio time, for the rental of halls, for transportation, for the remuneration of workers, and for scores of other unobjectionable, in fact indispensable, campaign activities. But when the outlay of money is too great serious evils follow. Candidates and parties become unduly obligated to the persons or interests who contribute large sums of money to campaign funds. Reprehensible methods of solicitation are employed. Paid propaganda becomes a major influence in the campaign. Candidates and parties with unlimited money to spend have so great an advantage over their poorer competitors, especially in regard to publicity and the dissemination of information, that both sides are not fairly presented to the voters.

There have been many efforts to regulate campaign funds and campaign contributions by law. More than three-fourths of the states limit the amount of money that may be spent by or in behalf of any candidate. Almost an equal number require that campaign expenditures shall be reported and given publicity. Nearly all forbid the expenditure of money for such purposes as bribery, paying workers at the polls, contributions to religious, fraternal, and charitable organizations, hiring vehicles to take voters to the polls, and other undesirable purposes. Some limit the amount which may be contributed by any individual, and the majority forbid contributions from corporations. Congress also has enacted various laws of the same character applicable to the elections of United States senators and representatives. Campaign receipts and expenditures must be reported to the clerk of the House of Representatives; expenditures are limited to a maximum of $5,000 for a congressman and $25,000 for a senator; corporations are forbidden to make campaign contributions; and all persons drawing compensation from the federal treasury are forbidden to solicit, receive, or be in any way concerned with soliciting or receiving, assessments, subscriptions, or contributions for political purposes. The Hatch Acts of 1939 and 1940 forbid any federal, state, or local administrative officer whose salary is paid in whole or in part from federal funds to engage in the soliciting or assessing of campaign funds; set a limit of $5,000 for individual contributions to such funds; and forbid any national party committee to spend more than $3,000,000 in a single campaign. The Smith-Connally Act of 1943 prohibited direct contributions by labor organizations to campaign funds. Evasion of this legislation has been easy and prosecution difficult.

Effects of the spoils system. Votes can be bought or swayed with jobs as readily as with money. The use of the patronage for this purpose is a time-honored American custom. The party controlling the jobs has a vast army of paid workers to throw into the campaign. It can count not only on the votes of the jobholders but also on the votes of their families and dependents. Until recent times we have not been aware of the dangers incidental to the use of the patronage for partisan purposes. The enormous growth of the administrative services of federal and state government since 1930 had brought these dangers sharply to the fore. There are now approximately 12,000,000 persons receiving payment of some kind from the federal treasury and something like 3,000,000 on the payrolls of the state governments. Not all of these are subject to political control, but fully half of them are. The import of these facts is obvious. The politically controlled or controllable public employees and beneficiaries, together with their families, possess more than 20,000,000 votes—enough to be the decisive factor in almost any election. The perversion of these votes to

partisan uses could be a more vicious factor in elections than the direct use of money for corrupt purposes.

Growing awareness of this patronage danger was responsible for the enactment of the Hatch Acts mentioned in the preceding paragraph. These measures not only limit the size of campaign funds and contributions in national elections, but forbid any federal administrative officer (save those in the highest executive positions) and any state and local administrative officers paid in whole or in part from federal funds to engage in partisan activities, serve on party committees, take part in campaigns, or to use their official positions or authority to influence the political behavior of others. They are forbidden to make promises of employment or threats of dismissal, to solicit or assess contributions, and to compile lists showing the political affiliations of persons on relief or receiving compensation or employment under relief appropriations. The effectiveness of this legislation is uncertain. It is said to have been largely evaded in the 1940 and 1944 elections.

The Party System

In a democracy, political parties are a most important means of popular participation in government. Parties nominate candidates for office, formulate public issues, crystallize public opinion, carry on electoral campaigns, largely determine the nature of election mechanisms and procedures, and, in the event of victory at the polls, administer the government. Participation in party affairs is one of the most effective ways of participating in decisions of vital importance in the process of government.

The American party system. In the United States we have a two-party system. Although this set-up was not intended by the authors of the Constitution, it is not an accident. Certain features of our constitutional system have made it almost inevitable that party groupings should consist of two major parties and a varying number of minor parties too small to be of more than occasional and temporary importance in electoral struggles. The threefold separation of powers, which is characteristic of our national and state governments, places a heavy handicap on minor parties and even on third parties of major rank. In order to control and manage the government with any degree of success, a party must gain possession of at least two, and preferably all three, of the great branches of government. Winning a few seats in one or both houses of the legislative branch gives a party very little influence in the government. To make its weight count, it must combine with other parties. But such a combination cannot be decisively influential unless it also controls the executive branch of the government, which dispenses most of the patronage and carries on most

of the daily operations of government. Legislative combinations have no means of controlling the executive branch directly. The President of the United States is chosen by the majority of a body of presidential electors directly elected by the voters of the several states; state governors and other leading executive officials of state government are elected by direct popular vote.

The result is that a coalition of minor parties has a very slight chance of achieving simultaneous control of both the legislative and the executive branches, and, therefore, that the effective political power of minor parties must always remain negligible. A third major party is in much the same situation. Assuming that it is strong enough to capture as many as a third of the seats in the legislative branch, it is still in no position to exert much positive control over the government as a whole unless it can make a deal with the party controlling the executive branch. That party, however, even though it may be in the minority in the legislature, is pretty much able to make such a deal on its own terms; for it controls most of the jobs, and jobs seem to be essential to keep a party organization intact—either jobs or a reasonable prospect of jobs.

The rise and decline of the Progressive Party of 1912 is an excellent illustration in point. The Progressive Party, born of a schism in the Republican Party, ranked second in the election of 1912 in both electoral and popular votes for President. It also won a goodly number of seats in both houses of Congress. In matters of principle it was closer to the victorious Democratic Party than to the Republican Party. But it could make no deal with the Democratic Party. The Democrats did not need the help of the Progressives badly enough to divide the spoils with them; and, if their need had been greater, they would have given the Progressives no more than they absolutely had to, and certainly not enough to enable the Progressives to establish themselves as dangerous rivals of the Democrats in future elections. A deal between the Progressives and the Republicans was impossible, because neither party controlled enough patronage to be of any service to the other. The Republicans still had a strong national organization based on long-established machines in habitually Republican states. Their hope of survival lay in holding on to this organization and keeping it alive. The Progressives had no such organization, but were trying to build one. But they did not command enough patronage to succeed in this endeavor. They were unable to hold their own people in line or entice away the support of the Republicans. So the Progressive Party quickly languished, and its members went over to the Democratic Party or back to the Republican fold.

Such has been the inner history of all third-party movements in this country. Two major parties can flourish, but three cannot. When three or

more arise, the peculiar structure of our constitutional system soon operates to eliminate all but two, or to reduce all but two to the status of inconsequential minor parties. This sequence has happened a good many times in American political history.

Present party alignments. The two major parties at present are the Democratic Party and the Republican Party. Both have had a long and varied history. The Democratic Party claims to be lineally descended from the party founded by Thomas Jefferson in 1800. In fact, there is little resemblance between the modern Democratic Party and the party founded by Jefferson. Jefferson's party was called the Republican Party. In course of time this party split into two factions, respectively known as the National Republicans and the Democratic Republicans. Both claimed to be the exponents of true Jeffersonian principles. The National Republicans became the forebears of the Whig Party and the Democratic Republicans of the Democratic Party. The disintegration of the Whigs in the years preceding the Civil War left the Democrats in almost undisputed possession of the field. In 1854 various irreconcilable elements of the Whig Party, the Democratic Party, the Free Soil Party, and one or two lesser parties combined to form a new party. They named it the Republican Party, because they chose to regard it and wanted the people to regard it as a revival of the honored party of Thomas Jefferson. The new party fought its first presidential campaign in 1856, and since that time the contest for power has been between it and the Democratic Party. In this span of years the Republican Party has won the office of President fourteen times and the Democratic Party eight times. Seats in Congress, state governorships, and state legislatures have been somewhat more evenly divided. In professed principles and in policies pursued in the administration of the government the two have not been far apart. Neither has been consistently a radical nor consistently a reactionary party. Their differences have been more differences of degree than differences of kind.

The fact that both major parties have stayed fairly close to the middle of the road has contributed to their longevity. The American people, on the whole, have been a middle-of-the-road people. Since both major parties have usually taken the middle way, though always on somewhat different courses, it has been easy for the people, when they did not like the Republican or the Democratic brand of "middleness," to shift to the other party without doing violence to their basic political instincts. This situation has vastly strengthened the advantage of the two major parties, and has been equally a handicap to parties striving to edge them out of the picture. It has also fostered the growth of a large body of "independent" voters—independent in the sense that they readily shift from one major party to the other, but probably not independent in the sense of inclination

to desert the major parties and form other attachments. There have been many attempts to lure these independent voters into third parties, but none has been permanently successful.

An ideal arrangement, according to some political thinkers, would be to unite all liberals in one political party and all conservatives in another. Even though desirable, this arrangement would be impossible; and there are grave doubts as to its desirability. Liberals and conservatives cannot be separated like sheep and goats. Nobody has yet discovered an infallible test of what constitutes a liberal or a conservative. The fact seems to be that most people face both ways. In some ways they are liberal and in others conservative, but never all one or the other. Assuming, however, a complete segregation of liberals and conservatives to be possible, how would it work? Instead of having two major parties near the middle of the road, with control shifting from one to the other as the voters move back and forth, the parties would be separated by a chasm too wide for many voters to cross. Both parties would tend toward increasingly extreme and irreconcilable positions. Changes of party control would be of a revolutionary character, whether from conservative to liberal or vice versa. Both parties would become parties of "no compromise." And the time would come when mutual antagonism and distrust would run so high that it would be impossible to keep the transfer of power on the peaceful plane of orderly and nonviolent party succession. Democratic government cannot function on the principle of no compromise.

Party organization. Party business is managed by a network of committees extending over the entire country. At the top is a national committee made up of members from all of the states and territories; in each state there is a state central committee containing representatives from each county; in each county there is a county committee consisting of members from each township, ward, municipality, or voting precinct. There may also be city committees, congressional-district committees, and committees for various other political units. Each committee is responsible for the general management of party affairs within its area, and is expected to coöperate with all other committees as far as may be needed. Although not strictly a hierarchy, with authority descending from the top to the bottom, this committee system does work that way to some extent. The national committee, having jurisdiction over the nation-wide affairs of the party, is respected and followed by the state and local committees to a very large degree. The state committee bears a similar relation to the county and other committees. But the most important committee of all, from the standpoint of actual contact with the voting public, is the county committee. This committee has to enlist and direct the workers in every voting precinct whose job is to get the party vote registered in full strength, to

get the vote out on election day, to serve at the polls either as officials or as party watchers and challengers, to make arrangements for all local meetings, to ring doorbells and solicit votes by direct interview with the voters, and to look after many other matters of practical detail. Weakness in national and state committees is unfortunate, but weakness in county organization is fatal.

The national committee consists of two members (a man and a woman) from each state. These are nominally elected by the quadrennial national conventions of the party, but that election is merely a ratification of choices made elsewhere before the meeting of the convention. As a rule the national committee members are chosen by the state convention of the party, but the laws of some states require that they be chosen by direct primary election. These choices are announced in the national convention by the chairman of the state delegation, and are duly approved by the convention. The privilege of naming the chairman of the national committee is conceded to the presidential nominee of the party, but in case of a vacancy between conventions the committee names its own chairman. Other officers and employees are chosen by the committee or by the chairman with the approval of the committee. The committee usually meets once a year, and may meet oftener on the call of the chairman. The chief duties of the national committee are to make arrangements for the national conventions and to conduct the campaign for President and Vice President.

State committees consist of members from each county chosen by county conventions, county committees, or direct primaries. Their principal job is to look after party affairs throughout the whole state and have general charge of state campaigns. They constitute an important link between the national and local committees, but transactions are carried on directly between these as well as by way of the state committee. County committees are chosen by primary caucuses in local subdivisions of the county or by direct primary elections. There is at least one member from each subdivision, and there may be more. State and county committees choose their own chairmen and other officers.

Political machines. Party organization is often referred to as a political machine. This term is not technically correct. The committee organization of a party may be transformed into a machine or be annexed by a machine, but it is not in its own nature a machine. Machines usually originate outside the regular organization of the party. A small group of clever and unscrupulous politicians band together to promote their own interests. They may form an organization wholly apart from the party organization (for example, a fraternal and social organization such as the Society of Tammany) or they may worm their way into the party organization. Very often they do both. The object is to get control of the organization

and use it for their own purposes. In each ward, precinct, or other local district they have an active group of retainers. These machine henchmen do yeoman service for the machine in caucuses and in primary elections where the members of local party committees are chosen. There they use all of the arts of persuasion and corruption to line things up for the interest of the machine. They get themselves elected to party committees, chosen delegates to nominating conventions, and named to other key positions. In these positions they do the bidding of higher-ups, who in turn execute the orders of those still higher up. At the top is an individual of exceptional political adroitness and force of character, who has been able to get all the rest to acknowledge his leadership. He is the "boss."

Political machines are able to flourish only when citizens who disapprove such things neglect party affairs. Through the local caucuses and direct primary elections those who want clean politics have ample opportunity to establish control of the basic organization of their party. By their indifference and neglect, they make it easy for the machine to move in and gain control. To vote against the machine in elections is to try to save the battle after it is half lost. The most effective way to stop the machine is to stop it before it gets started, and that can be done only by the active and continuous participation of high-minded citizens in the processes by which the local committees of their respective parties are chosen.

Direct Legislation and the Recall

Belief in the untrustworthiness of legislatures has culminated in a widespread movement to place legislative power directly in the hands of the voters. Beginning with South Dakota in 1898, nineteen states have placed in their constitutions provisions for the initiative and the referendum. These devices give the people an opportunity to participate directly in the enactment of laws or in the defeating of laws enacted by the state legislature. The initiative and referendum have also been adopted in the charters of a great many cities.

The initiative. The initiative is a process whereby laws may be enacted by a direct vote of the people. The customary steps in the use of the initiative are as follows: (1) Persons desiring the enactment of a certain law draft the measure and circulate petitions to have it placed on the ballot at the next election. (2) These petitions must be signed by a certain number or a certain percentage of the qualified voters and filed with a designated official (such as the secretary of state) a stipulated number of days prior to the election. (3) The petition is checked to ascertain whether it contains the requisite number of valid signatures. (4) If the petition is found to comply with the requirements of the law, it is given a number and a title,

and these are entered on the ballot in such a way that the people may vote for or against the proposed measure. (5) If a majority, or a stated percentage, of the voters mark their ballots in favor of the measure, it becomes a law.

The foregoing is the more common type, and is known as the direct initiative. A few states have what is called the indirect initiative. This requires the measure initiated by petition to go first to the legislature. The legislature may adopt it, may vote it down, may amend it, or may take no action at all. It goes before the voters only in case the legislature rejects it, refuses to act on it, or materially modifies it. Some states require an additional petition to take it out of the hands of the legislature and place it on the ballot, but most of them place it on the ballot automatically if the legislature does not adopt it. Some do not permit the legislature to modify it, and others provide that the original measure and the measure as amended by the legislature shall go on the ballot together, the people being enabled to choose between them.

In most of the states having the initiative, it may be employed both for the enactment of ordinary laws and for amending the state constitution. Seven confine its use to the enactment of ordinary statutes, and one requires the direct initiative for constitutional amendments and the indirect initiative for ordinary statutes.

The referendum. The referendum is a process whereby the people may overthrow an act of the legislature or defeat a constitutional amendment proposed by the legislature. The constitutions of most of the states have long required that proposed constitutional amendments be submitted to a vote of the people at some stage in their progress, but the application of the referendum to ordinary statutes did not come into vogue until after 1898. The referendum may be ordered against a legislative act in two ways: (1) The legislature itself may refer the measure, or (2) it may be referred by substantially the same process of petition as is used in the initiative. In either case the measure, instead of taking effect, is held up and goes on the ballot for a vote of the people at the next election. Sometimes the legislature has authority to order a special election. If it receives the required affirmative vote (usually a simple majority, but sometimes a majority or a stated percentage of the total vote cast in the election), it becomes a law; otherwise it is defeated. Not all measures, as a rule, are subject to referendum by petition. There is generally a constitutional provision exempting emergency measures, which are commonly defined as measures immediately or imperatively necessary for the preservation of public peace, health, or safety. The legislature is the judge of what constitutes an emergency measure; but the courts have sometimes overruled the legislative declaration of an emergency, on the ground that no emergency

existed and that the legislature was merely trying to evade the referendum.

There are two general types of referendum—compulsory and optional. It is frequently a requirement that constitutional amendments, charter amendments, bond issues, and other measures of special importance must in all cases be submitted to a vote of the people and be approved by them. In such cases the referendum is compulsory. When there is a choice as to whether the referendum shall be used, it is called the optional referendum.

Experience with direct legislation. Advocates of the initiative and referendum expected their results to be all good; opponents expected them to be all bad. They have turned out to be a complex mixture of good and bad. Experience has revealed a good many defects in the operation of these instruments of popular legislation. Some of these faults are mechanical and can be easily corrected; others are inherent in the very nature of processes involving mass action and probably will never be entirely overcome.

The mechanical defects include: (1) faulty requirements as to the circulation and signing of petitions; (2) faulty requirements as to the number of signatures needed; (3) the absence of any provision to insure good draftsmanship; (4) the lack of any restriction as to the number of measures which may appear on the ballot at one time; (5) faulty provisions respecting the adoption or rejection of measures by the initiative or referendum processes.

The problem of petitions. One of the serious problems involved in the circulation of petitions is whether petition circulators may be paid for their work. Some states forbid this and others allow it. Where payment is permissible, money may be, and often has been, a nefarious influence. Money-eyed groups have a decided advantage in the circulation of petitions, and the circulators, in order to collect their fees with a minimum of labor, very often resort to misrepresentation and forgery in getting signatures. On the other hand, where payment is not permitted, corporations and organized pressure groups, being able to call into service as circulators large staffs of employees or groups of obedient members, have an undue advantage over independent citizens. Neither system is ideal, but the results of payment usually have been worse than those of nonpayment. It has been suggested that the problem might be solved by payment from the public treasury, subject to safeguards which would severely penalize circulators bringing in invalid signatures and would make the payment dependent on the measure's being passed or defeated by a majority of the total vote cast in the election. No such scheme has ever been tried.

Another circulation difficulty is to prevent the securing of signatures by

improper means. The forging of signatures and the signing of false and fraudulent names are universally forbidden, but the machinery for the enforcement of these provisions is often inadequate. It is also forbidden in many states to secure genuine signatures by trickery, such as misrepresenting the nature of the petition or transferring signatures from one petition to another, but here again the enforcement is weak. Some of the states have tried to put teeth in their enforcement machinery by requiring every circulator to file an affidavit that every signature turned in by him is the actual signature of the person whose signature it purports to be; that the signer wrote the signature in the presence of the circulator; and that the signer was fully and correctly informed of the contents of the petition before signing; and that he signed voluntarily. Penalties are prescribed in case improper signatures are found on the petition. These requirements might be strengthened if the circulator were required to put up a bond, to be forfeited in case defective signatures were found in petitions circulated by him.

A third circulation problem is whether signatures may be obtained entirely in one city or county or must be more widely distributed. If the former rule prevails (and it is the customary rule), the petition may represent the wishes of only a small fraction of the people resident in one locality. To avoid this local concentration, some of the states require that at least half of the signatures shall come from half of the counties of the state. This insures that no petitions will be filed unless there is widespread interest in the proposal, but it also increases the labor and expense of circulating petitions.

How many signatures should be required in order to invoke the initiative or the referendum? There has been a wide variety both of opinion and practice on this question. It is universally agreed that fewer signatures should be required for the referendum than the initiative. Most of the states require a five or a six per cent petition for the former and an eight or ten per cent petition for the latter. The idea seems to be that it should be easier to challenge an act of the legislature than to pass a law independently of the legislature. A more fundamental question is whether the actual requirement, in either case, is too high or too low. Five per cent, or even ten per cent, is not a very stiff requirement to meet. In many instances the number of signatures required under such regulations has been so small as to enable unimportant minorities of "crackpots" and "diehards" to cumber the ballot with measures of no interest and slight concern to the general electorate. But one of the purposes of the initiative and the referendum is to enable minorities to take their cases directly to the people. If the signature requirement is made too high, this purpose

is defeated. For that reason most of the direct-legislation states adhere to the low requirement, despite its often "freakish" consequences. Some of the states definitely fix the number of signatures required or set an irreducible minimum. The percentage rule results in a fluctuating requirement—high when there was a large vote in the previous election and low when there was not. Under the fixed-number rule the requirement is always the same.

Drafting direct legislation. The promoters of initiative petitions, in most of the direct legislation states, are left to their own devices in the drafting of proposed measures. The measure goes on the ballot in the form submitted by them. Not being skilled in legislative draftsmanship, and not having the assistance of experts in this difficult art, the promoters often commit absurd and mischievous blunders. To guard against such mishaps, some states require all initiated measures, before going on the ballot, to be submitted to the attorney general of the state for an opinion as to the correctness of their legal form and phraseology. The indirect initiative, by compelling measures to go first to the legislature, provides an opportunity for the correction of mistakes in draftsmanship.

Too many measures. Some states have had as many as fifty measures on the ballot at a single election. The voter cannot possibly act intelligently on such a mass of legislation at one time. It is doubtful whether the average voter is capable of dealing with more than two or three measures at a time. Recognizing this difficulty, a few of the states have taken steps to limit the number of measures which may appear on the ballot at one time. While this limitation can be accomplished by arbitrarily restricting the number of measures acceptable for one election, an equally effective procedure has been a rigorous administration of all requirements as to signatures, form of petitions, percentages, filing, and the like. Such administration often has the effect of discouraging petitions in which there is no general interest. Sometimes it has resulted in the rejection of petitions and ultimate failure by reason of the inability of the sponsors to meet the requirements in time to get the measure on the ballot.

Legislation by minorities. Rarely do as many people vote on measures as on candidates for office. Under the rule followed in most states, this disparity makes no difference. If a measure receives a majority of the vote cast on it alone, it is passed; if not, it is defeated. Under this rule it sometimes happens that important measures are enacted into law by a minority of the voters. Several states have endeavored to prevent this kind of event by requiring more than a majority of the vote on the measure to pass it, or by requiring that the majority for the measure must be a certain percentage of the total vote in the election. Some also provide that a legisla-

tive measure may not be defeated by a referendum unless the negative vote is a certain percentage of the vote cast in the election.

Informing the voters. Correction of the mechanical defects of direct legislation, as outlined above, does not remove the inherent shortcomings of the people as legislators. The chief difficulty with the initiative and referendum has been that the great mass of people have not been and could not be adequately informed as to the true merits, probable consequences, and real issues involved in the measures confronting them on the ballot. Most of the states publish and send to each voter a pamphlet containing the text of each measure and brief arguments for and against; but these are too sketchy to be of much help. A simple reading of some measures will suffice to give a clear understanding of their purport; but many are so technical and so vitally related to already existing laws that the voter can gain little real knowledge merely by reading the text of the proposed measures. The arguments furnished along with the measures are always supplied by friends or foes, and seldom give an impartial view. Realizing their helplessness, the people have been largely swayed by the slogan, "When in doubt, vote No." From the large number of measures rejected each year, it would seem that the people are more often in doubt than not.

Experience has shown that the people vote most understandingly and wisely on simple, nontechnical questions in which there is a moral issue or one of broad policy. On complex legal and economic proposals they have done and are invariably likely to do foolish things. In 1940 the voters of one state passed an old-age-pension measure greatly increasing the number of eligibles and the benefits to each. The measure made it mandatory on the legislature to levy taxes to pay these pensions. Yet in the same election the voters passed a tax limitation measure which made it highly difficult to carry out the old-age-pension measure. Both measures involved financial considerations far beyond the ability of the average voter to comprehend, and the voters failed to perceive any correlation between the two. This is a sample of direct legislation with probably the best of intentions and the most unfortunate of results.

Good results. It must be conceded, however, that direct legislation has produced many beneficial results. Because of the unrepresentative structure of our legislatures, they do not always gauge public opinion accurately. The initiative and referendum have made it possible to give the people an opportunity to speak for themselves when the legislature is mistaken or unresponsive. The initiative in particular has been useful in giving the people a chance to express themselves on questions sidestepped by the legislature because of the fear that any action at all will be politically dangerous. There are many instances of public policies such as

woman suffrage and prohibition being brought to definite consideration by the initiative long before the legislature was willing to act. It is also true that direct legislation probably has had important educational values. The people have been obliged to give attention to many problems to which they would have devoted little thought if they had not been obliged to vote on them. Another gain is the possibility, of which numerous examples might be cited, of a more conclusive settlement of highly controversial issues than would usually result from legislative acts alone. A vote of the people is generally accepted as final, and everyone resigns himself to the result and makes the best of it; whereas legislative acts are never so universally and unprotestingly accepted.

The recall. Though not a mode of direct legislation, the recall is a device whereby a stated percentage of the voters, by petition, may order a special election to determine whether a certain official shall continue in office or be immediately removed and superseded by someone else. Eleven states have made the recall applicable to all state and local officials or to all save judges. Others provide for the use of the recall only in local government. The percentage requirement for a recall petition is rather high, usually about twenty-five per cent. Practice varies as to the procedure in case a recall election is ordered. Sometimes the people vote only on the question of whether the designated official shall be removed. If they vote in favor of removal, another election is held to choose his successor. In other instances the successor may be a candidate in the recall election. If the voters favor the incumbent, the recall has failed; if they favor the aspirant, the incumbent official yields the office to his rival.

Studies of over 150 recall elections held in this country show that the incumbent was ousted in more than half of the cases. The basis of the recall movement was primarily political in a large proportion of these elections; but the new officials proved to be an improvement on the old in most of these essentially political ousters by recall. There were also a number of instances where the recall was used to get rid of conspicuously bad officials who probably could not have been removed in any other way. It is probably true that the threat of recall, and the realization that it is an ever-present possibility, has exercised a somewhat restraining effect on many public officials.

Whether the recall should be applied to judges has been a much debated question. Some states have excepted judges from the operation of the recall on the theory that judicial independence would be dangerously compromised if judges were obliged to perform their duties under the threat of a possible recall on account of unpopular decisions. It is only fair to state, however, that there is little evidence that judicial independence has suffered in the states which make no exceptions in favor of judges.

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PART V. AMERICAN POLITICAL PROBLEMS

CHAPTER 18

GOVERNMENT AND LIBERTY

The Rights of Man and the Reign of Law

Doctrines of the Fathers. Our country was founded by men who loved liberty and prized it above all earthly possessions. With the cry "Give me liberty or give me death!" Patrick Henry electrified the resisting colonies and gave the American Revolution a resounding slogan. Thomas Jefferson in his *Summary View of the Rights of the British in America* sounded the keynote of the American cause with the impassioned declaration that "The God who gave us life, gave us liberty at the same time." Benjamin Franklin wrote in the *Historical Review of Pennsylvania,* "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Liberty for their country and liberty for the individual man were for these ardent patriots the greatest blessing Heaven could bestow. Political institutions that did not guarantee liberty were spurned as inevitable implements of tyranny. Above all else in their scale of values were what they conceived as the inalienable rights of man—"life, liberty, and the pursuit of happiness."

In the long and tumultuous drama of human government, liberty and authority have ever been the chief protagonists. No matter what the issues of the moment, the question of man's right to rule over man has never been far in the background. In every political struggle of vital significance it has invariably thrust itself to the fore. The growth of regulatory institutions in primitive society was, as we have seen in earlier chapters, an upshot of the struggle for survival. Men accepted the authority of the few, acquiesced in their dominion, because it was either that or the worse alternative of doing battle singlehanded with the adversities of Nature and the aggressions of fellow men. But men have never become fully reconciled to this subject condition. Always there has lingered in the human heart the desire to be free; always there has persisted in human society a struggle to throw off the fetters of political restraint or reduce them to the lowest point consistent with safety and order. On the other hand, the exigencies of life, the multiplied perils, in an advanced and complex civilization, to person and property and even to liberty itself have

produced an equally powerful impulse to organize, institutionalize, and put men under the sway of law and authority.

In every human soul and in every human society these two basic impulses are forever at war. The libertarian impulse sometimes gains the ascendancy; sometimes the authoritarian impulse triumphs. Neither is able entirely to extinguish the other. Some men, like Patrick Henry, Thomas Jefferson, and Benjamin Franklin, are convinced and fairly consistent libertarians. Others, like Cicero, who said in the *De Republica*, "Excessive liberty leads both nations and individuals to excessive slavery" or Daniel Webster, who said in a speech at the Charleston Bar Dinner, "Liberty exists in proportion to wholesome restraint," incline to authoritarianism. But the mass of men have no philosophy either of liberty or authority. When authority irks them, treads on their toes, goes counter to their interests or aspirations, unduly encroaches on their possessions or their personal freedom, they become libertarians. And when liberty degenerates into license and anarchy, when uncurbed exploiters and profit snatchers menace their economic security, when unregulated social or economic interests trench upon their concerns, they quickly swing over to authoritarianism and howl for the government to do something about it. Nor is any one individual ever strictly rational in his reactions to liberty and authority. He will be a rabid libertarian as to liquor legislation and a strict authoritarian on labor legislation, an ardent champion of Prohibition and a bitter opponent of legislation against child labor, a socialist in economic matters and an uncompromising libertarian on all governmental policies affecting religion.

The reconciliation of liberty and law. These common incongruities of human nature make the reconciliation of liberty with law a problem of perennial perplexity. The scale is forever being tipped this way or that by the pressure of infinitely varied combinations of persons, persons concerned not with liberty or authority in principle, but with this particular liberty or that particular exercise of authority, desired or opposed because of its bearing on their personal interests. As a result of the complex gyrations of these intricately interacting forces we get at one time what seems to be a definite trend toward libertarianism, at another a similarly pronounced trend toward authoritarianism; but as a matter of fact, beneath the surface, the volatility of these many different potencies is such that we can never be sure how strong and lasting, how fundamental in the operation of the government, any given trend will be.

The American political system was born at a time when the surface tides and currents were setting toward libertarianism, and our national and state constitutions embody in their provisions most of the essentials of that philosophy. Chief pillar of the libertarian system of thought is the

doctrine of inalienable rights. All men, so the hypothesis goes, are endowed by nature with rights which no government may justly and properly invade. Indeed, it is to secure and safeguard these rights that governments are instituted among men. In every constitution, therefore, there should be solemn guarantees defining the proper limits of authority and specifying the rights which rulers must respect. Violation of these sacred guarantees, according to the libertarian view, absolves the subjects of a government from their obligation of loyalty and obedience and furnishes justification for the overthrow of the government and the establishment of one that will conserve and respect the rights of the people.

But the pressing of these principles to their ultimate limits means recognition of the right of resistance and revolution, which, if admitted, is fatal to order and authority. The authoritarian therefore denies the existence of any such thing as an absolute and indefeasible right. Government, he says, is an institution established to maintain the integrity of society and must in all circumstances have legitimate power commensurate with that supreme necessity. Absolute rights are out of the question, he declares, because they are invariably destructive to law and order and lead to anarchy. Liberties must be viewed as relative, not absolute; as privileges, not rights. We get our so-called rights, he affirms, by reason of our membership in a certain political society, and they endure only so long as that society endures. Therefore we cannot claim anything as a right which might prove subversive to the social order which creates the rights of all. The only man who can properly claim rights is the solitary recluse who dwells entirely apart from human society, and he can have rights only in so far as he can assert and maintain his absolute independence of the rest of mankind.

Between these polar extremes of libertarianism and authoritarianism there is no satisfactory middle ground. Inalienable rights and unquestionable authority simply cannot be reconciled. You cannot compromise either doctrine without undermining its very foundations. In actual practice, however, it is necessary to find a middle road, to choose a path somewhere between anarchy and absolutism. This median can be found only by ignoring theories, disregarding broad principles, and dealing with each situation as one of practical adjustment. That is what has been done in our own country, though with very great difficulty because of the explicit and positive guarantees of our written constitutions.

Absolute liberty impossible. We recognize that absolute liberty is impossible, if we are to have an organized and orderly society; and that absolute authority is undesirable, if we are to have a society managed with deference to the worth of the individual. So we have invented the twin ideals of liberty regulated by law and of government administered under

law. Arbitrary human will or caprice we would eliminate, whether exercised as liberty or as authority. Law, as we conceive it, is a body of general rules of action expressing so far as it can be approximated the will of the whole people and applying equally to all men. Hence, by setting law above both liberty and authority, we aim to strike a balance between those two irreconcilable opposites and escape the choice between unrestrained freedom and unlimited authority. Under the reign of law, in theory, the rights of man and the powers of rulers are both walled about by universally accepted rules which preserve a rational and equitable balance between the interests of the individual and those of society.

The flaw in this theory, of course, is that law is not handed down from on high or administered by disembodied spirits. All laws—including the most sacred constitutional guarantees—are man-made and man-administered. In actual practice, therefore, the reign of law means the reign of those persons who at the moment are in a position to say what the law is or shall be. Their ideas of liberty and authority prevail while they are in the posts of decision and power. So in the end we have the degree of liberty or authority that finite human beings temporarily called to places of authority deem expedient or necessary. This fact obviously impales us again on the horns of the great dilemma, for law is but human judgment and will in an agreeable guise. In a democracy, however, we cannot rest content to let it go at that. "Democracy," said Woodrow Wilson in his annual message to Congress on December 7, 1920, "is an assertion of the right of the individual to live and be treated justly as against any attempt on the part of any combination of individuals to make laws which will overburden him or which will destroy his equality among his fellows in the matter of right or privilege . . ." If we subscribe to that conception of democracy—and most Americans do—we must eternally seek a reconciliation of liberty and law which tempers strong government with fair play for the common, average man. That is one of the great problems of American government today. We began our national existence with written constitutions replete with guarantees of liberty for the individual. So far as the letter is concerned these guarantees still stand, with many additions. But we find ourselves entering the fifth decade of the twentieth century with one of the most gigantic and powerful instruments of political authority ever created by men—a government that, if not all-powerful, embraces and touches all that we have and do. How well have we realized the democratic ideal of liberty under law? What may we expect in the future? These questions we shall endeavor to answer in subsequent sections of this chapter.

Constitutional Guarantees

In the first state constitutions. The first American constitutions were the state constitutions of the period from 1776 to 1778. Drafted and put into effect during the War of Independence, these instruments prominently reflected the libertarian sentiments of the revolutionists. All were adopted on the theory that they were acts of the people exchanging their natural rights for political rights under a social compact, and all took pains to specify with some particularity the natural rights which were *not* to be surrendered. This was done by inserting in the constitution a bill of guarantees explicitly restricting the authority of government in respect to certain fundamental rights, thus in theory placing them outside the range of political authority.

These bills of rights, as they were usually called, reserved to the people and inhibited governmental invasion of the great historic rights cherished by the English peoples. They were in effect condensed transcriptions of the Magna Charta, the Petition of Right, the Bill of Rights, and other notable acts of the British Parliament asserting and guaranteeing the liberties of the English people. In particular, they declared the right of trial by jury to be sacred and inviolable, prohibited the issuance of general search warrants, forbade the passage of ex post facto laws and bills of attainder, banned the exaction of excessive bail and the imposition of excessive fines or cruel and unusual punishments, guaranteed religious freedom and also freedom of speech and the press, restricted the suspension of the writ of habeas corpus, asserted the right of the citizen to bear arms, and provided that neither life, liberty, nor property should be invaded without due process of law. Practically all of these guarantees were perpetuated in later state constitutions, and with the passing of the years many new guarantees were added.

In the Constitution of the United States. The first constitution of the United States (the Articles of Confederation, 1781) contained no bill of rights. It was not thought necessary. The central government, if it deserved that name, was but a feeble coalition of sovereign states and had no power to deal directly with the affairs of people. Since this government possessed no power to encroach upon private rights, it was not thought necessary to lay any restrictions upon it. In the Philadelphia Convention of 1787 it was the general opinion that the government under the new Constitution, if adopted, would have none but delegated powers. So no bill of rights, as such, was incorporated in the draft as prepared by that convention. But the situation under the new government would not be exactly as under the Articles, and all recognized that fact. The new central government was to be given power to enact laws applying directly to the

citizens of all states, and, to prevent abuses of these powers, must needs be placed under certain restraint. It was felt also that certain limitations should be set against the states to forestall conspicuous abuses of their reserved powers. Therefore, after enumerating the powers of general government in Article I, Section 8, the authors of the Constitution added in Sections 9 and 10 of the same article a series of prohibitions running against the general government and the states respectively. These constitute a partial and incomplete bill of rights.

Against the central government (in Section 9) [1] the following bans were established:

1. Other than to impose a tax of not to exceed $10 per person, Congress was not to interfere with the slave trade before 1808.

2. Suspension of the privilege of the writ of habeas corpus, except in cases of rebellion or invasion, was forbidden.

3. The passage of any bill of attainder or ex post facto law was prohibited.

4. No capitation or other direct tax was to be levied, unless apportioned among the states according to population.

5. No tax or duty was to be laid on exports from any state.

6. No preferences or discriminations were to be practiced in the regulation of commerce, navigation, or revenues as between the several states.

7. No money was to be drawn from the treasury except in pursuance of appropriations regularly made by law, and regular statements and accounts of receipts and expenditures were required to be published.

8. No title of nobility was to be granted, and no person holding office under the federal government was to be allowed, without the consent of Congress, to accept any title, office, emolument, or present from any foreign ruler or government.

Against the states (in Section 10) [2] the following prohibitions were laid:

1. Every state was forbidden to enter into treaties, alliances, or confederations of any kind; to grant letters of marque and reprisal; to coin money, emit bills of credit, or make anything but gold and silver coin legal tender; to pass any bill of attainder or ex post facto law; to pass any law impairing the obligation of contracts; to grant any title of nobility.

2. No state, without the consent of Congress, was to tax imports or exports except as necessary to execute inspection laws.

3. No state, without the consent of Congress, was to lay any tonnage duty, keep troops or ships of war in time of peace, enter into any agreement or com-

[1] See Appendix, p. 634.
[2] See Appendix, pp. 634–635.

pact with another state or foreign power, or engage in war unless actually invaded or in imminent danger thereof.

In addition there were included in Article III, applicable to the national government only, provisions guaranteeing the right of jury trial, requiring such trials to be held in the state where the alleged crime was committed, and defining the crime of treason and prescribing the evidence necessary to convict for treason.

The amendments. Most members of the Philadelphia Convention felt that these guarantees were more than adequate, but the general public, and particularly the opponents of the proposed Constitution, did not. They feared the new central government would become a tremendous magazine of power, would usurp prerogatives not assigned to it, would build up a huge official personnel not amenable to state control, and would therefore oppress and tyrannize the people without check or hindrance. They demanded additional safeguards. The objectors concentrated on the ratifying conventions and insisted upon amendments explicitly securing private rights as the price of their support. In order to get the Constitution ratified it was necessary to make concessions, and certain of the ratifying conventions approved the Constitution only on condition that such amendments be adopted immediately after the new government went into effect. To carry out these pledges the first Congress under the Constitution proposed and referred to the states a number of amendments calculated to serve as a federal bill of rights. Ten of these were ratified. The first ten amendments of the Constitution are commonly known, therefore, as the Bill of Rights. It is important to remember, however, that they constitute strictly a federal bill of rights and not a general one. They were not intended to operate against the state governments, and have never been so interpreted.

The first ten amendments should be carefully read and studied.[3] Although their restraining effect is limited to the federal government alone, they constitute a well-nigh perfect summary of what the American citizen of that day conceived to be his fundamental and inalienable rights. Every state constitution contained a corresponding list of guarantees. As a matter of fact, the adoption of the first ten amendments was simply a matter of importing into the Federal Constitution protective guarantees which had been embodied in state constitutions from the very first. With these guarantees added to those included in the original instrument, and with similar guarantees in every state constitution, it was felt that liberties of the people were well protected. The federal government would be restrained by the one, the states by the other.

[3] See Appendix, pp. 639–640.

The subject matter of the first ten amendments may be briefly summed up as follows:

1. The enactment of any law subversive of religious freedom, freedom of speech and of the press, or of the right of the people peaceably to assemble and petition the government for redress of grievances is forbidden.

2. Infringement of the right of the people to bear arms is forbidden; also the quartering of soldiers in private households in time of peace save with the owner's consent, and in time of war except as prescribed by law.

3. Unreasonable searches and seizures of persons, houses, papers, and effects are prohibited; also general warrants not specifically naming the persons, things, or premises against which they are directed.

4. The right of indictment by grand jury is guaranteed to all persons charged with capital or other major crimes, except in the United States land and naval forces and the state militia when in actual service.

5. Persons charged with crimes are to be given a speedy public trial in the state or district where the crime was committed; are to be informed of the nature and causes of the charges against them; are not to be compelled to testify against themselves; are to be confronted with the witnesses against them and to have the benefit of compulsory processes to secure witnesses in their behalf; are to have the assistance of counsel; and are not to be put twice in jeopardy for the same offense. Excessive bail is not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6. In civil suits where the sum at stake is more than twenty dollars the right of trial by jury is to be preserved, and the rules of the common law are to be followed in the re-examination of any fact tried by a jury.

7. No person is to be deprived of life, liberty, or property without due process of law, and private property is not to be taken for public use without just compensation.

8. The enumeration of rights specifically guaranteed is not to be construed as prejudicing any other rights belonging to the people, and the powers not delegated by the Constitution to the United States nor forbidden to the states are reserved to the states respectively, or to the people.

It will be noticed that these guarantees in a measure duplicate certain of those set forth in Articles I and III. This was doubtless intentional. The sponsors of these amendments were leaving nothing to chance.

Certain of the amendments adopted since the first ten have provided additional guarantees. The Thirteenth Amendment, operating against both the nation and the states, outlaws slavery and involuntary servitude anywhere in the United States save as a punishment for crime. The Fifteenth and Nineteenth Amendments forbid both the nation and the states

to deny or abridge the right of citizens of the United States to vote on account of race, color, previous condition of servitude, or sex.

Guarantees in modern state constitutions. As has been stated above, virtually all of the guarantees of the Constitution and the amendments thereto are also incorporated in the constitutions of the several states, and restrain the state governments in much the same way that the federal guarantees circumscribe the national government. In addition to these traditional and customary guarantees many of the state constitutions include others which have commended themselves to the judgment of state constitution makers. Most state constitutions, for example, prohibit bondage or imprisonment for debt; many forbid religious tests for public office and protect freedom of conscience as well as freedom of religious worship; a number attempt to guarantee freedom of employment; several take pains to stipulate that the estates of suicides shall descend as in cases of natural death; a considerable number forbid the punishment of citizens under martial law unless they are members of the military forces; a few specifically safeguard the right of emigration by constitutional provisions to the effect that emigration from the state shall not be prohibited. These guarantees will suffice for example.

State governments are still further restricted by the Fourteenth Amendment to the Constitution, which forbids any state to abridge the privileges and immunities of the citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. Indeed, it is sometimes declared that the Fourteenth Amendment comprehends all private rights, and transfers their protection from state to national tribunals. That perhaps is stating the case a bit too strongly, but it is a fact nevertheless that since the adoption of the Fourteenth Amendment few state laws touching private rights have escaped challenge on the ground of violating that far-reaching enactment.

Private Rights in Reality

Liberty in the abstract is one thing, liberty in the concrete quite another. Constitutional guarantees may assert the right of the individual to immunity from political authority in this, that, or the other particular. But these guarantees have to be given substance by ordinary human beings in actual instances of conflict between public authority and private right. It is imperative, if organized society is to be maintained, that no private individual or group of individuals shall be permitted to subvert the solidarity, security, or well-being of the whole body politic. On the other hand, it is equally imperative, if individual liberty is to be preserved, that

government shall not be allowed to curtail or annihilate personal freedom unless the public interest urgently so requires. Somewhere a balance must be struck between collectivism and individualism. Someone must decide in every case where the issue arises whether individual liberty shall yield to social expediency or necessity, or vice versa. Someone must determine, in other words, whether constitutional guarantees mean literally and absolutely what they say, or something less or perchance more.

In the American system of government that deciding function belongs to the courts. They act as umpires between the individual and society, and owing to their independent position, their decisions are final. Regardless of the language in which constitutional guarantees may be couched, when the highest court of the state or the nation has spoken, there is no recourse on the part of the citizen or of the officials of the legislative and executive branches of government but to accept the decision and abide by it (except in time of war, when apparently the fundamental law itself may be suspended). We have in ordinary times, therefore, as much or as little liberty as the courts in pursuance of their function of interpreting our constitutional guarantees feel duty-bound to grant or withhold. If, then, we would know the state of our liberties at the present time, or at any given time, we must review the line of judicial decisions in respect to the basic guarantees on which our liberties are founded.

Constitutional guarantees of liberty fall easily into two great classes—liberty of person and liberty of property. Most of them fall entirely into one class or the other, but a few overlap both classes. Our purpose in the remainder of this section shall be to set forth briefly and clearly the main trends of American judicial opinion in respect to these two great categories of political liberty.

Liberty of person is the primary object of constitutional guarantees against arbitrary and unlawful arrest and restraint, summary and unfair procedures of trial and conviction for crime, and inhumane and inequitable penalties. To this end we have guarantees of indictment by grand jury, trial by jury, and of the right to call witnesses and to be confronted with adverse witnesses in open court; also guarantees against bills of attainder, ex post facto laws, self-incrimination, double jeopardy, and the suspension of the writ of habeas corpus. Liberty of person is likewise the object of the customary constitutional guarantees respecting slavery, imprisonment for debt, religious freedom, freedom of speech and of the press, assembly and petition, unreasonable searches and seizures, the right to bear arms, and equal protection, treatment, privileges, or immunities under the law. It is also one of the aims of the requirement that no person shall be deprived of life, liberty, or property without due process of law.

How have these various guarantees been treated in the courts?

The writ of habeas corpus. As to arrests, imprisonment, and criminal prosecutions and convictions it may be said that in general the courts have been literal, so literal in some instances as to place impediments in the way of efficient enforcement of the criminal laws. Arrests without the previous issuance of a warrant are not wholly forbidden, but are limited to circumstances where the emergency does not admit of such action; and the right to the writ of habeas corpus has been jealously guarded. This ancient bulwark of freedom enables a person detained against his will at once to apply to a court of competent jurisdiction for a hearing on the question of whether he has been legally arrested and held. If the court finds in the negative, it promptly orders him released. Only in extraordinary times has this right been seriously questioned. Realizing that in the midst of war or serious civil disturbance it might be dangerous to allow free recourse to the writ of habeas corpus, all of our constitutions make provision for the temporary suspension of the writ. The Federal Constitution states that it shall not be suspended except "when in cases of rebellion or invasion the public safety may require it," and implies that only Congress shall have authority to do so. Most of the state constitutions paraphrase the language of the Federal Constitution on this point, but there are nine which do not permit suspension under any circumstances.

Controversy over the suspension of the writ of habeas corpus has revolved about two points: (1) Is it the prerogative of the legislature or the executive? (2) May the courts pass upon the sufficiency of the emergency on which it is predicated? A number of the state constitutions explicitly state that only the legislature may suspend, but the majority, like the Federal Constitution, do not say so much in so many words. In the Constitution, the restriction suspending the writ is placed in Section 9 of Article I immediately following the grant of powers to Congress, the obvious implication being that the power to suspend was regarded as a power of Congress. But during the Civil War President Lincoln, reasoning that his powers as commander in chief of the military and naval forces must include this power, ordered the suspension of the writ of habeas corpus in large areas where no military operations were going on. In the case of *Ex parte Merryman*[4] the Supreme Court ruled that only Congress possessed this power. Congress in 1863 empowered the President to suspend the writ whenever in his judgment the public safety might require it, but in the case of *Ex parte Milligan*[5] five years later the Court held that even this grant of authority could not justify the suspension of the writ in a district where the civil courts were operating without impediment and the government was unopposed. It likewise held that the

[4] Fed. Cas. 9487 (1861).
[5] 71 U.S. 2 (1866).

suspension of the writ did not warrant the substitution of trial by a military commission for trial by court. There have been very few instances of suspension of the writ of habeas corpus by state legislatures. In most states where the legislature has the power it has authorized the governor to suspend the writ by proclamation. Suspension by executive proclamation in the states has generally occurred in connection with martial law. Under such circumstances the courts in a few of the states have refused to allow the writ and denied the right of petitioners to obtain it, but this cannot be said to represent the general attitude of state courts.

Indictment by grand jury. The right of indictment by grand jury has been faithfully preserved in federal criminal procedure and also in most of the states. A number of the states have done away with the grand jury system and provided for indictment by a bill of information filed by the prosecuting attorney. The United States Supreme Court in the case of *Hurtado v. California* [6] held that this did not amount to a denial of due process of law. Prosecution by information, said the Court, is just as fair to the accused as prosecution by grand jury, and there is nothing in the concept of due process that requires adherence to old forms and procedures when new ones safeguard liberty just as well.

Trial by jury. The right of trial by jury has also been zealously maintained, with one exception—the matter of administrative determinations. Both state and federal courts have ruled that legislatures may commit the decision of questions of fact to administrative officials or tribunals without recourse to judicial trial, by jury or otherwise. Such administrative determination must, however, be strictly one of fact and not of law, and the administrative authority making the decision must be duly authorized by law to act in the matter and follow intrinsically fair procedure. It is felt by some that this concession to administrative authority constitutes a material sacrifice of the fundamental liberties of the American people. Priceless legal rights so often turn upon issues of fact, it is said, that it is a denial of essential justice to permit such facts to be determined without a judicial trial. The answer of the courts is that it would be impossible for modern government to be carried on if every issue of fact touching fundamental liberties had to be submitted to judicial decision, and furthermore that administrative procedure in dealing with such matters is essentially just as fair as judicial procedure.

Self-incrimination, double jeopardy. Not only may an accused person decline to testify against himself on the witness stand; he may not be compelled in any way to produce evidence which might incriminate him. It has been held that it is a violation of this right to force the accused to exhibit portions of his body or clothing, submit to any examination or test

[6] 110 U.S. 516 (1884).

that would serve as evidence against him, or produce private books and papers which would have the effect of incriminating him. The failure of the accused to take the stand in his own behalf may not be adversely commented on by the judge or by opposing counsel in his trial. The privilege against self-incrimination is available not only to accused persons, but to witnesses, and any others who might be subjected to prosecution by the evidence that is sought from them. The immunity does not apply, however, to testimony or evidence on which the giver could not be criminally prosecuted. The immunity extended by the Constitution of the United States does not cover state proceedings, nor does that given by a state constitution apply in federal proceedings. It has also been held that the due-process clauses of the Fifth and Fourteenth Amendments of the United States Constitution do not embrace immunity from self-incrimination. Both the federal government and the states have enacted various laws granting immunity from prosecution to persons giving testimony in certain proceedings. If these provide complete protection for the person testifying, it is then proper to compel the giving of the testimony.

Provisions are found in the Constitution of the United States and in all of the state constitutions which forbid a person to be placed twice in jeopardy for the same offense. It is not a violation of this constitutional guarantee for a person to be tried for the same act in both the federal and state courts. A single act, by violating the laws of more than one jurisdiction, may give rise to more than one offense. This issue came up many times in connection with the enforcement of prohibition. Both the national government and the states had laws forbidding the manufacture and sale of intoxicants, and a rumrunner or bootlegger almost always violated both federal and state law in every liquor transaction. The Supreme Court invariably rejected the plea of double jeopardy in these cases, holding that, although there was only one transaction, it had resulted in two or more violations. In order to avail himself of the plea of double jeopardy, a person must be able to show that, for the offense now charged against him, he was formerly charged before a competent tribunal which acquitted him, convicted him, or reached some other conclusive decision. If the former proceeding was dismissed by the prosecutor, resulted in a disagreement of the jury, or had some other inconclusive termination, it is not double jeopardy to place him on trial a second time.

Bills of attainder, ex post facto laws. A bill of attainder has been defined as a legislative punishment without a judicial trial. Both the Federal Constitution and the state constitutions forbid such legislation, and the federal prohibition runs against the state legislatures as well as against Congress. Very few cases testing these constitutional guarantees have come before the courts. Some of the legislative enactments held void on this

ground are acts declaring a forfeiture of lands without a judicial trial, acts making nonpayment of taxes during the Civil War evidence of disloyalty to the Union, and acts debarring persons from public office and from certain professions because of past acts which had no relation to qualification for those positions or occupations.

An ex post facto law is one making punishable an act which was not so punishable at the time it was committed, or a law which retroactively alters the situation of an accused person to his disadvantage. Most ex post facto cases come up in connection with laws altering criminal penalties, changing criminal procedure, or modifying the rules of evidence in criminal trials. The courts scrutinize all such laws very closely. In many instances, though entirely valid as to future offenses, they may be ex post facto as to offenses committed prior to their enactment. Most of the cases come eventually to the Supreme Court of the United States because the ex post facto prohibitions of the Federal Constitution apply both to the national government and the states. The general rule is that retroactive changes are all right if they do not *necessarily* deprive the accused of rights which he had when the act was committed, do not *necessarily* place him in a worse situation than he was before, do not impose criminal punishment for something that was not subject to such a penalty when done, or do not *substantially* prejudice a person's position before the criminal law because of prior acts. The ex post facto guarantees apply only to criminal legislation. Retroactive civil laws may be unconstitutional on other grounds, but never because they are ex post facto.

Cruel and unusual punishments. The guarantee, found in the national and in most of the state constitutions, against cruel and unusual punishments has given rise to very little litigation. The courts are agreed that its purpose is to outlaw punishments which inflict unnecessary bodily suffering and are imposed for the purpose of torture. The fact that a penalty is unusual in the sense of being novel does not place it in the forbidden class unless it is also inhumane. The courts have sometimes been called upon to decide whether a new mode of capital punishment violates this prohibition. Ingenious lawyers have tried to convince the judges that the substitution of electrocution for hanging or of the lethal chamber for electrocution amounts to inflicting a cruel and unusual punishment. The answer of the courts has generally been that the new methods, not appearing to be essentially more barbarous and inhumane than the old, are all right.

Slavery. The Thirteenth Amendment completely outlawed slavery and involuntary servitude except as a punishment for a crime. Slavery under that name has entirely disappeared, but the courts have frequently had to decide whether certain kinds of involuntary servitude were beyond

the pale of constitutionality. In a recent case the Supreme Court of the United States invalidated a Georgia law which made it a punishable misdemeanor for any person, with intent to defraud, to procure money or any other thing of value on a contract to perform services. Of this law the Court said:

> The necessary consequence is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt is discharged. Such coerced labor is peonage. And it is no less so because a presumed initial fraud rather than a subsequent breach of the employment contract is the asserted target of the statute. It is of course clear that peonage is a form of involuntary servitude within the meaning of the Thirteenth Amendment.[7]

The objectionable feature of the Georgia law was that it gave the defendant no choice but to work or suffer a criminal penalty. If he could not repay the money obtained by his promise to perform services, the law presumed that he had obtained it with fraudulent intent and was therefore guilty of a crime. In order to escape the penalties of this imputed crime, he could not leave the service of his employer until the amount of his wages had discharged the debt. It was no crime for him to make the promise and obtain the money, but it became a crime when he refused to perform the promised services and was unable to repay the advance. Compulsory servitude as a penalty for a crime of which one has been duly convicted is permissible; but compulsory servitude in order to avoid a threatened criminal penalty is not.

Religious freedom. Judging from the language used, the authors of both our national and state constitutions intended to guarantee the utmost freedom of religious worship. Nothing could be more clear and positive than the words of the First Amendment. "Congress," it says, "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." State constitutions contain even more sweeping and dogmatic language, many going so far as to declare that no magistrate shall have any authority to interfere with the free exercise of religious worship, and that every person may worship God according to the dictates of his own conscience. One might suppose, from the comprehensive and unconditional language used in these constitutional provisions, that governmental interference with religion under any circumstances and in any form is entirely forbidden. Nothing could be farther from the truth. The courts have thought there never was any intention to guarantee absolute and unqualified religious freedom.

This question was squarely presented to the Supreme Court of the

[7] *Taylor v. Georgia*, 62 Supreme Court Reporter 415 (1942).

United States in a case in which one Reynolds was convicted of violating the antipolygamy law enacted by Congress for the government of territories. Utah was then a territory and Reynolds was a Mormon who practiced polygamy as then sanctioned by his church as an essential element of religious faith. He appealed his conviction on the ground that the act of Congress was in violation of the First Amendment. The Supreme Court argued from historical evidence that the primary purpose of the First Amendment was to secure separation of church and state and to insure freedom of conscience and belief. It said:

"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or were subversive of good order. . . . Laws are made for the government of actions, and while they cannot interfere with religious beliefs and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" [8]

In another case a student who had been dropped from the University of California because of refusal to take compulsory military training sued to force the university authorities to reinstate him. His refusal was on religious grounds, and he contended that the due-process clause of the Fourteenth Amendment (which has been interpreted to comprehend religious freedom) made it unlawful for the state to compel him to take military training contrary to his religious beliefs or forego the privilege of attending the state university. In answer to this plea the Supreme Court said:

There need be no attempt to enumerate or comprehensively to define what is included in the "liberty" protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. . . . Taken on the basis of the facts alleged in the petition, appellant's contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of "liberty" confers the right to be students in their state university free from the obligation to take military training as one of the conditions of attendance.

Viewed in the light of our decisions that proposition must at once be put aside as untenable.

Government, federal and state, each in its own sphere, owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain

[8] *Reynolds v. U.S.*, 98 U.S. 145 (1878–79).

peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend the government against all enemies.[9]

The most fully reasoned pronouncement of the United States Supreme Court on the question of religious freedom was handed down in the recent flag-salute cases. The laws of Pennsylvania and many other states require the pupils in the public schools, on pain of expulsion, to participate in the daily ceremony of saluting the flag and to recite in unison a pledge of allegiance. The members of a sect known as Jehovah's Witnesses, sincerely believing that the required ceremonies are a species of idolatry, refused to allow their children to participate in them. The children were expelled from school, and members of the sect in one Pennsylvania school district brought suit to enjoin the enforcement of the law on the ground that it violates the constitutional guarantee of religious freedom.

Speaking on this troublesome issue in 1940, the Supreme Court said in part:

> Government may not interfere with organized or individual expression of belief or disbelief. . . . Likewise the Constitution assures generous immunity to the individual from the imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government.
>
> But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religious belief . . . is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies the protection of religious toleration.
>
> . . . The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. . . . Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized.[10]

[9] *Hamilton v. Board of Regents*, 293 U.S. 245 (1934).
[10] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

Believing that the value of the flag-salute ceremony in promoting national unity and loyalty was so great that the individual conscience should not prevail against it, the Court upheld the Pennsylvania law. There was a vigorous dissenting opinion by Justice (later Chief Justice) Stone, who held that the flag-salute laws go far beyond what is permissible because they coerce not action alone but opinion as well. Three years later, on a somewhat different set of facts, the same issue was again presented to the Court. This time the Court held the state law unconstitutional, agreeing in substance with the dissent of Chief Justice Stone in the earlier case. Two of the judges joined in a concurring opinion in which they frankly stated that they had changed their minds. They still adhered to the principles affirmed by the Court in the former case, but felt that they had been mistakenly applied. Speaking for the majority of the Court in the second case, Justice Jackson said that the crux of the matter, when religious freedom is at issue, is whether the disputed law compels a person to manifest a belief he does not hold. If it does, and the overt consequences of allowing him to believe as he likes and act accordingly are not actually dangerous or harmful to the public, the law is unconstitutional. How much religious freedom does this assure the individual? Not absolute freedom, certainly; not as much freedom as he may think necessary for the salvation of his soul. It guarantees just as much freedom, and no more, as a majority of the judges of the Supreme Court, according to their understanding of the facts of the case, find compatible with public welfare.

Freedom of speech and the press. The language of the constitutional guarantees of freedom of utterance is no less positive than that in regard to religious freedom. The First Amendment of the federal Constitution says: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Most of the state constitutions say either that no law shall be passed to restrain or abridge the liberty of speech or that the freedom of speech and publication shall be inviolably preserved. A good many of the state constitutions, notwithstanding their unequivocal guarantees of free speech, authorize the legislature to provide suitable penalties for libel, slander, and defamation. Those which do not expressly make such exceptions to the free-speech guarantee have been given the same effect by judicial interpretation. The First Amendment has been similarly construed by the Supreme Court. In a recent case that high tribunal said:

> . . . it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—

those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[11]

In effect the Court was saying that it recognizes two classes of public utterances—those which, being intrinsically contrary to public policy from time immemorial, the constitutional guarantees were never intended to protect, and those which were intended to be protected and are protected unless, by virtue of special circumstances, they constitute a grave danger to the public. It is the second type which has given rise to the most serious political, and also judicial, controversies over the question of free speech.

Many times in our history Congress and the state legislatures have deemed it necessary to curb utterances of an allegedly disloyal, seditious, or revolutionary nature, and have enacted stringent laws repressing the freedom of speech and press in regard to such utterances. Both the national and the state legislatures have also at various times enacted laws ostensibly aimed at some other object than the suppression of utterance but having that effect nevertheless. The courts have found both forms of repressive legislation to be a never-ending source of litigation requiring difficult distinctions. To declare void all laws in any way or for any purpose abridging the freedom of speech or of the press would be to deny the government power to protect itself against dangers which might result in the destruction of government itself. The courts have always held that the constitutional guarantees were never intended to have that result and cannot be so interpreted. On the other hand, to approve some repressive laws and overthrow others, means that the courts either must decide arbitrarily according to their own likes and dislikes or must be guided by some principle of differentiation which they can justify on sound historical, social, and legal grounds. The search for such a principle has been going on for many years.

The clear-and-present-danger test. In the leading case in which the Supreme Court upheld the Espionage Act of 1918, Justice Holmes, speaking for the court, endeavored to enunciate such a principle. In part he said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court can regard them as protected by any constitutional right.[12]

[11] *Chaplinsky v. New Hampshire*, 62 Supreme Court Reporter 766 (1942).
[12] *Schenk v. U.S.*, 249 U.S. 47 (1919).

The Court has adopted the test of "clear and present danger" as a working principle and in many subsequent cases has marked out its specific meanings. One of the clearest statements of the Court's position was in a 1945 case in which a Texas statute was declared unconstitutional. The statute required paid labor-union organizers to register with a state official and secure an organizer's permit before soliciting members in the state. The Court thought this an infringement of the constitutional right of free speech. Justice Rutledge, speaking for the Court, said that any attempt to restrict this right "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." [13] In former years the Court had upheld laws curbing freedom of speech when it was convinced that the legislature had reasonable ground to believe there was an evil or danger to be prevented or cured. But in the case just cited and other late cases it has taken the position that there must be no doubt at all about the reality of the evil or danger to be dealt with by repressive legislation. The legislature is not to be given the benefit of any doubt. If the Court itself cannot see the alleged danger or evil, it strikes down the law. Critics of the Court have remarked that this amounts to substituting the opinion of the Court for that of the legislature on a question of fact—a practice once severely condemned by all of the present members of the Court. That, of course, was before they went on the bench. They thought it was reactionary for the Nine Old Men who constituted the Court prior to 1937 to substitute their opinion for that of the legislature in cases involving property rights. To do precisely the same thing, on precisely the same reasoning, in cases involving freedom of speech, seems to the present Court not at all reactionary but the quintessence of liberalism.

The Supreme Court has also held that the constitutional protections are available against judicial as well as legislative infringement of freedom of utterance. A California court had fined certain persons for contempt of court for public comments on judicial proceedings not yet completed, and their convictions were appealed to the Supreme Court of the United States. The Court was of the opinion that although disrespect for the courts and improper influence on the administration of justice were sub-

[13] *Thomas v. Collins*, 323 U.S. 516 (1945).

stantive evils, the utterances punished in this case were not of such a nature as to create a clear and present danger that those evils would occur. It further stated that the power to punish by contempt out-of-court publications was not an inherent power of the courts unrestrained by the guarantees of the First Amendment. On the subject of public criticism of the judiciary the Court said:

> The assumption that respect for the judiciary can be won by shielding the judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[14]

All questions of freedom of speech and of the press now go to the Supreme Court of the United States for final adjudication. Prior to 1931 there was doubt as to the jurisdiction of the federal judiciary in cases involving state laws infringing on this freedom. The First Amendment expressly limits itself to acts of Congress, and there is nothing in the Constitution explicitly barring state legislation curbing freedom of speech and of the press. To be sure, the Fourteenth Amendment forbids a state to deprive any person of life, liberty, or property without due process of law. The liberty thus protected might be broad enough to include freedom of speech and of the press, but the judges were not entirely sure. This doubt was settled in 1931, when the Court said: "It is no longer open to doubt that liberty of press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." [15] As a result of the ruling the Court now exercises a power of censorship over the laws of the 48 states whenever the question of freedom of utterance is raised.

Assemblage and petition. The right of the people peaceably to assemble and petition the government for the redress of grievances is expressly guaranteed by the Constitution of the United States and by most of the state constitutions. Both the federal and state courts have made it plain that the rights so guaranteed extend only to orderly assemblages not inimical to public welfare. The judicial decisions concede that legislatures have ample authority to restrict and regulate public assemblages to any extent which may be reasonably necessary to preserve order and prevent conspiracies to violate the law or undermine the authority of the government. The question in every case is whether the law as enforced by the police

[14] *Bridges v. California*, 62 Supreme Court Reporter 190 (1942).
[15] *Near v. Minnesota*, 283 U.S. 697 (1931).

exceeds the bounds of reasonable necessity in protecting the public interest. Sometimes the courts have to deal with very tangled situations. In 1939, Mayor Hague of Jersey City, New Jersey, acting under a city ordinance forbidding the holding of meetings in the streets and other public places without a police permit, tried to prevent meetings of the Council of Industrial Organization to organize labor unions. He ordered the police not to issue permits for such meetings, and, when a meeting was held without a permit, he ordered the police to break it up. The union leaders then brought suit to enjoin the mayor from enforcing this ordinance, and the case went to the Supreme Court of the United States on appeal. The Court faced a difficult problem. The Federal Constitution protects the right of assemblage against national but not state action. The alleged invasion of the right in the Jersey City case had been carried on by a political subdivision of the state of New Jersey. But the injunction was asked, not on the ground that the state constitution had been violated, but on the claim that the Jersey City ordinance infringed rights guaranteed by the Constitution of the United States.

A majority of the members of the Court were convinced that federal rights had been violated, but they could not agree as to the particular ones. Three of the justices argued that the Jersey City ordinance abridged the privileges and immunities of citizens of the United States, which is forbidden by the Fourteenth Amendment. Three rejected this argument, saying that the right of assemblage is not a privilege and immunity peculiar to federal citizenship, but that "freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." [16] As a result of this decision we know that freedom of assembly is protected by the Federal Constitution against state as well as federal action, but we do not know precisely why.

During the antislavery agitation prior to the Civil War several burning controversies arose in connection with the right of petition. One was whether the Constitution made it obligatory to receive petitions. Another was whether, if received, petitions had to be considered and acted upon. A third was whether the contents of a petition could be used as a ground on which to rest criminal charges against the petitioners. It seems to be settled now that formal receipt of a petition is all that is necessary, that it need not be taken up and considered, and that it may not be used as a basis of criminal proceedings. There is some opinion to the effect that in time of a war a treasonable or seditious petition might be used as a ground for criminal action.

The right to bear arms. The Second Amendment of the Constitution

[16] *Hague v. C.I.O.*, 307 U.S. 496 (1939).

of the United States says that the "right of the people to keep and bear arms shall not be infringed." Many of the state constitutions contain similar provisions. The courts have consistently held that the only right protected by these guarantees is the right to bear arms as a soldier in a legally authorized military organization. They do not sanction private armies, private troops of any kind, private arsenals, or the possession of any weapons forbidden by law. In upholding the National Firearms Act of 1934, the Supreme Court said: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel less than eighteen inches in length' at this time has some reasonable relation to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." [17]

Searches and seizures. The Fourth Amendment of the Federal Constitution and corresponding provisions in most of the state constitutions forbid unreasonable searches and seizures. Their aim is to give security to the houses, papers, and effects of the people against arbitrary and unjustifiable invasion and distraint. It is a general rule that a search or seizure is not lawful unless it is authorized by a warrant, supported by oath or affirmation, "particularly describing the place to be searched, and the persons or things to be seized."

This guarantee applies to criminal but not to civil proceedings. Its object is the same as that against self-incrimination—to spare a person the necessity of supplying the evidence for his own conviction. Since it is *unreasonable,* not *reasonable,* searches and seizures which are forbidden, the crux of the issue, whenever this guarantee is invoked, is the reasonableness of the search or seizure in question. A search or seizure supported by a proper warrant is always reasonable, but not all searches and seizures made without a warrant are unreasonable. In the latter case a great deal depends on the particular circumstances. A good illustration of this arose in connection with the enforcement of prohibition. Congress had authorized enforcement officers to search automobiles and other vehicles and seize contraband liquor without first procuring a warrant. It was contended that this law was unconstitutional. On that point the Supreme Court had this to say:

> We have made somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, a dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the

[17] *U.S. v. Miller,* 307 U.S. 174 (1939).

vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[18]

The Court has never attempted to set up a comprehensive test of reasonableness in searches and seizures. It was reasonable to search an automobile without a warrant because warrant procedure simply would not work. A different test of reasonableness might apply in other circumstances. Because the circumstances differ so widely in different cases, the Court has often seemed to shift ground in search and seizure decisions.

One question that has come up in many forms is whether books, papers, and other evidence obtained by accident or stealth may be used against an accused person. Incriminating documents have sometimes been stolen from accused persons and turned over to the prosecuting authorities; sometimes the owner has lost or mislaid them and government agents lawfully come into possession of them; the contents of wastebaskets have been known to yield important evidence which the accused thought he was destroying. In most of these cases the courts have thought there was no violation of the prohibition against unreasonable searches and seizures, provided the government came into possession of the incriminating evidence without wrong on its part. It is not wrong for the government to take and use what comes into its hands without any effort on its part to steal, connive at stealing, or otherwise improperly invade the privacy of the owner. Virtually the same problem has been presented in the numerous cases dealing with wire tapping. In 1928 the Supreme Court held that wire tapping to secure evidence against a suspected violator of the prohibition laws "did not amount to a search or seizure within the meaning of the Fourth Amendment." [19] There was a strong dissenting opinion, and considerable public protest followed. In the Communications Act of 1934 it was provided that no person, being unauthorized by the sender, shall intercept, divulge, or publish wire communications. Subsequent to this a man convicted of smuggling appealed to the Supreme Court on the ground that the evidence by which he was convicted had been secured by wire tapping in violation of the Act of 1934. The prosecution's contention was that the 1934 law did not apply to officers of the government. The Court held that it applied to federal officers as well as others.[20] Then came a case in which the conviction had been secured by evidence obtained by installing a detectaphone in the room adjoining the office of the accused and listening to his telephone conversations. The wires were not tapped and the officers heard only the accused's talk into the receiver. The Court held that this was not wire tapping within the meaning of the Communi-

[18] *Carroll v. U.S.*, 267 U.S. 132 (1925).
[19] *Olmstead v. U.S.*, 277 U.S. 438 (1928).
[20] *Nardonne v. U.S.*, 302 U.S. 379 (1937).

cations Act. That law, said the Court, protects a message throughout the course of its transmission by the agency or instrumentality of transmission, but does not protect words spoken or written as a message from interception by means not invading the course of transmission. In addition the Court said that the use of the detectaphone was not a violation of the Fourth Amendment. It had been argued that the use of a delicate sound-magnifying instrument to overhear conversations in a room was a much more arbitrary and unreasonable trespass on the privacy of the individual than tapping a telephone wire on which he had projected his voice beyond the confines of his own home or office. The Court answered that in its opinion the distinction was "too nice for practical application of the Constitutional guarantee." [21]

Equal protection of the laws. The Fourteenth Amendment of the United States Constitution forbids any state to deny to any person within its jurisdiction the equal protection of the laws. Most of the state constitutions contain similar prohibitions. While these guarantees apply expressly to the states and not to the national government, the Supreme Court's interpretation of the due-process clause of the Fifth Amendment (which is directed against the national government) has accorded virtually the same protections against federal action. The primary purpose of the equal-protection guarantee is to prevent arbitrary and unreasonable discrimination in the treatment of individuals and classes in the making and enforcement of laws. An excellent summary of the general meaning of the right of equal protection is found in one of the early cases in which the Supreme Court interpreted the Fourteenth Amendment. Said the Court:

> The Fourteenth Amendment, in declaring that no State "shall . . . deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals,

[21] *Goldman v. U.S.*, 316 U.S. 129 (1942).

education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.[22]

To the general principles thus outlined, the Court has conscientiously adhered, but in particular cases there have been wide differences of opinion and seemingly contradictory decisions. In each case the judges have to determine whether the law in question taken in connection with the special circumstances is in fact a reasonable and proper exercise of the police power or an arbitrary and unwarranted discrimination. It is on the facts rather than on the principles of law that the judges are most likely to disagree.

Privileges and immunities. In two places the Constitution of the United States mentions the privileges and immunities of citizens. Article IV provides that the citizens of each state shall be entitled to "all privileges and immunities of the citizens of the several states." The Fourteenth Amendment provides that no state shall "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." The courts have held that these clauses refer to privileges and immunities which attach to citizenship as such and are not necessarily enjoyed by persons who are not citizens. Most of the fundamental guarantees of both state and national constitutions protect *all persons*, noncitizens as well as citizens. These, however, are for citizens alone.

It is apparent also that the language refers to two classes of privileges and immunities—state and federal. As to state privileges and immunities the Supreme Court has said: "Beyond doubt those are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in

[22] *Barbier v. Connolly*, 113 U.S. 27 (1885).

lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." [23] Federal privileges and immunities pertain to the citizen in his relations with the government of the United States as distinct from those of the states. Congress has enacted legislation which imposes severe penalties on any person who causes any inhabitant of the United States to be deprived of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. These penalties apply even though the deprivation be made under the color of law. However, in cases carried to the Supreme Court under this act, it has not been made clear just what privileges and immunities the act is designed to protect or how far the Court will go in upholding it.

The right of compensation. Both federal and state constitutions forbid the taking of private property for public use without just compensation. When the government exercises its right to take private property, it is said to use the power of *eminent domain,* meaning of course that the sovereign power of the state gives a right superior to that of the individual. But it can employ that power in this country only when the taking is for a public (not a private) use and must justly compensate the owner for the property taken.

Many troublesome questions have occupied the courts in enforcing these restrictions. What if the government does not "take" a man's property in the sense of divesting his title and assuming the ownership itself, but makes and enforces a law which destroys or seriously diminishes the value and utility of the property? On this point the Supreme Court has said: "If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." [24] No compensation was made to slave owners when slavery was abolished, to saloonkeepers, brewers, and distillers when national prohibition was adopted, or to the owners of any other kinds of property rendered valueless by any proper exercise of the rightful powers of the government. There was no constitutional obligation to make compensation. Property had been destroyed but not taken for public use by the government.

The taking by the government must be for a public, not a private, use. One might suppose that any taking of property by the government or under its authority would be for a public use, but the courts have ruled otherwise. On one point the courts are unanimous. It is not permissible

[23] *Ward v. Maryland,* 12 Wallace 418 (1871).
[24] *Omnia Commercial Co., Inc., v. United States,* 261 U.S. 502 (1923).

for the government to take the property of one private person and give it to another person to be used as his own private property. That action clearly would not be a taking for a public use. But when the property taken is devoted to uses nominally for the benefit of the public, the problem is more difficult. It all depends, the courts say, on the nature of the use. Formerly the courts were inclined to scrutinize governmental activities much more closely than now. Activities not in line with the traditional functions of government, even though carried on by the government itself and beneficial to the public, were held to be of a private and proprietary rather than of a strictly governmental nature. In many cases the courts have held that the power of eminent domain could not be employed for private and proprietary purposes even by the government itself. Modern judicial opinion does not perceive so clear a line of demarcation between governmental activities that are essentially public in their nature and those which are essentially private. Broad classifications are avoided, and the conditions and circumstances of each use are viewed in the light of the one particular situation in which they actually exist. This approach leads to particularization rather than generalization. Instead, for example, of holding that the condemnation of land for such a purpose as a spur track or an irrigation ditch is always a public or always a private use, the courts are more likely now to hold that in one situation it is public and in another private. While this diversity is very confusing to the layman, it enables the courts to avoid the gross fallacies of sweeping approval or disapproval.

The question of just compensation has not occasioned great difficulty. The owner is entitled to the reasonable value of the condemned property, as determined by a competent court or administrative body. He is entitled to be heard on the question of valuation, but is not entitled to set the value himself. He can claim compensation for the property taken and losses resulting directly from the taking, but not for indirect losses. If the taking and resulting improvements add to the value of his remaining property, these benefits may reduce the amount he can claim as compensation. He is not entitled to compensation for speculative gains in the value of his property which might have occurred had there been no taking.

Freedom of contract. Among the liberties protected by constitutional guarantees inuring to the special benefit of property rights, none have been more prominent than those surrounding the right of contract. Freedom of contract is held to be implicit in the guarantees of the Fifth and Fourteenth Amendments that no person shall be deprived of life, liberty, or property without due process of law. Furthermore, the Constitution of the United States expressly forbids any state to impair the obligation of contracts, and forty-one state constitutions contain similar provisions. The

Supreme Court has held that the due-process clause of the Fifth Amendment impliedly forbids the national government to impair the obligation of contracts. Two freedoms are thus protected against arbitrary and unwarranted invasion—the freedom to make contracts and the freedom to enforce contracts.

The freedom to make contracts includes the right to acquire and dispose of property by contract, to contract with reference to the management or use of property, to make contracts in relation to all kinds of employment, and to enter into contractual engagements of any proper kind in connection with property, business, or personal affairs. It must be remembered, however, that the courts have repeatedly asserted that the right of contract is not absolute. Said the federal Supreme Court in a leading case:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[25]

In substance this statement means that every person in the United States is free to make any contract not contrary to public policy as determined by valid laws. Whether a law interfering with the freedom to make a contract is valid, is a question of due process—a topic which will be more fully discussed later in this chapter.

The freedom to enforce contracts is protected, as we have seen, by the guarantees against impairing the obligation of contracts. A law impairing the obligation of a contract is one which operates retroactively to nullify or diminish the binding legal obligation of the agreement. No law can impair the obligation of a contract as yet unmade, for there is no obligation to impair. Laws applicable only to future contracts can be challenged only under the due-process clauses, but laws applicable to past contracts come under the protection of the contract clauses. In construing the contract clauses, the courts have become involved in several difficulties. One of these is the question of what is a contract.

A legally binding agreement between private individuals is clearly a contract protected by the constitutional guarantees; but what about an agreement between the government and a private person? In the early

[25] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

case of *Fletcher v. Peck*,[26] the legislature of Georgia for a trivial consideration had conveyed lands to certain private persons. When it later appeared that these grants had been obtained by corrupt and fraudulent means a subsequent legislature tried to rescind the transaction. The federal Supreme Court held, however, that an irrevocable contract had been made, and hence that the action of the second legislature amounted to an impairment of the obligation of this contract. Nine years later, in the historic Dartmouth College Case,[27] the Court went a step farther and ruled that in granting a charter to a private corporation a state had made a contract which could not be retroactively revoked.

Impairment of obligation of contracts. As a consequence of these and subsequent decisions in line with them, all units of government were put in the position of being unable to revoke, alter, or materially qualify by retrospective legislation any grant of property, rights, or privileges to private individuals. This disability meant in many cases that the mistakes and misdeeds of one generation of officeholders were irrevocably fastened upon subsequent generations to the end of the term of the grant. This condition was intolerable, and the courts themselves soon realized it and endeavored to make amends in later decisions. In the course of time the courts evolved three principles of construction which have materially whittled down the invulnerability of contracts between governmental authorities and private persons.

The first of these principles is that all contracts (and particularly government contracts) are to be regarded as having been made with a clear understanding of the constitutional and statutory law at the time of making and to include, by implication, all relevant provisions of such law. Taking advantage of this ruling, most of the states have enacted constitutional or statutory prohibitions against the granting of irrevocable or long-term charters, franchises, and other contracts by the state and its political subdivisions. Since these become implied provisions in every subsequent grant or contract, such agreements are rendered revocable or alterable by their own terms.

The second principle of construction was that all government contracts are to be strictly interpreted. Should there be doubt as to whether rights or privileges claimed under such an instrument actually were intended to be granted, or were in fact granted, it is the duty of the courts to hold that nothing is to be presumed to have been granted unless it can be proved beyond a reasonable doubt. As Chief Justice Taney put it in the famous Charles River Bridge Case, ". . . the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms

[26] 4 Cranch 87 (1810).
[27] *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819).

of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act . . ." [28] This rule of construction has been an effective bar to the enlargement of contractual rights and privileges by making ambiguous provisions elastic enough to include whatever might be claimed.

The third principle of construction has been well stated by the Supreme Court of the United States in a recent case. "Our decisions," said the Court, "recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power, but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public, and the means adopted must be reasonably adapted to that end . . ." [29] This rule is merely another way of stating the ancient doctrine that truly sovereign power is inalienable. Government may attempt to grant away its power to make regulations in the interest of public health, order, safety, morals, and welfare; but all such efforts are unavailing. Government cannot divest itself of sovereignty by grants to private persons because private persons cannot be sovereign in any respect or degree. Therefore, all attempts to grant sovereign powers to private persons are empty words. However, as the Supreme Court very carefully pointed out in the language just quoted, it is possible for the government to bind itself by contractual obligations which may not be revoked or altered by what is merely an ostensible exercise of its police power. All contracts yield to sovereignty but not to pseudo sovereignty. The question in every case, then, is whether an attempted use of the police power to undermine contract rights is a real exercise of that power in accordance with the underlying principles of the Constitution. Thus the whole thing boils down to a question of due process of law, which we are to consider more fully later on.

Unconstitutional taxation. Infringement of property rights may often come about through the exercise of the power to tax. That power, as the courts have often remarked, is the power to destroy. They have also begun to say in recent years that the power to tax is the power to regulate as well as to destroy. At one time the courts were much inclined to the view that taxation for other than revenue purposes was not taxation at all, but something else. If the purpose of a tax measure clearly was not revenue, the courts were disposed to look with disfavor on it. A different view has now come to prevail. If, on any subject, the government has the power to regulate directly, the courts see little reason why it may not also regulate indirectly by means of taxation. Only when the government seeks to regulate indirectly by taxation something it is forbidden to regulate by

[28] *Charles River Bridge v. Warren Bridge,* 11 Peters 420 (1837).
[29] *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938).

direct action do the courts question its power to tax for nonrevenue purposes.

Because of the measureless possibilities of the taxing power both for destruction and regulation, it is important for the citizen to understand something of the nature of constitutional limitations on the power to tax. Perhaps the most sweeping of these is the rule against taxation for a private purpose. Most of the state constitutions contain explicit provisions enjoining this rule on their taxing authorities. The Federal Constitution does not in so many words forbid taxation for a private purpose, but the Supreme Court has said that it is implicit in the general theory of our government that only taxation for a public purpose is valid.

Public purpose in taxation. What constitutes a public purpose in taxation? The courts are not entirely agreed on the answer to this question. "Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances." [30] This pronouncement of the Supreme Court of the United States sums up the position of the courts quite accurately. It is virtually the same position that they have taken on the public-use question in eminent domain. They will not make a sweeping classification of public and private purposes for which taxes may be levied, but will judge each case on its merits in view of all of the surrounding circumstances. Most of the cases have had to do with taxes to pay subsidies or benefits to private enterprises or individuals, or with taxes to finance government enterprises competing with private business. The central question in each case is whether the tax is a purely arbitrary exaction for private benefit alone or is a reasonable imposition for the promotion of a program or policy conceived for the public good. It is not important that the program or policy shall be sound and successful. Not success or failure, but essential purpose, is the true test. Taxes to pay old-age pensions have been upheld, because, though private individuals are incidentally greatly benefited, the primary purpose is to prevent or correct conditions harmful to society in general. On the other hand, taxes to pay subsidies to encourage industrial concerns to establish factories in a community have been held invalid, because, though there might be some incidental public benefit, the chief result, if not purpose, would be the enrichment of a limited number of private individuals.

Uniformity in taxation. Another requirement for constitutional taxation is equality or uniformity. Originally most of the state constitutions included provisions requiring equal and uniform rates of taxation throughout the state. The Federal Constitution requires all duties, imposts, and excises to be uniform throughout the United States, and it has been held

[30] *Green v. Frazier*, 253 U.S. 233 (1920).

that the due-process clause of the Fifth Amendment forbids the national government to levy discriminatory taxes. State taxing power is similarly restricted by the due-process clause of the Federal Fourteenth Amendment.

The uniformity requirement of the Federal Constitution has been interpreted to require uniformity of rates on the same subject throughout the Union. Some state courts have read their uniformity clauses in the same way, but others have held that they do not permit selectivity of subject at all. In these latter states, if you tax property at all, you must tax all property at the same rate; if you tax incomes at all, you must tax all incomes at the same rate. This view has made it impossible to set up differential rates of taxation for different kinds of property or different classes of income. To overcome this difficulty a good many states have adopted constitutional amendments permitting the classification of property and other subjects for tax purposes.

In federal taxation, and in many of the states, since there is no constitutional barrier to selectivity, each form of property (land, buildings, securities, and the like) each level of income, each privilege or transaction selected for taxation may be treated as a separate subject of taxation. If there is uniformity within that category, the constitutional requirement is satisfied. But the Fifth and the Fourteenth Amendments have been held to forbid discriminatory taxation, and this prohibition means that the various categories of taxation must be fair and reasonable. The Supreme Court of the United States has expressed this requirement in the following language:

> The rule . . . only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. . . . Mr. Chief Justice Fuller said in *Giozza v. Tiernan* that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley, as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all. . . . It may impose different specific taxes upon different trades and professions and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State framing their constitution." [31]

[31] *Magoun v. Illinois Trust and Savings Bank*, 170 U.S. 283 (1898).

Here again we are brought to what is intrinsically a matter of reason and justice—due process of law.

Due process of law. As has been stated many times in this text, the Fifth Amendment forbids the national government and the Fourteenth Amendment forbids the states to deprive any person of life, liberty, or property without due process of law. These are the most important of all constitutional guarantees of individual freedom. They cover almost all relations between government and the individual touching the great freedoms for which democracy stands. Be it noted especially that they are provisional, not absolute, guarantees. Government is forbidden to deprive persons of life, liberty, or property *without* due process of law; when it acts *with* due process, it may make such deprivations even to the extent of exacting the life of the individual or completely divesting his property

The paramount question, then, is, what is due process of law? The genealogy of this concept may be traced back to the early beginnings of Anglo-American law and political institutions. In the forty-sixth article of the Magna Charta the monarch agreed to use his powers in conformity with the "law of the land." He was to govern, in other words, not according to the dictates of his own capricious will, but according to the ancient and established laws of the realm—according to due process of law. In the long struggle for political freedom in England and America this idea that the wielders of authority should be *under* rather than *over* the law of the land—that all authority should be exercised in pursuance of law—became a deep and firmly rooted principle which found expression in such instruments as the Petition of Right of 1628, the American Declaration of Independence, the declarations of rights adopted by several of the states during the Revolution, most of the early state constitutions, and the Ordinance of 1787 for the government of the Northwest territory. That it should find its way into the Constitution of the United States was almost inevitable.

Procedural due process. It was the general understanding, prior to the middle of the last century, that the phrase "due process of law" referred only to procedure. Life, liberty, and property could be taken if the procedure employed was all right. The traditional procedures of Anglo-American jurisprudence—for example, indictment by a grand jury and trial by a petit jury—were due process without a doubt. New procedures were not banned simply because of their novelty, but, in order to meet the requirements of due process, they must be essentially reasonable, fair, and just. Many cases on the subject of procedural due process have been decided by the courts. The Supreme Court of the United States has summed up its conception of the procedural requirements of due process in the following terms:

Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. . . . Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitutions of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. . . .[32]

The Court has also held that due process does not require judicial proceedings, but that any legislative or administrative action which meets the essential requirements for due process for judicial proceedings may be equally good. On the other hand, it has held that not even the fact that judicial trial was conducted is sufficient when the essential requisites of due process are disregarded. It has held judicial trials invalid when the evidence showed that the judge and jury had been intimidated by a mob, that the accused had not been given the right to have counsel for his defense, that coercion had been used to wring a confession from the accused, that the prosecutor by connivance had obtained a conviction by perjured testimony.

Substantive due process. Shortly after the adoption of the Fourteenth Amendment the federal Supreme Court began to intimate that in its opinion due process required considerably more than essentially just and reasonable procedure. The Court reasoned as follows: Written constitutions are intended to restrain not merely the procedures but also the powers of government; when, therefore, a written constitution forbids the government to deprive any person of life, liberty, or property without due process of law, that provision cannot be interpreted to mean that, if correct procedure is followed, the legislature may enact any law it pleases invading life, liberty, and property; such an interpretation would mean that the constitutional provision restrains the powers of the government not at all, but only the mode of exercising those powers; hence, it must be concluded that due process requires the substance of every law as well as the forms of procedure under it to be essentially just and reasonable.

[32] *Twining v. New Jersey*, 211 U.S. 78 (1908).

Having once adopted the principle of substantive due process, the courts found that it imposed upon them a most formidable task. Procedure is a mode of action which can be more or less objectively examined and appraised. But to determine whether the substance of a law accords with due process, the court must pass judgment on its purposes and effects. These might be simple, objective facts; but usually they were matters mostly of opinion. Consequently, if the courts overthrew an act of the legislature as contrary to substantive due process, they could be very easily accused of merely substituting their opinion for the opinion of the legislature. In order to absolve themselves of any suspicion of using the principle of substantive due process to veto legislation which the judges disliked, the courts immediately undertook to formulate a guiding rule for the exercise of their power of review. This formula was soon stated by the United States Supreme Court in the following language:

> There are, of necessity, limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real and substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[33]

Thus put forth are two tests for determining whether the substance of a law is contrary to due process. First, is it a law for a purpose sanctioned by the Constitution, but employing methods, devices, or requirements not truly and reasonably designed to accomplish that purpose? Second, is it so obviously contrary to the legislative authority sanctioned by the Constitution as to leave no reasonable doubt?

Simple as these tests appear to be, they have kept the courts in hot water much of the time. Not only have they failed to allay the suspicion that judicial decisions as to substantive due process merely reflect judicial opinion on public policy, but they have led to vehement and often absurd disagreement among the judges themselves. Nothing illustrates this more clearly than the line of decisions by the Supreme Court of the United States on laws fixing minimum wages and limiting hours of labor. The first of these cases involved a New York law establishing a ten-hour day for workers in bakery and confectionery establishments. Ostensibly this was a law for the protection and promotion of public health, a valid purpose for the exercise of the police power. A majority of the judges, Justice

[33] *Mugler v. Kansas*, 123 U.S. 623 (1887).

Peckham writing the opinion, could see "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker." [34] Justice Holmes filed a strong dissenting opinion in which he said:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of hours of work.[35]

The reasonable-man test. The difference between Justice Holmes and the majority of the Court was essentially this: The majority members thought they should declare the law unconstitutional if they themselves could see no reasonable relation between the means and the end; Holmes thought the basis of the decision should not be the opinion of the judges on the matter of means and ends, but of a hypothetical "reasonable man." The judges probably would have differed just as widely on what "a rational and fair man necessarily would admit" as they did in their personal opinions. There were millions of eminently reasonable men in the United States, some of whom could easily see a reasonable connection between a ten-hour law and the promotion of public health and others of whom could not see it at all. If the judges were to be guided by the opinions of *all* reasonable men, it would be necessary to take a national referendum before they could decide; if by the opinion of *any* reasonable man, they should uphold the law even though only one reasonable man in the entire country could see the real and substantial relation between the end and the means; if by the opinion of a reasonable man in the abstract, each judge had as much right as any other to impute opinion to such a creature.

We have dwelt at some length on the cleavage between the judges in the New York Bakeshop Case, because of the belief held by multitudes of self-styled "liberals" that Justice Holmes had the answer to the problem of substantive due process. In eloquent and forceful dissenting opinions in the case of the Kansas law forbidding the coercion of any person to join a labor union, in the case of the District of Columbia minimum-wage law, in the case of the Nebraska law requiring teaching in both public and parochial schools to be in the English language, and in various other cases in

[34] *Lochner v. New York*, 198 U.S. 45 (1905).
[35] *Ibid.*

which the Court found a legislative act unconstitutional on the ground that it violated substantive due process, Justice Holmes pressed home his point. However, he did not go the extreme of insisting that the Court should uphold *all* legislative acts regardless of character. A consistent adherence to his "reasonable man" doctrine certainly should have led him to that position, for in every legislative majority it must be assumed that there are some fair and reasonable men. But Justice Holmes was unwilling to give up entirely the principle of substantive due process; for him, as for judges less inclined to give the legislature the benefit of the doubt, there were limits beyond which the lawmaking power could not constitutionally go. One of these limits was exceeded by the Oregon compulsory-education act of 1922. This law was not enacted by the state legislature but by the voters themselves by means of the direct initiative. A majority of the voters of Oregon had solemnly enacted that every child between the ages of eight and sixteen years should be sent to a public school, and it was a misdemeanor, save under special circumstances, to send such a child to a private school. The Supreme Court of the United States declared the law contrary to substantive due process and therefore unconstitutional. Justice Holmes did not dissent. Did he conceive that not one of the thousands of persons who voted to enact that law was a rational being, that not a single one had a reasoned belief that there was a strong probability that the cause of public education would be helped by the measure adopted? He did not say.

A year later, however, Justice Holmes, dissenting from the decision of the Supreme Court holding void the minimum-wage law of the District of Columbia, restated his "reasonable man" doctrine in somewhat different terms. "The criterion of constitutionality," he said, "is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held." [36] The controlling factor, according to this restatement, should not be what a reasonable man thinks but what he reasonably might think. It is difficult to see how this refinement could help. Justice Holmes was impressed by a mass of documentary evidence which left no doubt in his mind that a reasonable man might reasonably believe that a minimum-wage law would promote public welfare in various ways. But there were reasonable men—indeed, justices of the Supreme Court—who deduced the very opposite conclusion from the same documentary evidence!

[36] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

The "arbitrary or capricious" test. In 1937 the Supreme Court overruled its former decision on the validity of minimum-wage legislation, but did not adopt the "reasonable man" criterion. It simply said:

> What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.[37]

The foregoing statement represents the latest position of the United States Supreme Court on the question of substantive due process. Without camouflage or equivocation the Court, in effect, said: "We are convinced that the action of the legislature was not arbitrary or capricious; therefore it was valid." Thus, at last, it has been made clear that the measure of substantive due process is not what the Supreme Court deems to be good or bad public policy or what it deems to be good or bad means of effectuating public policies, but whether the Court thinks a law has been enacted without a sincere public purpose or employs means grossly unsuited to the accomplishment of such a purpose. Although the Court has not said so, and probably never will, it has achieved, through the principle of substantive due process, the position of final arbiter not merely of the rights of the individual but of the rights of the government as well. Substantive due process does not require the Court to decide whether the government has violated some definite constitutional prohibition, but merely whether it has been "arbitrary or capricious." No broader protection against tyrannical government has ever been conceived. Let us firmly remember, however, that the current value of this protection—its concrete reality in

[37] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

the actual affairs of the day—depends upon the independence, highmindedness, and farseeing statesmanship of the Supreme Court. A Court which bows to any political, religious, racial, or economic group or interest; a Court which acknowledges a debt to or thinks itself obliged to reflect the point of view of any President or any Congressional group; a Court dominated by fixed ideas; a Court unmindful of the truth that democracy consists of some things that must never change and some things that must always change, and unable clearly to distinguish between the two—such a Court can never be a trustworthy custodian of substantive due process.

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CHAPTER 19

GOVERNMENT AND BUSINESS

The Road to Regulation

The philosophy of *laissez faire* was sweeping the world at the time our government was founded. Adam Smith's epochal book, *The Wealth of Nations,* was published in 1776. In this book, which became the bible of nineteenth-century political economists, the learned author argued with great force and ingenuity that the law of nature should be the supreme law of economic life. Let the invisible hand of nature regulate economic life, and all would be well. Artificial interference with nature's laws would be sure to bring disaster. Governmental regulation of business should be avoided as far as possible. In fact, according to Adam Smith, three, and only three, kinds of governmental interference with individual freedom were necessary; all others were superfluous and vicious. The proper functions of government were: (1) to defend the people against attacks by foreign powers, (2) to maintain order and administer justice, and (3) to provide necessary public works and facilities which private enterprise could not finance and operate.

This doctrine became an axiom of early American political thought, and diligent efforts were made to write it into the fundamental law. Many provisions guaranteeing private rights were incorporated in the Federal Constitution and in all of the original state constitutions. The purpose was to transform the principle of *laissez faire* into basic law, but, comprehensive as were these constitutional limitations on governmental power, they did not go as far as Adam Smith recommended. That was impracticable. Even in the eighteenth and early nineteenth centuries practical men were aware that Adam Smith's ideal was unattainable. To confine governmental authority within the limits proposed by his theory would prevent many undertakings and rule out many kinds of police regulation that were deemed essential to public welfare.

The decline of *laissez faire*. From time immemorial it had been an accepted principle of English and American law that the regulatory authority of government extended to all public needs. Despite their *laissez faire* ideas, the constitution makers of the eighteenth and early nineteenth centuries did not try to set aside this principle. They merely undertook to keep it within what they conceived to be proper bounds.

They did not think it necessary or possible to specify the exact limits of public necessity, and hence of regulatory power. They wanted limitations, but not too rigid limitations. What they did was to forbid the invasion of life, liberty, or property without due process of law, the taking of private property for public use without just compensation, the denial of equal protection of the laws, and the impairment of the obligation of contracts. Restrictions such as these left room for as much regulation of business as might be judged consistent with due process, equal protection, and so on. The constitutional guarantees did not chart the boundaries between what was and was not permissible in sharp and unbroken lines, and the resulting ambiguities and uncertainties made possible wide variations of judgment as to whether any particular form of business regulation would come under the ban. The controlling judgment, under our system of government, was in the first instance that of Congress and the state legislatures and in finality that of the highest state and national courts. But these organs of government naturally were largely swayed by the state of public opinion prevailing at the time their judgment was exercised.

Laissez faire opinion was dominant at first, but changing social and economic conditions gradually brought about an ever-progressing departure from this position. Three major factors caused a universal and constantly growing demand for governmental regulation and assistance in the field of business. One was the rapid development of mechanized forms of manufacture and transportation. The accompanying development of large-scale business created serious and continuing problems which did not solve themselves. Some sort of action had to be taken, and government was the only social institution which could do so. A second factor was the growth of large cities and vast areas of congested population, necessitating extensive police regulation for the protection of public health, safety, or morals. The third of the three great forces of change was the impatient haste of the American people to expand and develop the resources of the country. Natural growth was too slow for a people who wanted to settle the whole continent and build up a vast industrial structure in a single generation. Governmental assistance in a multitude of ways was demanded and given, and governmental control and regulation were inevitable consequences.

The growth of regulation. Regulation began on a very modest scale. It had always been a rule of English and American law that businesses "affected with a public interest" were properly subject to an extraordinary degree of governmental interference and regulation. This rule was not overturned by the doctrine of *laissez faire* or by any of the constitutional prohibitions adopted in pursuance of that principle. When a business had the character of a natural monopoly or when the public was in some way

peculiarly dependent upon its services, few would deny that it had special obligations to the public. Innkeepers and common carriers had long been in this class, and nobody had ever supposed that due process, equal protection, and other constitutional buffers were intended to prevent governmental regulation of their rates and services. These types of business were in a class by themselves, and the principle of *laissez faire* was not applied to them as fully as to other kinds of business.

There were not very many forms of business in the category of special public interest at the time most of our great constitutional guarantees were adopted, but such as were clearly recognized as being of this species were held to be fully subject to governmental regulation for the protection of the public interest. When new forms of business appeared, such as the canal company, the railroad company, the telegraph company, and numerous others, they were not at first regarded as being specially affected with a public interest. And, as a matter of fact, they usually were not. Some years of experimentation and improvement had to pass before they could become public necessities. To foster and encourage such enterprises, they were usually given extremely liberal charters and were subjected to little or no governmental regulation. The time came, however, when it was clearly evident that they had moved into the class of public necessities and should be treated as business affected with a public interest. Almost invariably they resisted every effort to place them under governmental regulation, claiming exemption under their charter privileges and immunity under every constitutional guarantee that might be construed in their favor. A long battle ensued, but step by step the old principle of law as to business affected with a public interest was extended to many new forms of business. Long before the New Deal, and before there was any anticipation of such a thing, it had been fully established that the power of government in this country is ample for the complete regulation of any business that can be shown to be in the public-utility class. Not only had the legal principle been established, but thousands of business enterprises, including many of the largest, had been placed under close regulation by the national or state governments or both.

Regulation of business not affected with a public interest. Regulation of business not specially affected with a public interest proceeded even more slowly and tentatively. Although there had never been any doubt, even under the most restrictive constitutional guarantees, of the right and power of government to take all necessary steps to protect public health, safety, and morals, recognition of the need for such action in connection with business enterprise was slow to come. In the interest of public morals commercial amusements of certain kinds have always been banned or permitted under stringent regulation. Governmental controls of this type

have constantly increased in number and scope as our civilization has grown in magnitude and complexity. Regulation for the protection of public health at first affected business enterprise very little; but as medical science gradually showed how diseases are spread by contaminated foodstuffs, improper sanitation, and faulty industrial hygiene, each succeeding year witnessed the enactment of laws compelling business concerns to comply with stringent governmental regulations for the protection of public health. A similar development has taken place in the enactment of legislation for the prevention of industrial and motor-vehicle accidents.

One of the basic beliefs of the *laissez faire* theorists was that free competition was the best regulator of business. It was not imagined, however, that it would ever be necessary for government to regulate business in order to insure free competition. By the end of the nineteenth century that kind of regulation had become one of the chief duties of government in this country. Invoking the old common-law rule prohibiting contracts and combinations in restraint of trade, both the national government and many of the states had undertaken to outlaw monopolies, and were imposing severe restrictions upon many forms of business enterprise in order to enforce these taboos. As Big Business became bigger and more powerful, the demand for increasingly rigorous antitrust legislation forced government gradually to lay down fundamental rules of business ethics and to enforce them by minute supervision of business methods.

Another kind of business regulation which attained considerable vogue in the first quarter of the present century was general-welfare legislation, designed to promote the greater good of society as a whole. Business interests were subjected to far-reaching control for the conservation of natural resources, for the prevention of child labor, for the compensation of injured employees, and for other purposes of social welfare. These regulations did not proceed from any theory of governmental responsibility for general social well-being; they came at a time when the people of the United States were not thinking in terms as broad as that. They came in answer to the demand that something be done about certain conditions that were causing a lot of trouble. But they represented, nevertheless, wide deviation from the principle of *laissez faire*.

Governmental aid to business began soon after the opening of the nineteenth century, with a widespread popular demand for financial subsidies, grants of land, and various special privileges in forwarding the construction of canals and turnpikes. Railroads and steamship lines in their turn asked and received in abundant measure the same sort of governmental assistance. By the end of the century national, state, and local governments were, directly or indirectly, giving a helping hand to all

sorts of business enterprise. And the helping hand not only helped; it also regulated. It had to regulate in order to prevent or correct abuses incidental to its benefactions.

Adam Smith's formula of *laissez faire* conceded the propriety of governmental action in providing public works and other common facilities and services which private enterprise could not supply. The American people have always been in hearty agreement with that idea. We have never balked at state capitalism when convinced that it was necessary or had certain practical advantages over private capitalism. We began our national life with government ownership and operation of the postal system, and we have steadily augmented the number and variety of enterprises carried on by governmental agencies. Long before there was any Tennessee Valley Authority or any fearful anticipations of "New Deal socialism," our national government was in the business of operating barge lines, fleets of merchant vessels, railroads, canals, irrigation works, and numerous other commercial enterprises; many of our states were operating toll roads and bridges, banks, canals, railroads, grain elevators, and other enterprises in competition with private capital; hundreds of cities were operating municipal waterworks, and many also had publicly owned and operated electric-light systems, markets, docks, terminals, warehouses, cemeteries, hospitals, and sanitariums.

To sum up: From the dawn of American independence down to the launching of the so-called New Deal there was a constant multiplication of governmental functions and a constant expansion of governmental activities. This trend had resulted in a network of governmental regulation of business, which, for the sake of comparison, we may call the Old Deal. The nature of this Old Deal needs to be clearly understood if we are to grasp the real character and significance of the New Deal.

The Old Deal

Public utilities. The growth of public-utility regulation has been one of the striking phenomena of American government. As noted above, the common law from the earliest times recognized that certain types of business possess characteristics rendering them peculiarly essential to public welfare and therefore especially liable to public regulation and control. Business enterprises of this nature came to be called public utilities. The qualities which differentiated a public utility from other forms of business were, first, that it had to do with a public necessity; and, second, that the nature of the business was such that free competiton was impossible, or, if possible, could not be relied upon for regulating the business to the advantage of the public.

One of the best examples possible is that of water supply. Water is both a domestic and an industrial necessity. When population multiplies and becomes dense, it is impossible for each household and each business institution to provide its own water supply. In the early history of nearly all American cities private companies were organized to construct waterworks and sell water to the community. In some places there was only one available source of public water supply, and the water company had a natural monopoly. In other places several sources were available, and two or more competing companies were organized. Where there was no competition, the company was in a position to force the consumers to take the kind and quantity of water offered and pay almost any charge it wanted to exact. Where there was competition between water companies, conditions were just as bad for the consumers. In order to have real competition there must be parallel sets of mains and laterals throughout the city, which was a great waste of outlay for construction, a great nuisance to the consumer who wanted to change from one company to the other, and a constant interference with the free use of the city streets. Moreover, if real competition occurred, the rival companies, in order to get business, would often lower rates and then endeavor to recoup their losses by rendering inferior service. The consumer was more or less at their mercy, because he could not quickly and easily shift his patronage from one company to another.

The business of water supply was clearly a public utility, and as such it could not be allowed the same freedom as a business not similarly affected with a public interest. With the coming of urban civilization and the growth of our mechanized economic system many forms of business have been added to the list of public utilities. Definitely in this class under the Old Deal were railroads, steamboat lines, motor trucks and busses, street railways, telegraph systems, wireless communication systems, gas companies, electric light and power companies, and, of course, water-supply companies.

Modes of public-utility regulation. Many years of trial and error in dealing with public utilities had resulted in the general acceptance by legislatures and courts of four basic canons of regulation. These were: (1) that public utilities might not begin or discontinue business without special authorization from a legally competent public agency; (2) that their charges were subject to reasonable control by public authorities; (3) that their services were likewise subject to reasonable control; and (4) that their financial operations and methods of doing business were subject to inspection, supervision, and regulation by properly authorized public officials.

Three basic methods of regulation had also developed. These were:

(1) regulation by legislative enactment enforced by action in the courts; (2) regulation by franchise; and (3) regulation by administrative commissions. The first method was the usual process of control by law. Legislatures would enact statutes prescribing the rights and duties of the particular public utility. Violations of this law were declared to be civil wrongs or criminal offenses, and sometimes both. Private citizens might sue the company on violations that were civil wrongs, and public prosecutors might proceed against it on criminal grounds. Regulation by franchise was in effect regulation by contract. In order to obtain permission to enter business the company had to make application to the legislature, the city council, or some other properly empowered authority. The permission was granted in a document called a franchise. In order to secure this franchise the company had to agree in advance to abide by all of the terms and conditions included therein. By stipulating rate scales, service standards, and other items to be complied with, regulation could be secured without legislation. Violation of the agreement might result either in the revocation of the franchise or in the acceptance of severe penalties as an alternative to regulation. The third method of regulation, by administrative commissions, was occasioned by the need of continuous expert examination and supervision. Public utilities came to be so specialized and technical, so very different from ordinary business, that regulation by legislation and by franchise often failed because they were left to persons who did not know the business well enough to use their powers intelligently. Ordinary legislators, prosecutors, and judges could not be expected to understand the intricacies of the public-utility business, or to maintain the close daily supervision necessary for effective regulation. The favorite device for making regulation more successful was an administrative commission of three or more members devoting their whole time to public-utility regulation. These commissions were usually given power to issue specific orders, make rules and regulations, conduct investigations, require reports, and prescribe rates.

There was a prolonged battle in the courts over the constitutionality of public-utility regulation, the lines of battle being determined by the kind of regulation attempted. Franchises could not be revoked or modified without raising the question of whether there had been an impairment of the obligation of a contract. Statutes, prosecutions, and administrative rules and orders often raised the same question and invariably brought up the issue of due process of law. The utility companies were often victorious, but in the long run the battle went against them. Ways were found to satisfy constitutional requirements without much relaxation of regulatory practice. By the time of the New Deal it was well settled that public utilities were to be conducted under close and elaborate governmental

regulation; the utilities had virtually ceased to dispute the government's right to regulate, and only asked for fair and reasonable regulation.

Quasi utilities. Certain types of business, though not wholly in the category of public utilities, closely approach that status in one or more respects. Some of these may never become full-fledged public utilities; others probably are on the way to become typical utilities. The quasi utilities usually differ from true public utilities in that they are less essentially monopolistic, in that they do not deal with such indispensable public necessities, or in that competition is less apt to produce untoward results. Yet they are in some ways deeply affected with a public interest, and for that reason must be amenable to sufficient regulation to make sure that the public interest will be protected. Good examples of quasi public utilities prior to the New Deal were the insurance business, the banking business, the brokerage business, the warehousing business, and some kinds of terminal marketing.

These forms of business were quite generally regulated under the Old Deal. Most of them were under state regulation, but some came under national regulation as well. Special permission was required in order to engage in these businesses, and there were many statutes and administrative regulations governing their methods of operations. The principal purpose of these controls was to protect the public against certain frauds and abuses that were likely to occur in these particular businesses. They were nearly all businesses to which people entrusted their money or their property, and therefore had exceptional opportunities to mulct the public. Very seldom was there any attempt to regulate their charges or their services, but they were required to keep accounts in prescribed forms, make regular reports, submit to examination and inspection, and follow fixed rules in dealing with the public. Two modes of regulation were chiefly employed. Regulatory statutes were enacted, and these were enforced by the usual processes of civil suit or criminal prosecution. In addition, as the work of regulation became increasingly technical and arduous, special administrative offices or departments were created and empowered to issue orders and regulations, to license, inspect, and supervise, and to initiate prosecutions when needed. Prominent and important among the officers of state government were the state commissioner or superintendent of insurance, the state superintendent or examiner of banks, the state corporation commissioner, and the state warehouse inspector. Corresponding officers of the national government enforced regulations applicable to interstate commerce.

Antitrust legislation. One of the chief reasons for the wide acceptance of the *laissez faire* theory in the eighteenth and early nineteenth centuries was the belief that free competition would prevent monopolies. Monopo-

lies fostered and supported by political favoritism had been one of the worst evils of the previous economic system. But the hope that free competition would banish monopolies proved to be illusory. Free competition enabled Big Business ruthlessly to beat down Little Business and thus to repress all effective competition. By the middle of the nineteenth century there was a growing demand for governmental action to prevent and curb monopolistic business combinations. There was an old common-law rule that contracts in restraint of trade were contrary to public policy and unenforceable at law. Many of the state courts applied this rule to business combinations, and most of the states passed antitrust laws which explicitly prohibited monopolistic combinations.

The greater monopolies, because they were operating in interstate commerce, were beyond the reach of state government. Accordingly there was a demand for national legislation against monopolies. In response to this demand Congress in 1890 enacted the Sherman Antitrust Act, which prohibited, under severe penalties, all contracts, combinations, or conspiracies in restraint of interstate or foreign commerce or tending to create a monopoly. This measure was supplemented in 1914 by the Clayton Act, which put a ban on all business activities in interstate or foreign commerce that might have the effect of substantially lessening competition; and by the Federal Trade Commission Act, which prohibited unfair competition and made the Trade Commission responsible for initiating action to suppress such competition.

All forms of business, whether in the class of utilities and quasi utilities or not, were subject to the antitrust laws. This meant that all forms of business were subject to regulation and control in pursuance of the enforcement of antitrust legislation. At first, both in the state and the national government, the principal methods of enforcement were by civil suit to recover damages, or by criminal prosecution, or by both. There was an enormous amount of litigation, and some very sensational convictions were obtained; but enforcement by lawsuit proved on the whole to be disappointing. It was spasmodic rather than continuous enforcement, and it often failed because the prosecuting officers and the judges were not technically equipped to deal understandingly with intricate matters of corporate organization and finance. For the better enforcement of antitrust laws many of the states created the office of corporation commissioner or a similar office under a different title. This officer and his staff were to supply the expert knowledge and the continuous activity needed for efficient enforcement. They were given power to regulate the formation and business practices of corporations, to require reports, to conduct investigations, and to carry on prosecutions. The national government also added a commissioner of corporations to its administrative machinery, but this

office was replaced in 1914 by a three-man body, known as the Federal Trade Commission.

The regulation of money and credit. The Federal Constitution gave Congress the sole power to coin money and regulate the value thereof, and of foreign coin. The issuance and control of money was conceded to be not only an exclusive function of government, but an exclusive function of the national government. The Constitution was silent about paper money, except that it forbade the states to issue bills of credit or to make anything but gold and silver coin a legal tender in the payment of debts. It was also silent as to the control of banking and bank credit. But before the Constitution was fifty years old many of these uncertainties had been clarified by decisions of the Supreme Court.

It was settled that Congress had absolute control of metallic money. It could select any metal or combination of metals as a medium; it could set up any system of coin units that it pleased; and it could vary the metallic content of any unit as it saw fit. It was settled that, although the states might not issue paper money on their own credit, they might own or control banks empowered to issue notes circulating as currency; but it was also settled that the federal government might tax such bank notes out of existence. During and shortly after the Civil War there was a controversy as to whether the national government might issue paper money on its own credit. It was finally settled that this was one of the properly implied powers of the national government. Very early in our history it was settled that the national government might charter banks and control their credit operations. All of this jurisdiction, of course, was Old Deal legislation and adjudication. Money and credit were potentially under full governmental control long before the close of the nineteenth century. Congress had created a national banking system, and in 1914 had set up the Federal Reserve system in order to achieve more complete and perfect regulation of the credit operations of national banks. The gold standard had been established in 1900 and the gold value of the dollar had been arbitrarily fixed at 25.8 grains of gold 90% pure. Under the authority of the national government several types of paper money were in circulation, and the note issue of state banks had been stopped by discriminatory taxation.

Regulation for social welfare. The Old Deal was by no means backward in regulating business for the sake of public health, safety, morals, and other considerations of social welfare. The state governments began to license, examine, and regulate professions and occupations early in the nineteenth century. Before the coming of the New Deal the list of regulated callings included attorneys, physicians, pharmacists, nurses, dentists, bacteriologists, plumbers, electricians, stationary engineers, motion-pic-

ture operators, and many others. This list was constantly growing, not merely because of the desire of the public to have such callings under governmental control but because of the pressure brought by the members of these occupations themselves. They wanted to be regulated in order to enforce standards which would shut out incompetents and reduce competition.

State regulation of building construction, of factory equipment, and of sanitary installations was universal before the New Deal, and there was also a great deal of municipal regulation in the same fields. Business enterprises were forced to comply with regulations to prevent disease, to forestall accidents, and to safeguard against the hazard of fire. They were required to contribute to compensation of injured employees; they were required to pay minimum wages to certain classes of employees; they were obliged to limit working hours to a prescribed maximum; they were forbidden to pay wages in company-store orders; they were compelled in many instances to recognize various rights claimed by labor unions; they were forbidden to misbrand or adulterate their products; they were forced to abandon certain unethical trade practices; they were inspected, supervised, and prosecuted right and left.

State and local regulation for social welfare was largely supplemented and amplified by federal regulation having the same object. The states could not control evils incident to interstate and foreign commerce, but the federal government could. The national government, using its commerce power, its postal power, and its foreign-relations power, placed a ban on the transportation of lottery tickets from one state to another, prohibited the interstate shipment of contaminated or adulterated foods and drugs, placed the hunting of migratory birds under federal control, struck at the white-slave traffic, and undertook in many other ways to promote social well-being throughout the nation. Scores of business enterprises came under national regulation through these popular Old Deal laws. Though it failed of success, there was a nation-wide effort in the 1920's to outlaw child labor by federal legislation; this may be taken as a good example of the direction in which the Old Deal was moving.

Government aid to business. American business has never been satisfied to stand on its own feet and make its own way. From the very beginning of our national life business interests have used every device of political pressure they could employ to win assistance from our national, state, and local governments. They have pleaded for protective tariffs; they have begged for cash subsidies; they have wangled millions of acres in land grants; they have cried aloud for easy loans; they have lied and bribed to gain tax exemptions; they have lobbied shamelessly for pork-barrel appropriations; and they have labored incessantly for the regulatory legisla-

tion that would fall hard on their competitors and easy or not at all on themselves. If they had been looking far ahead, they would have realized that they were paving the road to regulation with mile-wide blocks.

Government is a great giver, but it seldom gives without getting something in return. If it gets nothing else, it almost invariably gets the power of regulation. When it enacts a protective-tariff measure, it confers a great boon on the favored business interests; but now, having the admitted power and duty to levy protective rates, it may not only vary the rates as it sees fit but may interfere and regulate at will in order to perform its tariff function properly. When it grants a subsidy or makes a loan, it not only helps the recipient but also gains the power to attach regulatory conditions. When it gives away land or other property, the gift may not only be conditional but may also involve perennial regulation in order to insure the fulfillment of the objects of the gift. Under the Old Deal business had gotten itself inextricably entangled in a network of governmental regulation which it might have escaped altogether if it had been more self-sufficient.

State capitalism. When the government goes into business it either displaces or competes with private enterprise. It was an approved theory long before the New Deal that some kinds of commercial service should not be left in private hands. In some instances the people did not trust private enterprise, however efficient it might be; in other cases they believed that more efficient service could be rendered by governmental agencies. The postal power was given exclusively to the national government because postal service was a national necessity. So far as the Constitution was concerned the national government might have arranged to have the work actually carried on by private enterprise; but public opinion demanded government ownership and operation from the very first. People did not want private enterprise in this field.

The same motivation had resulted in many other adventures in state capitalism under the Old Deal. The national government built and operated the Panama Canal, the Alaska Railroad, the Mississippi River barge lines, scores of irrigation projects, the Boulder Dam irrigation and power system, and, from time to time, a large fleet of merchant vessels and passenger ships. Some of the states constructed and operated canals, railroads, grain elevators, and warehouses; a few went into the banking business and into certain lines of insurance; cities by the score went in for municipal ownership and operation of water-supply systems; many acquired other utilities, such as electric light and power systems, street-railway systems, and gas plants; and not a few, in various parts of the country, established municipal ice plants, municipal fuel yards, municipal theaters, and other definitely commercial enterprises.

Both the theory and the practice of state capitalism were well rooted in this country by the end of the nineteenth century. Private enterprise was displaced and excluded in cases where a public monopoly was deemed preferable; but in many instances competing public enterprises were established primarily for the purpose of forcing private enterprise to lower rates and give better service. In other instances public enterprises were launched in order to demonstrate the practicability of the undertaking and thus encourage private enterprise to take new ventures. In other words, state capitalism was employed both for the purpose of supplying services which private capitalism was not trusted to perform or was not capable of performing and of regulating the processes and influencing the development of private capitalism. That this trend long preceded the New Deal is a fact worthy of special note.

The New Deal

The coming of the New Deal. In the presidential campaign of 1932 Franklin D. Roosevelt sharply criticized the administration of President Hoover, and promised, if elected, to give the country a wholly "new deal." These words became one of the catch phrases of the campaign, and there is no doubt that millions of people voted for Mr. Roosevelt in the expectation that drastic changes in governmental policy would be made if he were elected. The Democratic platform of that year outlined a certain program of reforms which the party pledged itself to carry through if given office; but this was far from a blueprint of what later came to be known as the New Deal.

Looking back upon the first two administrations of Franklin Roosevelt, it is now easy to realize that the New Deal developed out of circumstances that were not fully anticipated by anyone. Events, rather than preconsidered and carefully wrought plans, directed the courses of governmental policy to a very large extent. There was first a period of grave emergency during which the paramount aim was to man the pumps and keep the ship afloat by any means possible. This interval was followed by an almost equally feverish period of striving to promote a quick and general recovery of business. After a measure of recovery had been realized there came a much more prolonged period in which two major aims stood out: (1) to hold the gains that had been made, and (2) to put through fundamentally corrective reforms.

Noting these three phases of the New Deal, writers began to speak of the three R's of the Roosevelt program—relief, recovery, and reform. This was an easy method of approach, for most of the New Deal measures did fall into one or more of these categories; but it cannot be truthfully

said that there was ever an integrated and fully developed program involving these three objectives. No doubt there were individuals, and possibly groups of individuals, in the Roosevelt administration who thought and endeavored to act in terms of a definitely conceived and fully rounded program; but there were just as many, with just as much influence, whose minds did not range far ahead of immediate situations and immediate modes of dealing with such situations. Confronting the government were conditions demanding, or seeming to demand, prompt and comprehensive action. The country was in a mood for action, and action was taken. Action to provide relief was desperately needed on many fronts; action to stimulate and speed recovery was equally imperative; action to promote reform was often necessary to prevent a recurrence of dangerous conditions. In some of these actions the planners had their way, at least in part; in others the opportunists had their way. The result was a long series of measures which must be discriminatingly analyzed before we can reach any rational conclusion as to their revolutionary character.

In this chapter we are concerned only with New Deal measures bearing directly upon business enterprise. Our main purpose is not to examine these in detail but to note their basic features and determine their significance in comparison with previous trends in business regulation.

Relief for business. The word relief usually brings to mind pictures of bread lines, make-work enterprises, grocery orders, and similar undertakings. Businessmen have not liked to think of themselves as suppliants for relief. Many would gladly forget the New Deal measures which rescued many business institutions, large and small, from the brink of bankruptcy. Relief for business was just as urgent and just as eagerly sought in the early years of the New Deal as relief for unemployed workers, distressed farmers, and foreclosed home owners. Many banks, insurance companies, railroads, and industrial corporations were on the verge of collapse. Their income had shrunk to pathetic levels, the public would not buy their bonds, and there was no financial institution capable of lending the funds needed to tide them over the emergency.

One of the first actions of the Roosevelt administration was to expand the borrowing and lending power of the Reconstruction Finance Corporation. A government corporation, created in the latter part of the Hoover administration for the purpose of making loans to private corporations and public agencies, the R.F.C. was originally limited to credit operations not exceeding $4,075,000,000. This limit was removed. The credit operations of the R.F.C. have totaled more than $9,000,000,000, of which more than $6,000,000,000 have gone for the aid of business. Further aid for business was provided by the Industrial Loans Act of 1934, which was designed especially to help finance small business institutions which

could not command credit on reasonable terms through ordinary channels.

It cannot be justly argued that the New Deal policy of credit relief for business represented a new departure in American ideas or practices. Government loans to business are almost as old as the history of our country. One only has to read the story of canal and railroad promotion, to mention but two examples, to realize that New Deal lending was merely a modern application of an ancient, if not always honored, custom. The New Deal extended government credit on a vaster scale than ever before, centralized the administration of such credit to an unprecedented degree, and perhaps employed it for a greater variety of purposes than in the past. But conditions dictated these innovations, not principles or theories.

Business recovery. No amount of argument can ever settle the question of whether business recovery would have proceeded more surely and soundly without New Deal aid than with it. The country was not in a mood to wait for nature to take its course, nor in a mood to endure the pains and trials which such a course might entail. There was an overwhelming demand that the government do something to stimulate and promote recovery, and there was also a confident belief on the part of President Roosevelt and his associates that the government was equal to the task.

It is difficult to discern in the New Deal recovery legislation a consistent theory or program of economic readjustment, but certain immediately useful steps were assiduously attempted. The first of these was the restoration of confidence in the financial structure of the country; the second was the breaking of the great economic log-jam that had resulted from low prices, frozen credits, overproduction, reckless speculation, unfair competition, and many other contributing causes; the third was to stimulate business activity by pump priming, that is, by lavish government spending for public works and other objects requiring large industrial production; the fourth was to create or open up markets for the products of American farms and industries. We shall summarize the recovery legislation under these headings.

Banking legislation. The first need for the restoration of confidence was to get the banking system of the country securely on its feet again. While the R.F.C. was busily bolstering up tottering banks with loans, Congress was enacting legislation designed to facilitate the reorganization of insolvent banks, to revive public faith in the safety of banks, and to correct some of the weaknesses of the national banking system which were believed to have been responsible in part for the banking crisis of 1932 and 1933. The Emergency Banking and Gold Control Act of 1933 gave the President extraordinary powers over banking operations, foreign exchange, and gold hoarding. These were emergency powers which made it possible very quickly to stop the hoarding of gold, to put weak or fail-

ing banks through reorganization by a federal conservator, and to provide liberal credit through the R.F.C. without the usual high requirements as to collateral. To bring money back into the banks and to build up a continuing confidence in the safety of banking institutions, the Glass-Steagall Act of 1933 created a deposit-guaranty system. The Act provided for the organization of the Federal Deposit Insurance Corporation, financed in part by the national government and in part by the member banks. National banks were required to join and state banks might do so voluntarily. Members were assessed at the rate of ½% of their deposits to build up a fund which would be used to pay the depositors of failing banks in case the assets of the bank were insufficient. Deposits up to $5,000 were guaranteed. The same law contained provisions modifying the procedure in handling insolvent banks in such a way that hasty and unduly costly liquidation might be avoided. Another provision of the same measure required national banks to divorce their security affiliates and get out of the investment brokerage business, thus eliminating one of the principal causes of bank insolvency. The Banking Act of 1935 tightened government control over the expansion and contraction of bank credit by vesting authority over these matters in an Open Market Committee composed of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve Banks. This change was designed, among other things, to increase confidence in the credit structure of the country by preventing ill-considered changes of discount and call-loan rates.

Price stabilization. Another step for the restoration of confidence was the attempt, by various means, to stabilize price levels. There was a belief in the earlier period of the New Deal that prices were too low and in the later period that they were getting too high. It was desired to bring prices up to a level sufficient to revive business activity and restore confidence in the future, but to keep them from going high enough to discourage buying and thus induce another recession. The principal means employed to regulate price levels were the devaluation of the dollar, the expansion or contraction of the currency, and the control of bank credit. In consequence of a series of executive orders and a congressional joint resolution in 1933, the circulation and use of gold as money was stopped, persons having gold or gold certificates in their possession were ordered to surrender them to the national treasury, and the gold clause in public and private obligations was canceled and debts were made payable in legal tender. An amendment to the Agricultural Adjustment Act of 1933 empowered the President to reduce the gold content of the dollar as much as 50% and also to establish a bimetallic system. Early in 1934 Congress passed the Gold Reserve Act which permanently devalued the dollar and appropriated to the federal government all of the monetary gold in the

United States. Acting under authority granted by this measure, the President reduced the gold content of the dollar to 15.21 grains, thus making it worth 59.06% of the old value. It was thought that this change would have the effect of increasing prices. On this transaction the government made an estimated profit of $2,000,000,000, which was set up as a stabilization fund to control exchange transactions in the dollar at home and abroad.

Price control by the manipulation of the currency was authorized by the Thomas amendment to the Agricultural Adjustment Act of 1933, but the power was never used by the administration. The same amendment authorized the acceptance of silver at not more than 50 cents an ounce from foreign governments in payment of indebtedness to the United States, and this was followed by the Silver Purchase Act of 1934 which authorized the President to purchase silver at home and abroad until the government's stock of monetary silver was one-fourth that of gold or until the price of silver exceeded $1.29 an ounce. Under this legislation the Treasury purchased 1,687,000,000 ounces of silver and put into circulation an addition of about $700,000,000 in silver certificates. Whether this silver action was merely a sop to the silver-mining interests or was a serious attempt to lift prices by inflation has been much disputed. Only 220,000,000 ounces of newly mined domestic silver were bought, indicating no great effort to help the domestic silver industry; and yet the currency issue against monetary silver was too small to have an inflationary effect.

Price control through bank credit became the New Deal's chief mode of striving for price stabilization. The Federal Reserve Banks were authorized by the Thomas amendment to engage in open-market operations in United States securities to the amount of $3,000,000,000, and the government, as we have already noted, had gained increased control over the open-market operations of the Federal Reserve System. Thus the government was in a position, by regulating the flow of securities to and from the banks, to broaden or contract the credit base against which bank notes could be issued. When prices were too low or were falling too rapidly, the credit base was expanded in order to provide credit for more business activity, and when they were too high or were rising too rapidly the opposite action was used. Credit regulation was also effected through government lending, the principal agency being the R.F.C.

Assistance to debtors. Breaking the economic log-jam was one of the objects of many New Deal measures. The attempt to increase prices by devaluation and credit expansion was not only designed to restore confidence but also to break the stalemate of supply and demand which had unduly slowed the economic machine. One of the chief causes of the economic stagnation which characterized the depression years from 1929 on-

ward was the tremendous accumulation of public and private indebtedness. Indebtedness had piled up and national income had fallen until it was impossible in many cases for debtors to pay even interest charges, to say nothing of retiring the principal. Many New Deal policies and measures were designed to remove this obstacle to recovery. The Farm Credit Act of 1933, the expansion of the R.F.C., the Railroad Adjustment Act of 1933, the bankruptcy legislation of 1934, and the Farm Mortgage Act of 1935 were the leading items in this program. The fundamental object of all of these measures was to assist various classes of debtors to refinance their loans on easier terms that would be somewhat more compatible with their earning power.

Two methods of assisting debtors were used. One was by direct loans through specified government agencies, giving the debtor low interest rates and a long time in which to pay. The other was by changing the bankruptcy laws so as to lighten the difficulty and lessen the losses of liquidation through bankruptcy. Corporations were enabled to avert complete liquidation by securing the approval, by the court in charge of the proceedings, of any reorganization plan agreed to by holders of two-thirds of the claims against the corporation. Farmers were permitted to go into voluntary bankruptcy and repurchase the mortgaged property on easy terms at a value fixed by the court, and, in cases of involuntary bankruptcy, to stay foreclosure for five years and then repurchase at an appraised value. Municipal corporations were enabled to go through bankruptcy and scale down their indebtedness, provided 51% of their bondholders agreed. The farm bankruptcy law was declared unconstitutional in 1935, and a new farm-mortgage law was enacted which eliminated the features held objectionable by the Supreme Court. The municipal bankruptcy law was declared unconstitutional in 1936 and a new measure was passed in 1937. A general revision of bankruptcy laws was enacted in 1938.

Regulation of competition. Some of the influential advisers of the New Deal regime believed that one of the principal causes of economic stagnation was cutthroat competition. The theory was that a few rapacious and unprincipled enterprisers in each industry, or a few who were on the margin between success and failure, by paying starvation wages, using child labor, and resorting to various methods of unfair competition, compelled rival enterprisers to adopt similar expedients. The results, it was said, were overproduction, selling below cost, low wages, nonpayment of dividends, and greatly reduced purchasing power on the part of both workers and investors. So long as this vicious circle remained unbroken it was thought that sound and permanent recovery could not occur.

The New Deal solution for this problem was embodied in the National Industrial Recovery Act of 1933. This measure required every trade

group to adopt or have prescribed for it a so-called code of fair competition. These codes were to deal with such matters as wages, hours of labor, prices, service hours, and fair trade practices. Upon approval by the President these codes became binding law, and severe penalties were provided for violations. By way of compensation for this loss of individual freedom, it was provided that businesses conducted under a code of fair competition should be exempt from the restrictions of the antitrust laws; but it was further provided that no code should impose inequitable restrictions on membership, promote monopolies, or eliminate or suppress small business units. Under this measure something over 500 codes of fair competition were put into operation, but the whole structure was struck down in 1935 by a decision of the Supreme Court declaring the National Industrial Recovery Act unconstitutional.

Pump priming. The New Deal's third method of attack on the problem of recovery was pump priming, and this eventually became its chief reliance. The theory of pump priming is very simple. It holds that, when private enterprise is unwilling or unable to spend, the government should step into the breach and spend vast sums in operations that will start production and induce private enterprise to act. Then, when private enterprise gets going, the government should withdraw from spending. The outstanding pump-priming measures of the New Deal were the creation of the Public Works Administration in 1933, under which, up to 1939, funds amounting to $5,800,000,000 had been allotted for various construction purposes; the Federal Housing Administration (created in 1934 and subsequently enlarged in scope) with expenditures of more than $2,500,000,000 to its credit up to 1939; the United States Housing Authority of 1937, which is devoted primarily to slum clearance and up to 1939 had commitments of more than $500,000,000; the Flood Control Act of 1938, which authorized an expenditure of $375,000,000, over a period of five years, for flood-control works and the prevention of river pollution; the Tennessee Valley Authority, which up to 1939 had received $194,000,000; and the various work-relief agencies, the heaviest outlays up to 1939 being over $4,300,000,000 for the Works Progress Administration and about $1,250,000,000 for the Civilian Conservation Corps.

Market expansion. The expansion of markets was, as we have already noted, the fourth expedient of the New Deal for promoting recovery. To open up larger foreign markets, Congress in 1934 authorized the President to negotiate reciprocal trade agreements with foreign countries and created the Export-Import Bank to assist in financing foreign trade. Enlargement of domestic markets was mainly sought through cash benefits to farmers complying with the various crop-control and soil-conservation

programs of the government, through wage increases expected under the National Industrial Recovery Act, and through the stimulation of business by pump-priming activities.

The New Deal recovery program was certainly novel and radical in one respect. Never before had the national government, or any state or governmental subdivision, made such vast and concerted endeavors to counteract depression and promote economic recovery. Aside, however, from the National Industrial Recovery Act, the methods employed were pretty much in line with previous governmental usages with regard to business. On a smaller scale and for more limited purposes, similar steps had been taken before. Arbitrary tinkering with monetary and banking processes had been going on since the first days of the Republic. Arbitrary changes in bankruptcy legislation had been made many times before. Governmental lending was no new thing, nor public works constructed with government funds. From the recovery standpoint, it may be said on the whole that what the New Deal did was merely to give business larger doses of several old-fashioned remedies.

New Deal reforms. It is on the side of reform that the New Deal has aroused the most heated and irreconcilable differences of opinion. We are concerned here only with those measures of reform by means of which larger governmental control of business has been brought about. Included in this category would be the banking legislation of 1933 and 1935, the Federal Securities Act of 1933, the Securities and Exchange Act of 1934, the Federal Communications Act of 1934, the Bituminous Coal Acts of 1935 and 1937, the National Labor Relations Act of 1935, the Motor Carriers Act of 1935, the Public Utility Holding Company Act of 1935, the Commodity Exchange Act of 1936, the Chain Store Act of 1936, the Unfair Advertising Act of 1938, the Fair Labor Standards Act of 1938, the defunct National Industrial Recovery Act, and possibly the Social Security Act of 1935. A brief scrutiny of each of these measures will help us to form an opinion as to the real trends of New Deal reform. The banking laws and the National Industrial Recovery Act, already having been discussed, will not be included in this review.

Securities regulation. The Securities Act and the Securities and Exchange Act may be considered together. The former provided for federal regulation and control of the issuance and sale of corporate securities in interstate and foreign commerce. It was made illegal to sell, offer for sale, advertise by any means, or transport securities in such commerce without first filing certain information and securing permission to proceed. This registration might be refused or revoked on such grounds as misrepresentation in advertising, fraud in present or previous transactions, insolvency, or violations of the Securities Act. Enforcement was placed

in the hands of the Federal Trade Commission, but was later transferred to the Securities and Exchange Commission. In addition to amplifying the Securities Act, the Securities and Exchange Act created a special commission to regulate stock exchanges and enforce the federal securities legislation. Many of the business practices of stock-exchange brokers were placed under stringent restrictions and some objectionable practices were forbidden altogether. The Securities and Exchange Commission was given broad powers to make inquiries, require reports, and take other essential steps in enforcement. This legislation represented a new departure for the federal government, but was not without precedent in previous American practice. Many of the states had had such laws on their books for years, and the Supreme Court of the United States had ruled that they were fully in accord with the Constitution.

The communications and coal acts. The Communications Act placed all forms of wire and wireless communication under the regulation of the Federal Communications Commission. Wire communications had previously been under the Interstate Commerce Commission and radio communications under the Federal Radio Commission. The latter body was abolished by the new legislation. This measure was nothing more than a recognition that communication facilities had become a public utility of national importance and as such should be subject to unified regulation.

The two Bituminous Coal Acts were designed to stabilize this trouble-ridden industry. The Act of 1935, which was declared unconstitutional by the Supreme Court, attempted to give legal sanction to a program of production control and price fixing and to set up a system of arbitrating differences over wage scales. Enforcement was to be achieved through a code of fair competition adopted by coal producers. A tax of 15% was levied on all soft coal produced and 90% of the collections were to be rebated to producers signing and observing the code. A National Bituminous Coal Commission and a National Coal Labor Board were created for administrative purposes. Certain provisions, which had been declared unconstitutional, were omitted from the second act. It continued the Coal Commission and gave it broad powers of regulating prices, marketing, and business practices in the soft-coal industry. Provision was made for the drafting and adoption of a code of fair competition, and for a rebatable tax as a means of securing adherence. These measures represent an effort to cure a sick industry by devices based on the commerce and taxing powers of the federal government. The devices were not without precedent, but they carried federal control into new territory. It must be said, however, that a decided majority of the mine operators and labor unions in the bituminous coal industry were heartily in favor of this legislation and actively lobbied for its passage.

Labor relations. The National Labor Relations Act was something unparalleled in previous American legislation. Many of the states in prior years had enacted laws recognizing the right of labor to organize and to engage in strikes and various other tactics in furtherance of collective bargaining, and Congress had enacted similar legislation for the protection of labor activities in interstate and foreign commerce. But never before had an attempt been made to force employers to recognize labor unions and bargain collectively with them. This measure prohibited and penalized as unfair labor practices: (1) any interference by the employer with self-organization on the part of his employees; (2) the discharge of the worker or any discrimination against him on account of union activities, the maintenance of company unions, and the refusal of the employer to bargain with duly chosen representatives of his employees. It established the National Labor Relations Board for purposes of enforcement and gave it large powers to intervene in controversies between employers and employees and to make rulings on the obligations of both parties. Appeals from Labor Board rulings might be taken to the nearest Circuit Court of Appeals and thence to the Supreme Court. The constitutionality of this far-reaching law was upheld by the Supreme Court, but in later cases the Court was disposed to scrutinize the proceedings of the Labor Board very closely and frequently overruled them.

Public-utility legislation. The Motor Carriers Act placed interstate motor trucks and busses, with certain specified exceptions, under the control of the Interstate Commerce Commission. The Commission was given wide regulatory powers as to rates, routes, wages, hours of labor, safety precautions, and the financial operations of motor carriers in interstate traffic. This was simply bringing another form of transportation under federal regulation as a nationwide public utility.

The Public Utility Holding Company Act required all holding companies operating utilities in interstate and foreign commerce to register with the Securities and Exchange Commission and subjected them to extensive regulation as to financial operations and procedure. It also outlawed the pyramiding of holding companies in the formation of utility systems and ordered the reorganization of utility systems in such a way as to prevent any holding company or combination of holding companies from controlling more than one integrated operating system. After trying their fortunes unsuccessfully in the courts, the leading utility interests of the country decided to comply with this law. It represented a use of the commerce power to extend federal control to a previously unregulated sphere of business activity.

The Commodity Exchange Act broadened and increased federal control over exchanges for trade in agricultural commodities. It provided

for a Commodity Exchange Administration in the Department of Agriculture, superseding the former Grain Futures Administration. All exchanges trading in grains, cotton, mill feed, potatoes, butter, and eggs were required to be licensed by the Commodity Exchange Administration, and likewise all floor brokers and commission merchants. Various trade practices were banned and others were subjected to close supervision and regulation. This measure marked the final culmination of a trend which began with the Federal Warehouse Act of 1916 and continued with the Grain Futures Act of 1922, the Produce Agency Act of 1927, and the Perishable Commodities Act of 1930.

Regulation of trade practices. The Chain Store Act, more commonly known as the Robinson-Patman Act, was designed to equalize competitive advantages as between chain stores and independent retailers. It did not specifically mention that purpose, but it prohibited unfair price discrimination in interstate or foreign commerce where the effect might be to lessen competition, to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. It forbids discrimination in price between different purchasers of the same kind and quality of goods where any one of the three effects noted above may result. In other words, a manufacturer or other seller of goods might not favor a chain store as against an independent merchant unless he could show real justification. It was also forbidden to use certain types of brokerage and other fees to accomplish discrimination. The enforcement of the act was vested in the Federal Trade Commission. Thus was forged another link in the long chain of antitrust enactments.

The Unfair Advertising Act was an amendment to the Federal Trade Commission Act of 1914. It extended the jurisdiction of the Commission over advertising. The original Trade Commission Act prohibited unfair competition, and the Supreme Court had held that the Commission had no authority to suppress objectionable advertising unless it could prove that such advertising was unfair as between competitors. The amendment of 1938 gave the Commission authority to proceed against "unfair or deceptive acts or practices in commerce," which brought objectionable advertising, whether unfair as between competitors or not, under the jurisdiction of the Commission. This change was one that had been urged for many years; in fact, long before the New Deal.

Wages and hours. The Fair Labor Standards Act, often called the Wages and Hours Act, was styled a measure to place a floor under wages and a ceiling over hours. It fixed minimum wages and maximum hours for all employments in interstate commerce. Minimum wages were to start at 25 cents an hour and go up to 30 cents an hour the second year. Above that point committees appointed by the administrator of the Act would

fix minimum wages for each industry. Maximum hours were to be 44 a week the first year, 42 the second year, and 40 thereafter. Enforcement of the measure was placed in a Wage and Hour division, headed by an administrator, in the Department of Labor. This was the first broad attempt at direct regulation of wages and hours by the federal government. The same thing had been attempted indirectly by the National Industrial Recovery Act, and the federal government had previously regulated wages and hours on railroads and a few other employments. But such regulation was by no means a new thing in American history. Many of the states had been doing it for one purpose or another for fifty years or more.

The Social Security Act, which will be more fully discussed in a later chapter, bore heavily on business, more as a measure imposing burdensome taxes and requiring vexatious reports and accountings than as one of regulation.

War Control and Decontrol

From the New Deal to the War Deal. The New Deal marked an important turning point in the relations of government and business in the United States. With the coming of World War II, the country moved from the New Deal to a system of controls far more sweeping and authoritarian than anything it had previously tolerated even in the time of war. At the end of the war the foremost question was that of decontrol. It was universally agreed that a vast amount of decontrol was in order, but there were many points on which differences of opinion emerged. How extensive should the decontrol be? How rapidly should it proceed? Should it merely take us back to the New Deal, back to something less than the New Deal, or forward to something more advanced than the New Deal? Not only were there differences of opinion on these questions; there were equally varying conjectures as to what was actually possible.

The New Deal had been drastic, though in principle not unprecedented or essentially radical. As we have previously noted, very few of the New Deal measures were wholly novel. Such things had been done before in this country, but they had been done on a much more limited scale. To assume, as many of its critics did, that the New Deal was a deliberately planned prelude to socialism, was to ignore what had been going on through all the years of the Old Deal. When the New Dealers boasted that they had "planned it that way," they were indulging in pure political hokum. The New Deal was not planned; it was improvised—and improvised very largely from old materials. The only real novelty of the New Deal was its magnitude. Never before in the United States in so

brief a space of time had so much been done to subject private business to governmental intervention and control. Never before had the people of the nation responded so universally and favorably to the principle of state control. This seemed to indicate that the American people perhaps had reached a new conception of the rôle of government in economic life.

The growth of governmental regulation under the Old Deal had been massive in the aggregate, but always casual and sporadic. Private enterprise had generally held the initiative and had been allowed to plot its own course. Government intervened only when it had to—only when prolonged abuses or critical difficulties forced the city, the state, or the nation (as the case might be) to take a hand. Though such interventions often turned out to be far-reaching and permanent, they were interventions primarily for corrective purposes, not for the purpose of seizing the helm and steering the course. The New Deal seemed to mark the advent and general acceptance of the idea that government should be a positive and continuous factor in economic processes; that it should assume the responsibility of keeping the economic system properly in balance and of making it work successfully. In short, it seemed to many that the people had arrived at the point where they wanted government to be not only a policeman but also a manager. Perhaps American thinking had reached such a point, but it certainly had not determined how much managing it wanted government to undertake. Conclusive proof of this is to be found in the popular reaction to government management of economic life during World War II.

There will be endless speculation as to the possible fate of the New Deal if the world had remained at peace. On that question one man's guess is as good as another's. The world did not remain at peace. In the autumn of 1939, just as the New Deal seemed to be reaching maturity, the outbreak of war in Europe forced the United States to shift from a peace to a semi-war economy, and in 1941, when this country entered the war, an all-out war economy became necessary. War has always subjected private enterprise and private interests to extraordinary governmental controls. In that respect World War II went beyond all former wars. The Axis nations chose to wage "total" war. This meant much more than war between armies, navies, and air forces. It meant war between peoples, war between industrial systems, war involving all economic resources and all manpower, war absorbing every ounce of the nation's productive capacity. To wage total war, either aggressively or defensively, a nation must have almost total control over economic life.

Almost overnight, therefore, the United States went from the New Deal to the War Deal; from government pilotage of business to well-nigh complete governmental domination. As a necessity of war, the Amer-

ican people accepted the War Deal, though not always with equanimity. Some aspects of it they did not accept without coercion. After four years of it, they had had more than enough to suit their taste. The moment peace came, the demand for prompt and speedy decontrol was too general and insistent to be ignored.

War controls over business. Despite its being hurriedly improvised, subject to constant change, and never well organized, the War Deal worked a profound, if not lasting, revolution in American economic life. It reached almost every aspect of production, distribution, and finance. In some way and to some degree it brought under government control, mainly national, every business enterprise in the country and all persons having dealings with them. It told the farmer, the miner, the lumberman, and every other producer of important raw materials what to produce, how much, and when. It regulated the flow of raw materials from producer to manufacturer and processor and thence through wholesaler and retailer to the ultimate consumer. In respect to scores of critical products and commodities (e.g., tires, automobiles, sugar, gasoline, fats, fuel oil, and metals) it rationed both producer and consumer. It applied price control to nearly 8,000,000 different commodities and services, and enforced its price regulations upon more than 3,000,000 business establishments. It set controls over manpower, wages, salaries, profits, rentals, loans, installment buying, the issuance and sale of securities, and numerous other business affairs.

No one who lived through the war period will soon forget the Office of Price Administration, the War Manpower Commission, the War Production Board, the War Labor Board, the Office of Defense Transportation, the War Relocation Authority, the War Food Administration, the Petroleum Administration, the Solid Fuels Administration, the War Shipping Administration, and the many companion agencies which took a prominent part in the operation of the War Deal. And no person engaged in business at the time is ever likely to forget the countless rules, orders, directives, and instructions he had to follow; the many inspections, examinations, and check-ups imposed upon his business operations; the scores of involved questionnaires he had to answer; the endless reports he had to make; the elaborate and difficult accounts he had to keep. Nor will any householder of the war days quickly efface the memory of the troubles he had in replacing worn-out appliances and equipment in his home and in obtaining essential supplies.

Avoidable or not, the snarls of red tape which clogged so many of the War Deal agencies and operations, the annoyances, the irritations, the burdens, and in many cases the utter irrationality of the requirements were so many times multiplied and affected so many persons who never

before had felt the direct hand of governmental control that they are properly chargeable with much of the blame for the vehement popular reaction against "bureaucracy" which swept the country as soon as the end of the war was in sight.

Decontrol. The demand for decontrol did not come from business people alone. It came from every farm, from every home, from every street-corner in the land. It spoke universally, but not with a single voice. Most people wanted decontrol where the shoe pinched them, but were not too concerned about the pinches they did not feel. This made for confusion, both on the part of the people and of the public men who had to chart the way out of the wilderness of control. The imminence of the congressional election of 1946 befogged the situation still more. Some men of impressive stature as economists and business leaders professed to see ahead a long and difficult period of reconversion from a war to a peace economy. A sudden release of government controls would, they thought, aggravate the complications of this period and possibly might hasten the onset of a depression. So they advocated a "gradual and orderly" relaxation of government controls in accordance with a plan to preserve the economic equilibrium of the nation. Other men, of equal eminence as authorities in economic matters, were firmly convinced that the problems of reconversion, whatever they might be, could be most promptly and soundly solved by "free enterprise." They demanded the immediate termination of all government controls save two or three of the most imperative.

The Truman administration was divided on this question, and so was the Congress. So, in fact, was the Democratic majority in both branches of the Congress. The result was an attempt to appease both points of view. A good example of such tactics was furnished by the eventful history of the Office of Price Administration and the price control system in the summer and fall of 1946. To replace the law which was due to expire at the end of June, Congress passed a modified OPA measure. Holding this measure to be grossly inadequate and defective, President Truman vetoed it. Congress was unable to override the veto or pass a new bill in time to save the OPA. For several weeks there was no price control. Then Congress passed a new measure which the President accepted; but before the end of the year the President himself issued executive orders nullifying most of the controls provided by this measure.

Politics could not keep up with economics. While the politicians were debating what to do, the producers, distributors, and consumers of the country were doing things which resulted in acute shortages of meat, butter, sugar, cotton goods, and other essential commodities. It was widely asserted that the continuance of government controls was chiefly responsible for these shortages and the "black" markets which went with

them. This undoubtedly came to be the conviction of a large majority of the American people. In realization of this, and in the hope of winning public favor, President Truman, on the eve of the congressional election, lifted most of the controls on foodstuffs. The election resulted in a severe reverse for the President and the Democratic Party, and was generally interpreted as meaning that the American people wanted to wipe out all war controls at once. The President accepted this view. Before the end of the year 1946 he had removed most of the war controls and put an end to the agencies administering them. Only a few, such as rent control and sugar rationing, survived, and these were terminated before the end of 1947.

It can be said, therefore, that for all practical purposes the year 1947 ushered in a return to the New Deal. We were back to the prewar position of government and business. But there was now a Republican majority in both houses of Congress, and the Republicans had declared for a modification of the New Deal. The direction of the proposed modification was not clearly disclosed. Many assumed that it would be "reactionary"—a reversal of the trend of the preceding decade; but there was some ground for the expectation that, although many details of the New Deal laws might be changed and many corrective measures adopted, there would be no substantial recession from the principle of state responsibility for the proper management of economic life.

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CHAPTER 20

GOVERNMENT AND THE FARMER

Early Agricultural Policies

In several of the preceding chapters of this book we have had occasion to touch upon government policies with reference to agriculture, but the subject is too important to leave without special consideration. Agriculture is not merely a basic industry; it is in some respects *the* basic industry of the nation. National independence depends upon agriculture. A people who cannot draw the major part of their sustenance—all if need be—from the products of their own soil cannot be secure in their nationhood. In war they may be starved into surrender though victorious on the field of battle, and in peace they must pay tribute commercially to the food-producing nations in order to live. Even if this disadvantage were not the case, agriculture would still be a most vital factor in national existence. We must look to agriculture for a large proportion of the raw materials needed by other industries and for a large part of the tonnage necessary to the continued operation of our railways and steamship lines. Factories and mercantile establishments must look to the farm population for a market for a large part of the goods they make and sell. When farm purchasing power languishes, a blight almost invariably falls upon the economic life of the country. Furthermore, agriculture is not simply an industry; it is a social system which contributes indispensable human and cultural values to the texture of national life.

Government in the United States has always been concerned with agriculture, for there has always been a farm problem. In George Washington's day it was very different from the farm problem of today, but it was a very fundamental problem just the same. Washington, himself the proprietor of a great landed estate, was so impressed with the importance of agriculture in the affairs of the nation that in 1796 he urged Congress to create a national board of agriculture. His recommendation was not acted upon, probably because of the strong feeling of states' rights which prevailed at the time and the fact that agriculture was then essentially a local industry.

The old type of agriculture. The prevalent type of agriculture in Washington's time and even as recently as fifty years ago in some sections of the country was wholly unlike the agriculture of today. In those days the

things produced on the farm, except for a few commodities such as cotton and tobacco, were principally consumed on the farm. The population of the nation was over 96% rural, and there were no great urban markets for farm products. The farmer slaughtered and cured his own meat, ground his own flour or had his grain ground at the mill for his own use, cut fuel from his own wood lot, made most of his own tools and implements, and did a great deal of his own carpentering and building. The farmer's wife raised the garden stuff which supplied the table, made butter and cheese, wove cloth and made dresses for the women and suits of homespun for the men, manufactured soap, candles, and various other necessities now made outside the home. The farm, in fact, was an almost complete industrial unit, and was largely self-sufficient. Surplus products were sold on the local market, or, as was very often the case, were exchanged for other commodities instead of being sold for cash.

Cash income was not a vital matter, for there were not many things the farmer had to buy. Economic depressions passed over his head unless he chanced to be producing tobacco or cotton or some other commodity that had to be sold in world markets. The labor problem was simple. In the South the farmer used slave labor; in the North the farmer and his family did most of the work themselves, and extra help, when needed, was supplied to a large extent by mutual exchange of labor among neighbors. Land was cheap, and there was an abundant and seemingly inexhaustible supply of free or cheap land to be had by the simple expedient of moving westward. Failure for the farmer meant little more than removal to a new part of the country and starting afresh. He had little capital invested, and it required little to make a new start elsewhere. Moreover, even if he were wholly unsuccessful as a farmer, it was almost certain that the value of his land would increase with the growth of population and thus enable him to offset his losses in the end.

Life on the farm was hard, and without conveniences or advantages. But even so, it was about on a par with the urban life of the same period, and had the added attraction of economic security. The farmer lighted his house with tallow candles and used an open fireplace for cooking and heating, and so did the city dweller. The farmer obtained his domestic water supply from a pump or well, and so did the urbanite. The farmer had no plumbing conveniences, and neither had the city man. The farmer had no paved roads, and the city dweller had to slog through mud and mire despite his primitive pavements and sidewalks. The farmer lived in isolation and had few social advantages, but he was sure of food, clothing, shelter, and certain minimal comforts, which the city man was not.

Effects of the machine age. With the coming of the machine age the farmer found his position greatly altered, especially in the industrial por-

tions of the country. The attractions of city life multiplied enormously. The city offered opportunities for lucrative employment, commercial success, luxurious living, and improved social status. Farm boys and girls flocked to the cities by the millions, leaving the farmer with a serious labor problem. This he could partially solve by using cheap immigrant labor and introducing machinery to take the place of hand labor, but these expedients called for a cash outlay. The necessary cash could only be obtained by modifying his subsistence mode of farming and specializing in the production of commodities which could be sold for cash in the markets of the cities. For this the average farmer was not well suited by temperament, training, or experience. He must now become a capitalist and operate his farm as a commercial venture, but his capital resources were generally inadequate and his commercial skill nil. Moreover, transportation costs, marketing costs, and other factors beyond his control entered into the profit-and-loss equation. Many a farmer solved the problem by pulling up his stakes and moving to the frontier, where subsistence agriculture still flourished. But in course of time industrialization overtook him there, and the day came where there was no longer any frontier, any free land, or any other avenue of escape from the clutches of the capitalism of mechanized society.

Government policies in the first century. American governmental policies with reference to agriculture during the first century of our nation faithfully responded to the wants of the farmer in that period. The farmer wanted cheap land and lots of it, and state and national governments did all in their power to provide it. The opening of the frontier was facilitated in every possible way. Though Congress at first adhered to the policy of selling public lands at auction, it also provided for military grants under which millions of acres were given free to former soldiers and sailors of the United States. The auction policy was more favorable to land speculators than to farmers, and to remedy this condition Congress in 1841 passed the Preëmption Act which gave the settler a prior right to bid on land occupied by him and to buy it at a price not exceeding $1.25 an acre. Still there was dissatisfaction, and Congress in 1854 passed the Graduation Act, which authorized the sale of land which had been on the market for a stated period at prices ranging between 12½¢ and $1 an acre. But what the farmer wanted was free land. This was one of the cardinal tenets of the Free Soil Party, which was eventually absorbed by the Republican Party. In 1862 Congress, under the control of the Republicans, enacted the famous Homestead Act, which provided that any head of a family, 21 years of age, might acquire 160 acres of government land by residing thereon five years and making certain required improvements. More than 250,000,000 acres of public lands were given away to

settlers under the Homestead Law. Where grazing and irrigation were practiced, however, the 160-acre homestead was too small, so Congress in 1877 obligingly passed the Desert Land Act which allowed the settler under certain conditions to take 640 acres. Through the Timber Culture Act of 1873 Congress also provided that 160 acres might be taken by a settler who would devote 40, later 10, acres of it to timber culture. The states were equally generous. Many of them received huge grants of land from the federal government on their admission to the Union, and proceeded at once to sell them off or give them away on easy terms.

The farmer also wanted cheap labor, and governmental policies as to immigration and slavery were calculated to help him secure it. Despite the violent protests of the Know-Nothings and other antialien organizations, unrestricted immigration continued to be the policy of the American government down to the 1870's and 1880's, and the restrictions then imposed did not materially diminish the flow of European immigrants to the United States. Not until after the First World War did our government adopt a really restrictive immigration policy, and then upon the demand of the industrial rather than the agricultural population. The solicitude of our government for slavery prior to the Civil War and its reluctance to balk the extension of slavery reflected the pressure of the agrarian South in the interest of cheap labor.

When the farmer found himself obliged to abandon subsistence farming for capitalistic agriculture, his first great problem was transportation. To market his produce at a profit he had to have quick and cheap transportation, and he besought the aid of his national and state governments in securing it. They responded in truly prodigal fashion. Billions of dollars of public funds were poured out to subsidize the construction of canals and railroads, and in a good many instances public ownership and operation of canals and railroads was undertaken. Then when complaint arose among the farming population that transportation charges were extortionately high, both state and national governments embarked upon far-reaching programs of rate regulation.

Although American agriculture has been upon an export basis from the very first, and presumably therefore would not require tariff protection, experience demonstrated that various foreign farm products could compete at seaboard points with the products of the American interior. The American farmer then demanded protective duties on agricultural imports, and got them—on wheat, wool, beef, pork, sugar, and numerous other commodities.

Realization of the importance of agriculture in our national life, reinforced by pressure from the farming population, also caused our state and national governments very early to enter upon a stupen-

dous program of fostering agricultural development and production. This program has taken many directions. Michigan in 1855 and Maryland in 1856 established a state agricultural college and experiment farm. Every state now has such an institution. Congress began to make appropriations for agriculture in 1830. Under the Morrill Act of 1862 and the Hatch Act of 1887 Congress made generous provision for federal aid to state agricultural colleges and experiment stations, and later acts of Congress have greatly increased the funds supplied by the federal government to promote agricultural education, research, and production through these agencies. For the same purposes state budgets have carried sums equaling and often exceeding the outlays of the federal government at Washington. The Department of Agriculture has been pressed into service to the same end. Since its establishment in 1862 it has built up a vast organization for research and information. It tells the farmer how to conserve the soil, how to fertilize it to get the best results, what crops to plant on different types of soil, how to select seeds, how to breed the best livestock, how to cultivate different crops, how to combat weeds, how to fight animal and insect pests, how to control plant diseases, and a thousand and one other things which help him to produce abundantly. It has also spent millions of dollars to bring arid lands into cultivation and to reclaim and restore abandoned farm lands.

Elements of the Modern Farm Problem

Since 1900 the economic and social position of the American farmer has undergone a profound change—a change so revolutionary that neither public opinion (rural or urban) nor governmental policy has as yet completely caught up with the facts. The governmental policies summarized in the foregoing section were instituted at a time when the farm problem was as simple as it is now complex. During the first century of American agriculture farming was transformed from a subsistence industry into a commercial venture, and, as we have seen, governmental policies were adjusted accordingly. But it was nevertheless a period of abnormally rapid growth in all directions. Population was growing by leaps and bounds, industry was growing with fabulous speed, cities were growing, and there appeared to be no limits to the demand for agricultural products. Surpluses there were from time to time, but they were mainly local and temporary. The problems of agriculture, though varying somewhat in different parts of the country, were essentially problems of expansion. No one saw anything in prospect but increased consumption, bigger markets, and better times. When reverses came to the farmer, as they sometimes did, they were charged to the iniquities of the railroads, the trusts,

the bankers, the farm-machinery interests, and that universal bugaboo—Wall Street; and often justly so. But this unfortunately was blaming symptoms more than causes, and misled the farmer and to a large extent the general public into the false assumption that all would be well with agriculture if, by some sort of political legerdemain, the interests exploiting the farmer could be suppressed.

We can now see that destiny has long been compounding a ghastly joke on the American farmer—lulling him into security while contriving a dilemma which offers him ruin or readjustment on a grand scale. The modern farm problem in the United States is infinitely complex. It is not the same for any two branches of agriculture or for any two parts of the country. Agriculture as a whole, however, has certain common hardships: operating costs, marketing difficulties, overproduction and falling demand, low prices, and low standards of living.

Capital costs. The farmer's capital difficulties began with the disappearance of free land. Land values began to soar, and, owing to speculative buying and selling, were pushed to heights not justified by the earning power of the land. Farm owners sold their holdings at handsome figures to buyers who, thinking that miracles would never end, expected to do the same in their turn. Sometimes they did, but more often, especially since the First World War, they found themselves encumbered with mortgages which could not be paid off with farm earnings. Deflationary reactions of course brought farm values tumbling down, and this collapse further complicated the troubles of the mortgage-burdened farmer, as he could not extricate himself by selling his farm and retiring the mortgage. Equally distressing was the position of the man endeavoring to make a start in farming. No period of deflation ever brought land values down to the point where he could get into the game with virtually no cash investment, as did the homesteader of former generations. The beginner of the past thirty or forty years has had to have cash to put up or else buy on credit subject to mortgage. The only other alternative was to become a tenant farmer, which meant sharing between owner and tenant an income which pretty generally was insufficient for the two. It is stated now by competent authorities on agricultural economics that a preponderant majority of each new generation of farmers must start either as debtors or as tenants. Nor do the capital difficulties of the present-day farmer end with the investment required for land. He must have machinery, which is also costly and for which he must pay cash or go into debt. If he were to attempt to do without modern farm machinery and farm as his grandfather or great-grandfather did, he could not make enough to pay expenses. So the farmer of today is loaded at the outset

with a heavy capital investment, greater in a large percentage of cases than is necessary to launch the average merchant.

Operating costs. Operating costs constitute just as great a difficulty as capital investment. Cheap labor is no more. Even the lowest wages now paid on the farm are high in relation to farm earnings. The farm now has to compete in the labor markets with industries which pay higher wages than it can stand. Only in times of universal unemployment can the farmer bargain to any advantage at all. Even in such times his advantage is largely wiped out by the low prices of farm products which inevitably accompany periods of depression. Furthermore, the farmer, in order to carry on his operations, has to buy seeds, fertilizer, insecticides, gasoline, and various other products priced at industrial rather than agricultural levels. In addition he has to meet high fixed charges in the form of insurance and taxes. Insurance rates on farm property are commonly higher than on city property. In taxation the farmer is the victim of two misfortunes: (1) that taxes on real property are the easiest of all taxes to levy and collect, for which reason real property has been saddled with an unfair portion of the tax burden; and (2) the fact that tax levies on real estate are based on capital value rather than earnings or income, which means that the farmer must often pay in excess of the current return from his farming operations.

Markets. Difficult also is the position of the modern farmer in relation to markets and marketing. The farmer of former times sold mainly in the local markets, but the farmer of today must find his outlets in distant industrial centers, both domestic and foreign. "Between the producer and the consumer," says former Senator George W. Norris, "there is a multitude of middlemen, who neither toil nor spin and yet make enormous profits upon the food products of the country, as such products travel from producer to consumer." [1] It is hardly fair to say that the middleman neither toils nor spins, and the magnitude of his profits is often exaggerated; but there is no denying the fact that the farmer foots much of the bill. To get farm products from producer to consumer in modern industrial society an elaborate structure of buyers, shippers, wholesalers, jobbers, retailers, and transportation agencies has grown up. The costs of these marketing facilities have to be borne either by the producer or by the consumer. Competitive conditions have made it difficult to pass them on to the consumer to any great extent and fairly easy to pass them back to the farmer. So the farmer pays most of the marketing costs; they are simply subtracted from his income. Present marketing machinery may be unduly elaborate and costly, and may lend itself to the deliberate exploitation of the farmer; but without it, or something to perform the same services,

[1] *Current History*, April, 1926.

the farmer could not market his crops at all. Farm leaders have long advocated coöperative marketing as a solution of the agricultural marketing problem, and in some branches of agriculture there has been a great development of coöperative marketing agencies during the past dozen years. These have undoubtedly saved the farmer money, but it has been found that even the costs of coöperative marketing are too heavy for the farmer to bear alone.

Falling prices. The crux of the farmer's troubles has been that the exchange value of his products sank far below the general price level, and seemingly could not be restored. The farmer could afford to assume high investment costs, pay high operating cost, and bear heavy marketing costs if he could get a proportionately high price for his products. But excessive production combined with declining consumption created a situation adverse to any material and permanent rise in the exchange value of farm products. For over a hundred years vigorous efforts have been made in this country, and in many other countries as well, to increase farm acreage and likewise production per acre. During the First World War these efforts were redoubled, with the result that, except for England, France, Germany, Russia, and certain mid-European nations, the whole world emerged from the war period with greatly extended farm acreage and productive capacity. Temporary food shortages in the areas named above sustained this top-heavy agricultural structure for a year or two after the 1918 Armistice. Then came a crash. Agriculture was revived and stimulated in the countries whose production had fallen off during the War, and most of them, because of a desire to achieve national self-sufficiency and also because poverty and external indebtedness made it hard for them to buy abroad, took steps to increase the volume of their own farm production as much as possible. This turn, of course, ruined the export market for the American farmer—and also for farmers in all other countries dependent upon export trade.

Meanwhile certain other eventualities long in gestation had emerged into the sphere of reality. The first was a definite, world-wide slowing down of the rate of population growth. This change was particularly noticeable in the United States, where for over a century, thanks to foreign immigration, there had been an abnormally high rate of population growth. But though more marked in the United States than elsewhere, the phenomenon was practically universal, being apparent in oriental as well as in occidental countries. For various reasons, most of them peculiar to the machine age, the human race had ceased to multiply with its former fecundity, and the time was clearly in prospect when world population would become practically stationary or even decline. In several countries that point had already been reached; in the United States, statisticians

said, it would be reached in 1953; in Latin America and Asia somewhat later. For agriculture, and especially for American agriculture which had long been on an export basis, this condition meant the end of the ever-expanding market, the beginning of a constantly shrinking demand both at home and abroad.

Under normal conditions this shrinkage would have come slowly and imperceptibly, and would not have become alarming for some years. But just as it was setting in it was given a sharp impetus by certain radical changes in habits of the people as regarded farm products. The first of these was brought about by the perfection of the motor vehicle. With the passing of the horse-drawn vehicle, millions of acres previously devoted to forage crops were released to other forms of production. Farmers turned this acreage to the production of wheat, corn, and cotton, thus contributing to the already growing surplusage of those commodities. At the same time, however, the consuming public (partly in response to the dictates of fashion, partly because an ever increasing proportion of the people were engaged in sedentary or semisedentary work, and partly in obedience to the recommendations of the medical profession) was beginning to use less bread, potatoes, sugar, and meat. War measures in food economy hastened this tendency by teaching the housewife how to get along without these traditional items of the dietary. About the same time the invention of artificial silk placed garments of the new materials within the reach of all classes of people, thus greatly diminishing the demand for cotton and wool.

Despite all these factors tending to slacken demand, agriculture went on producing as before. Not only was there no material reduction of acreage in cultivation, but, owing to the high success of scientific farming, there was a steady increase in production per acre. The Secretary of Agriculture, Mr. Henry A. Wallace, pointed out in his annual report in 1933 that there had been a 20% increase in output on farm acreage that had remained constant from 1919 to 1929, and also that the export trade in farm products had declined from 15.8% of the total in 1919 to 7% in 1929 with no corresponding decline of total farm production. Because of declining income the farmer was caught in a vicious circle. Falling prices forced him to increase production in order to make ends meet, and the more he increased production the more prices fell. He could not, like a factory, temporarily suspend operations until the surplus was absorbed, for he had no reserve funds to fall back on and his fixed charges went on as before. The more he cut his production, the more he went behind. So he went on producing until in many instances it became practically impossible to move his crops at all.

Living standards. Still another serious factor in the farmer's predica-

ment is the standard of living in the United States. It is sometimes said that the average American farmer could pull through if he would give up his luxuries and live as the farmer of past generations did. Such statements usually come from persons who never lived on a farm and know nothing of the realities of the farmer's standard of living. The farmer's standard of living has not risen higher than the general standard, and has risen with and because of the general standard. "Life in our cities and towns is now so closely interwoven with that of the surrounding country," writes Mr. O. M. Kile, "that it is no longer possible to maintain one standard of living for the former and a lower standard for the latter. That is, not unless the character of the people remaining on the farms actually changes." [2] In other words, unless the farmer is prepared to resign himself to the status of a peasant he must preserve his high standard of living. It is an economic as well as a social necessity for him. The farmer's automobile is not a luxury in a motorized society. Efficient and rapid transportation is more essential to him than to the city man. The farmer's telephone is no luxury; he needs it in his daily business far more than the average apartment holder in the city. The farmer's electric lights are no luxury; they cut his insurance rates and the generating plant supplies power for various kinds of useful machinery. But how can he maintain this high standard of living in the face of increasing production, declining markets and prices, and all the other adverse circumstances mentioned above? That is the question which the farmer of today insists that government shall help him answer.

Recent Policies as to Agriculture

Recent governmental policies for the benefit of agriculture betray much confusion of thought and purpose. State and national governments both continue to encourage agricultural production and expansion in numerous ways, though at the same time striving by various expedients to rectify the exchange value of farm products in a buyer's market.[3] But it is possible nevertheless to perceive in the agricultural legislation of the period since 1912 and particularly since 1920 certain lines of departure that mark the beginning of a wholly different relation between government and the farmer from anything known in the past. The farmer, once the chief bulwark of the state, appears about to become a ward of the state. This view develops from three major trends in latter-day farm legislation.

Credit legislation. The first of these is the effort to put the farmer in

[2] *The Woman Citizen*, June, 1927.

[3] The scarcity of farm products resulting from the Second World War is deemed both an artificial and a temporary scarcity. For that reason farm organizations have opposed the abandonment of price-protection policies for the farmer.

a more favorable credit position. When land was to be had for the taking and operating costs were low, the credit difficulties of the farmer were negligible. But now that substantial capital is necessary for the acquisition of land and considerable in addition is needed for operating purposes, credit is a major problem for the farmer. He could often, in the past, get credit—among other sources, from the banker, from the insurance company, and from the loan shark—but not on terms he could afford. These lenders dealt with the farmer as they would with the ordinary commercial borrower; but agricultural credit and commercial credit, it was discovered, are two different things. The farmer needed a kind of credit that banks and other money lenders could not supply. He needed low interest rates; but owing to the slow turnover of capital in real-estate loans and certain extraordinary risk factors, the lenders could not give him as low rates as were accorded to the commercial borrower. He needed long-term credits adapted to the peculiar turnover periods of the agricultural industry, and these they could not give him either. Yet there was no private source to which he could turn for the sort of credit he needed.

Nevertheless the farmer had to borrow, and did borrow from any available source, much to his own detriment and sometimes greatly to the detriment of the lender as well. More than a few banks failed because their resources were too largely tied up in "frozen" farm loans, and more than one insurance company and investment concern got into difficulty for the same reason. Nor did the troubles of the money lenders redound to the advantage of the farmer; on the contrary, they impaired his ability to get further credit. Out of this coil of trouble came the movement which culminated in the federal farm-loan system. After an exhaustive study of the rural credits problem by a special commission appointed by President Wilson, Congress in 1916 passed the Federal Farm Loan Act. This measure created a system of Federal Land Banks and Joint-stock Land Banks to provide more liberal and practicable credit for the farmer.

The Loan Act provided that the country should be divided into twelve farm-loan districts with a Federal Land Bank located in some convenient center in each district. Each such bank started business with a capital stock of $750,000, which was mainly subscribed by the federal government. General control of these institutions was given to the Federal Farm Loan Board, appointed by the President and Senate. Each bank was in turn governed by a board of seven directors chosen in part by the Farm Loan Board, in part by the farm-loan associations of its district, and in part by joint action of the board and the associations. The function of each Land Bank was to lend money to farmers for periods of five to forty years at a moderate rate of interest, taking as security mortgages on the borrower's land and improvements. The bank could not make loans directly to farm-

ers, but acted through the medium of farm-loan associations. Any ten farmers seeking to borrow $20,000, or more might form such an association.

The association had to subscribe to the stock of the Land Bank for a sum equal to 5% of the loan, and the borrowing farmer had to subscribe for the same amount of stock in the loan association. As a result of these requirements the Land Banks gradually came to be largely farmer-owned. The funds of the Land Banks came from two principal sources. The federal government advanced each bank an initial capital of $750,000 and has advanced additional sums in recent years. The capital supplied by the government has been largely returned by loan-association purchases of Land Bank stock. To supplement this source of capital, each Land Bank was empowered to sell bonds secured by its mortgage loans. When the market for these bonds was impaired by the collapse of 1929, the federal government created the Federal Farm Mortgage Corporation and supplied it with ample capital. Land Bank bonds were sold to the Federal Farm Mortgage Corporation, which in turn sold its own bonds to the public. These bonds were guaranteed as to principal and interest by the federal government and were made exempt from all income taxes both state and federal. A report in December, 1935, showed that the Federal Land Banks at that time had outstanding loans to 650,000 farmers, aggregating over $2,000,000,000. The rate of interest paid by farmers was 4%. The Land Banks today hold about one-third of all farm mortgages.

The provision for Joint-stock Land Banks in addition to the twelve Federal Land Banks was to enable private mortgage firms to continue in business by complying with certain terms of the Loan Act. They were permitted to organize as Joint-stock Land Banks and make loans to farmers under rules and regulations prescribed by the Farm Loan Board. A considerable number of private firms took out charters under this law and continued in business until 1933, when they were liquidated under a provision of the Farm Relief Act of that year.

The farmer has need for short-term credit as well as for that of longer duration, but for this type of credit the Loan Act of 1916 did not provide. Therefore, in 1923, Congress enacted a measure establishing a system of Intermediate Credit Banks. Alongside each of the twelve Land Banks was set up an Intermediate Credit Bank with a capital of $5,000,000. These banks were authorized to make loans to loan associations, coöperative marketing associations, loan companies, or banks, and through them to the individual farmer. As security for loans they could accept bills of lading, warehouse receipts, livestock paper, and other approved short-term collateral. Loans were made for periods ranging from six months to three years. The farmer wanting such a loan to finance a crop or a live-

stock deal goes to his local bank, loan association, or marketing association, which may advance him up to 75% of the value of his crop or herd and discount the loan with an Intermediate Credit Bank. In addition to government subscriptions these banks secure loanable funds through the sale of their stock and debentures.

The federal farm-credit system was considerably revamped by the Agricultural Adjustment Act and the Farm Credit Act of 1933. By executive order on May 27, 1933, President Roosevelt established the Farm Credit Administration to take over the functions of eight separate agencies previously engaged in the administration of farm credits. Provision was then made for four new types of credit institutions under the Farm Credit Administration; Production Credit Corporations, Production Credit Associations, a Central Bank for Coöperatives, and Regional Banks for Coöperatives. A Production Credit Corporation was established in each land-bank district and was closely affiliated with the land bank. Initial capital was provided by the federal government. Loans to the farmers are made through the Production Credit Associations. Any ten or more farmers may organize such an association, but the Governor of the Farm Credit Administration has power to prescribe the amount of their capital stock, fix the territory within which they may operate, determine the mode of selecting their officials, fix the compensation of all officials, limit the amount of individual loans, and otherwise regulate their organization and procedure in great detail. The Central Bank for Coöperatives is an agency, under the Farm Credit Administration, to supply credit to coöperative marketing associations. The capital is provided by the federal government. Loans may be made directly to coöperative associations and the Regional Banks for Coöperatives. A Regional Bank for Coöperatives was established in each of the twelve land-bank cities, and the directors of the land bank are ex officio directors of both the Production Credit Corporations and the Regional Banks for Coöperatives. Capital is provided by the Farm Credit Administration. These banks are authorized to make loans to organizations of farmers acting coöperatively in processing, handling, or marketing farm products or in purchasing, testing, grading, or processing farm supplies.

The 1933 legislation also made provision for a Land Bank under specified conditions to make direct loans to farmers. For the refinancing of farm mortgages the Land Banks are authorized to issue and sell farm-loan bonds to a total of $2,000,000,000, on which interest not to exceed 4% is unconditionally guaranteed by the United States. It may exchange these bonds for first mortgages on farm lands or may purchase mortgages outright. To enable the land banks to be more lenient with farmers, the law authorized the Secretary of the Treasury to subscribe to the paid-in

surplus of the land banks a sum equal to their extensions and deferments to farmers. All banks organized under the farm-credit legislation are declared to be instrumentalities of the government and may act as fiscal agents in performing such duties as the Secretary of the Treasury may prescribe. Furthermore, their notes, debentures, and bonds are exempt both as to principal and interest from all federal and state taxation save surtaxes, estate, inheritance, and gift taxes.

Marketing legislation. Quite as symptomatic of the new order of things in agriculture as credit legislation are the recent policies of government in respect to agricultural marketing. Within the past twenty-five years both state and national governments have developed four distinct lines of policy with regard to agricultural markets and marketing: (1) the gathering and dissemination of complete and authentic marketing information, (2) the establishment and maintenance of uniform standards for farm commodities, (3) protection against fraud, discrimination, and speculation, and (4) the fostering of coöperative marketing.

It is of great value to growers and buyers of farm commodities to have adequate and reliable information as to crop and market conditions throughout this country and, so far as possible, throughout the whole world. Neither farmers nor marketing agencies are able to gather and distribute such information, so the government has undertaken to do it. The Bureau of Agricultural Economics in the United States Department of Agriculture and corresponding agencies in many of the state departments of agriculture are the chief factors in this service. Representatives of the governmental agencies in all parts of the country make observations, make estimates of crop production, calculate the carry-over from previous seasons, gather information as to supply and demand at principal market centers, and regularly and promptly report their findings to the head office. There they are compiled and given out. American consular and diplomatic representatives in foreign countries are required to collect and report information regarding crop and market conditions abroad. Farmers find this information useful in planning their plantings and timing the sales of their crops. Dealers in farm commodities find them similarly helpful in their operations.

Standardization of farm products has come to be important for several reasons. It is necessary in the first place in order to insure uniform prices; in the second place, in order to secure a dependable market; and in the third place, to protect the farmer against sharp practices on the part of the dealer and the dealer likewise against the sharp practices of the farmer. Private enterprise could not bring about such standardization, and the government has therefore undertaken to do it. Commodity standardization laws in great numbers have been passed by Congress and likewise by

most of the state legislatures. Federal laws apply to commodities in interstate and foreign commerce, state laws to commodities in intrastate commerce. The laws usually set up certain standard specifications to be followed in grading farm products, establish certain official grades, provide for official or semiofficial inspections to insure observance of the law, and prescribe penalties for violations. Among the commodities now subject to national or state standardization or both are wheat, cotton, tobacco, milk, butter, eggs, potatoes, onions, apples, hay, citrus fruits, and many of the common vegetables.

One of the perennial grievances of the modern farmer is the "raw deal" he gets from the middleman. Justly or not, the farmer is convinced that he is the victim of gross exploitation by the long chain of dealers standing between him and the ultimate consumer. It is his firm belief that produce brokers and commission merchants are in a conspiracy to cheat him at every turn, and that the Wheat Pit, the Cotton Exchange, and the other great commodity markets engineer gigantic orgies of speculation at his expense. It may not be so, but enough smoke can be perceived at times to warrant the suspicion of fire. Legislative bodies have heard the farmer's complaints and passed innumerable laws to give him protection. Virtually every state of the Union now has laws licensing and regulating produce dealers, warehouse men, and commission merchants, and prescribing penalties for various fraudulent, discriminatory, and unfair practices. Federal legislation in this field includes the Warehouse Act of 1916, the Grain Futures Act of 1922, the Produce Agency Act of 1927, and the Perishable Commodities Act of 1930. The Agricultural Adjustment Act of 1933 went farther than any of these, giving the Secretary of Agriculture large authority over all produce dealers. He may license all such dealers, refuse to grant them licenses unless they abandon practices and charges deemed unfair to the farmer or inimical to the agricultural industry, revoke their licenses for violations of the law or noncompliance with his orders, and demand reports and check accounts on the minutest details of their business. The Commodity Exchange Act of 1936 represents a further extension of federal authority in regulation of the middleman. This measure established the Commodity Exchange Administration (replacing the old Grain Futures Administration) in the Department of Agriculture, for the purpose of regulating commodity exchanges trading in grain, cotton, rice, mill feed, potatoes, butter, and eggs. All such exchanges must be licensed by the Commodity Exchange Administration; all floor brokers and commission merchants must be registered with it; and it is given authority to forbid or regulate certain trade practices, such as short selling, wash sales, cross trades, credit extension, and hedging.

The fourth significant development in marketing legislation is the

promotion under government sponsorship of coöperative marketing. Both the states and the national government have been active in fostering this movement. Most of the states have passed laws to facilitate the organization of coöperative marketing associations and to relieve them of many of the cumbering restrictions imposed on ordinary business corporations. With the aid of state departments of agriculture many such associations were organized throughout the country. But the formation of national associations was retarded until after the passage of the Federal Marketing Act of 1929. This measure created the Federal Farm Board (now defunct) and gave it a revolving fund of $500,000,000 to be used in making loans to farm organizations and coöperative associations and otherwise to assist in the handling, storage, processing, and marketing of farm products. Immediately large farm coöperatives with regional subsidiaries throughout the country sprang into existence and received huge loans from the Federal Farm Board. These funds were used to build up marketing organizations and acquire marketing facilities. Unfortunately the Farm Board became involved in a misguided program of price stabilization and lost many millions of dollars on its market operations. But the great farm coöperatives developed under its patronage still survive and constitute an important part of the marketing machinery of the nation. The Marketing Act of 1937 authorized the Secretary of Agriculture to enter into agreements with producers or producers' associations, and also with the processors and handlers of agricultural commodities, the object being to effect arrangements for improving and stabilizing market conditions.

Production control and price stabilization. Having reviewed the trends of modern farm legislation in respect to credit and marketing, it now remains for us to consider legislation for production control and price stabilization. The growing distress of the agricultural population after 1920 focused the attention of Congress on the problem of farm relief. The crux of the problem was the low exchange value of farm products. Many schemes were proposed, and Congress after much hesitation passed the McNary-Haugen Bill in 1927. This was a measure for production and price control by indirection. It proposed to fix a fair domestic price for farm commodities. Government agencies would determine the world price for each commodity covered by the measure, and would then impose a tariff duty sufficient to insure the desired return to the producer, in the domestic market. Production in excess of domestic demand would be taken over by government agencies and sold in export trade. The losses sustained in these transactions would then be charged against the producers by one of three possible methods: (1) an equalization tax or fee might be levied on producers in precise ratio of their production for

sale; (2) an allotment might be fixed for each producer, and he would be required to dispose of any surplus above the quota otherwise than by sale in the domestic market; (3) an export debenture or duty might be levied upon production in excess of domestic demand. This measure was vetoed by President Coolidge because he was opposed to price control and had doubts as to its constitutionality. Congress was unable to pass it over his veto.

The Agricultural Marketing Act of 1929 was a compromise. Though President Hoover and many of his leading associates were opposed to direct governmental action to control farm production or prices, they were not averse to giving the farmer substantial financial aid in the creation of coöperative associations which might be employed to the same ends. The Act accordingly provided a fund of $500,000,000 to be used by the Farm Board to facilitate the establishment of the necessary farm organizations and in assisting them to market their crops advantageously. Before it could get the coöperative scheme fully launched, the threat of sharply falling prices diverted the Farm Board to a program of price stabilization by the direct purchase of farm commodities, though it is doubtful if the Act contemplated such procedure. To sustain the price of wheat, cotton, and tobacco in particular, the Farm Board went into the open markets and spent some $400,000,000 in buying and storing huge quantities of these commodities. These operations proved unavailing, and farm prices sank to the lowest levels in history.

One of the first steps of the Franklin Roosevelt administration was the enactment of the Agricultural Adjustment Act of 1933, which consolidated the Farm Board under the Economy Act with the Farm Credit Administration. In addition to its credit and marketing features, this measure embodied a plan of production control and price regulation. The declared purpose of the Act was to restore the farmer's purchasing power to the prewar level. To accomplish this, it attempted two things never before tried in American history: (1) to restrict farm output, and (2) to tax the consuming public in order to compensate the farmer for reduced production.

It sought to accomplish the first of these objects by a complicated system of agreements between the Secretary of Agriculture and individual farmers. The Secretary was to make an estimate of the amount of reduction needed for each commodity to avoid serious overproduction. The total reduction was then to be apportioned among the various producing areas, where it would be allotted to individual growers by state and local committees. The grower was not obliged to accept the designated allotment, but was offered a cash bonus or "benefit" if he did. On his reduced crop, under the agreement with the Secretary of Agriculture,

he would be paid the difference between the exchange value of the commodity at the current price level and the average price level of the years 1909–1914. Thus, in the case of wheat, it was estimated that in 1933 the farmer should receive 89 cents a bushel to put him in the same exchange position he occupied in 1909–1914. The price of wheat at the time was 59 cents a bushel, and the bonus was therefore fixed at 30 cents a bushel. The government subtracted 2 cents a bushel from the bonus to cover administrative expenses. The money to pay the bonus was raised by a tax of 30 cents a bushel on all milling and other forms of processing wheat. The same plan in general was applied to other benefited commodities. The presumption was that the processor, if he did not want to absorb the tax himself, would add it to the price at which he sold to the consumer.

Voluntary control not succeeding to the satisfaction of certain farm groups, Congress in 1934 passed the Bankhead Cotton Control Act, the Kerr-Smith Tobacco Control Act, and the Jones-Costigan Sugar Control Act, and in 1935 the Warren-Bailey Potato Control Act. With the exception of the Sugar Control Act, these all embodied the feature of compulsory control through discriminatory taxes levied upon the producer for output in excess of allotted quotas. The Sugar Control Act established import quotas for foreign sugar and backed this up with a system of acreage restriction financed by processing taxes for domestic sugar.

In January, 1936, the Supreme Court declared the Agricultural Adjustment Act unconstitutional on the ground that the processing taxes were not such taxes as the federal government had authority to levy and that the acreage control feature was an invasion of the reserved powers of the states. The tobacco, cotton, sugar, and potato measures, being based on similar principles, were forthwith repealed on the recommendation of President Roosevelt. Three years of crop control, assisted by extensive drought conditions, had resulted in crop shortages and sharply increased prices in many agricultural commodities. There was a strong demand for a return to the "economy of abundance." Not wishing to oppose this sentiment, the government made no effort to replace the control features of the Agricultural Adjustment Act.

As a makeshift, the Soil Conservation and Domestic Allotment Act was passed in February, 1936. This act was ostensibly a measure to conserve the soil resources of the nation, and to foster the growing of soil-conserving crops and the utilization of scientific methods of land management. It provided, however, for the payment of bounties to growers of wheat, corn, cotton, and tobacco who would coöperate with the government by substituting approved grass and leguminous crops in acreage formerly planted to one of the four staples mentioned above. The coöp-

erating farmers were not to be under contract with the government, but were to proceed under the supervision and approval of state and county farm committees. This measure might have satisfied farm demands for some time had it not been for a sudden turn for the worse in farm prices.

By midsummer, 1937, it was evident that farm prices were again on the downward path and might go lower than ever before. Abundant rainfall and the abandonment of acreage control has resulted in huge crops of wheat, corn, cotton, and tobacco. Domestic markets were glutted and there was no effective way of dumping surpluses in foreign markets. Farm groups pressed for action, and February, 1938, the Crop Insurance and Agricultural Adjustment Act was passed. This measure continued the soil-conservation program and set up a new system of aids and controls. The plan involved the following major devices: (1) appropriations from the general treasury to finance the farm program; (2) acreage allotments and cash benefits to producers of major crops complying with the soil-conservation and production-control features of the law; (3) benefit payments to be made on the basis of the normal yield of the allotted acreage instead of on acreage removed from production; (4) crop loans to farmers when prices fall to a certain point below the 1909–1914 price, thus enabling them to hold surpluses on the farm instead of pouring them into the markets; (5) market quotas, imposed by a two-thirds vote of the producers of a given crop, when surpluses rise above necessary carry-over reserves; (6) additional stabilization of production by crop insurance, the farmer putting aside part of his crop as a premium by which the government will insure him up to 75% of his normal harvest.

The present farm program. The Agricultural Adjustment Act of 1938, the Soil Conservation and Domestic Allotment Act of 1936, and the Sugar Act of 1937 supply the legislative underpinning for the present program of agricultural regulation and control. The program consists of three major parts: (1) the conservation plan; (2) the marketing quotas; (3) loans on crops in storage.

The conservation plan involves the establishment of acreage allotments for basic crops and the payment of benefits for compliance with these arrangements. Provision is also made for the payment of supplementary parity benefits when farm prices are low. The parity scheme assumes that in the years 1909–1914 agricultural prices yielded sufficient purchasing power to enable the farmer to get a dollar's worth of manufactured goods by the sale of a dollar's worth of agricultural commodities. If that were true, the farmer's economic status was on a par with that of other producers. In other words, he was enjoying parity. The scheme further assumes that the purchasing power of the farm dollar

has been below parity since 1914. The purpose of parity payments, when made, is to give the farmer an income closer to parity levels. Some farm interests have insisted, however, that changing conditions justify payments considerably above the established parity levels.

The market-quota system is not compulsory, but is available to producers of cotton, corn, wheat, rice, tobacco, and peanuts. A quota arrangement may be put into effect by the affirmative vote of two-thirds of the producers of one of these commodities. When adopted, the quota arrangement allows each producer to market a definite quantity, and no more, of the quota commodity. The quotas apply to all producers of the commodity, those who voted against as well as those who voted for the quota plan. There are prohibitive tax penalties for marketing crops in excess of the assigned quota. The purpose of the quota plan is to divide the available market justly between all producers and to prevent overproduction which might cause a collapse of prices.

Loans on stored commodities, made through the Commodity Credit Corporation, are designed to enable the farmer to carry over, without financial detriment, the surplus production of his good years to be marketed in poor crop years. The stored crops are held as collateral for the loans. Also stored under government seal are the stocks of commodities collected as premiums for crop insurance taken by farmers.

The sugar-control program operates in a similar manner. The Secretary of Agriculture annually estimates the amount of sugar needed by consumers in the United States, and then sets up marketing or import quotas for the various sugar-producing areas. The marketing quotas apply to domestic producers and the import quotas limit the amount of sugar which may be brought in from foreign countries. Domestic growers of sugar cane and sugar beets receive benefit payments for compliance with certain conservation, wage, and marketing requirements.

Surplus marketing. The marketing legislation of recent years has led to the formation of many marketing agreements between the producers and handlers of various farm commodities. These agreements, formed under the supervision and approval of the Secretary of Agriculture, usually have as their object the regulation of shipments, grades, and sizes from the different producing areas, but in some instances they also establish minimum prices to producers. Such agreements tend to create more orderly and stable marketing conditions, though they do not directly help solve the problem of surplus production.

Supplementary to the system of marketing agreements were various other expedients to help meet the surplus problem and at the same time promote a better distribution of foodstuffs among the consuming population. Among other things, the Department of Agriculture was authorized

to purchase surplus farm products for distribution directly to needy families through state welfare agencies; to purchase certain commodities to be sold through regular merchandising channels to needy families who could apply in part payment food stamps, cotton stamps, and so on which had been given them by the government; to purchase commodities for shipment abroad under the Lend-Lease Act and other legislation supporting foreign sales. When World War II converted the surplus problem into a scarcity problem, most of this legislation became inapplicable.

Crop controls in World War II. It became necessary for the United States as a participant in World War II not only to do her share of the fighting but to assume the major responsibility for supplying our allies with both foodstuffs and munitions of war. Immediately the farm problem ceased to be one of limiting production and promoting orderly marketing. Production had to be pushed to the utmost limits, and distribution had to be managed to meet as successfully as possible the unpredictable exigencies of war. Fortunately, it was found that the existing farm legislation could be easily adjusted to those requirements.

The acreage-allotment and marketing-quota methods of peacetime stabilization proved to be well suited to the setting of goals and the expansion of production for war purposes. Since 1933 there had grown up throughout the country an elaborate and smoothly functioning organization of county and state committees of farmers coöperating with the Department of Agriculture. When war came, the Department required very little new legislation to enable it to employ this machinery for the very opposite of its original purpose. The war program called for vast increases in nearly all farm products and for exceptionally huge increases of grain, meat, and dairy products. The allotments and quotas were set accordingly, and the response of the 4,000,000 agricultural producers of the nation exceeded all expectations. Special payments were used to stimulate the production of certain of the most vital commodities; subsidies were used to offset for farmers and processors the effects of the price ceilings established for various farm products; commodity loans were made on numerous crops in order to facilitate marketing controls and build up reserves. Emphasis on soil conservation practices continued throughout the war, payments being made to farmers either in cash or in materials and services for compliance with specified conservation practices.

At the end of the war it was apparent that the immediate reconversion of American agriculture to a peacetime footing was impossible. There were shortages of foodstuffs everywhere in the world, not excepting the United States. The problem, therefore, was to manage a gradual reconversion which would maintain the stability of our farm production and readjust step by step as foreign production returned to normal. There

seemed to be no better means to this end than the allotment and quota system which had so well served the needs of the war and prewar periods. It was evident, however, the strains of postwar readjustment might be even greater than those the system had previously borne.

Farm security. Now gathered under the Farm Security Administration of the Department of Agriculture are several activities designed to render financial and other assistance to specially needy portions of the farm population. The rural rehabilitation program provides loans to enable tenant farmers, sharecroppers, and farm laborers to buy farms; also loans to enable eligible farmers to purchase seed, feed, farm equipment, and other farm necessities. Emergency loans are made to farmers in areas stricken by disasters of nature. The resettlement program undertakes to aid farmers to move from farmed-out areas to sections of greater promise for agricultural purposes. The migratory labor program maintains comfortable and sanitary camps in important farm areas to provide housing for the thousands of transient farm workers needed at different seasons of the year. Since the war much of the work of the Farm Security Administration has been in the aid of veterans who wish to get established in farming. It is authorized to make special loans to them and to help them in various other ways.

State agricultural departments. A department, board, or bureau of agriculture is found in every state. All of these coöperate with the United States Department of Agriculture in the administration of certain portions of the national farm program. In addition, they are charged with the enforcement of a great variety of state legislation for the assistance and regulation of agriculture. Among the duties commonly assigned to the state agricultural agency are: the enforcement of state quarantines against plant and animal diseases; the inspection of dairies, cheese factories, nurseries, seed houses, and other agricultural industries; the licensing of produce dealers, warehousemen, and many businesses of importance to agriculture; the registration of cattle brands, livestock remedies, and the labels of agricultural produce; supervision of the grading and packing of specified agricultural commodities; the compiling of agricultural statistics; the supervision and regulation of weights and measures; and the enforcement of food and drug laws.

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CHAPTER 21

GOVERNMENT AND THE WORKER

Problems of the Working Class

Modern industrial society is made up of two major classes of people—the employing class and the working class. The employers own, or control if they do not own, the principal means of producing and distributing economic goods. Hence they dominate the management of commerce and industry. The workers are dependent upon the employers for the means of livelihood. Though the workers may have good incomes and own considerable property, they do not own or control the kind of property which makes jobs or enables them to determine their own economic destiny. This is because the industrial system which has come into being as a result of the increasing substitution of machinery for manual and mental labor makes concentration of economic power advantageous.

To underwrite business enterprises requiring vast quantities of mechanical equipment, enormous aggregations of capital are necessary. The man of small means can never accumulate or borrow enough to acquire control of such a business, and very few persons of large means are wealthy enough to enable them to do so. The principal proprietors of modern large-scale business enterprise are corporations. By the sale of stocks and bonds, a corporation collects and utilizes the capital resources of large multitudes of people—rich, poor, and in-between. A corporation does not necessarily concentrate ownership, but it does concentrate control. There may be thousands of shareholders in a big corporation, but it is almost invariably controlled by a small board of directors. A few holders of large blocks of stock, though none has a majority, can easily combine and control elections to the board of directors. Holding companies, voting trusts, and other devices facilitate such combinations.

The principal stockholders, the directors, and a few top officers constitute the management of the corporation. Multitudes of workers of all kinds may be employed to carry on its operations, but they have no voice in the management. They are merely hired men. Such hired men make up a rapidly growing element in the population of modern society. The day has gone when the average man can reasonably expect to be in whole or in part his own employer, or to gain a living through the management of his own capital. The opportunities for individual enterprise are

growing relatively fewer and the opportunities for collective enterprise through corporate management are becoming ever more numerous. For that reason the great majority of individuals must look forward to being, not employers, but employees—members of the working class.

For the working class, whether of the manual or the white-collar variety, this state of affairs is ominous. It means that the workers, except through organized action, have ceased to be the masters of their own destiny. White-collar workers, having been until recently somewhat more fortunately circumstanced than manual workers, have not been articulately conscious of their precarious position in the economic system. Manual workers, on the contrary, being more ground down and having less hope of bettering their conditions, have become acutely aware of the difficulties of the worker in modern society, and have taken steps to war against them. They have built up, in the first place, a vast and powerful network of labor unions for various kinds of self-help and to make common cause against employers; in the second place, they have used their political power to procure governmental aid.

The major problems of the employee class today are as follows: (1) to secure employment, (2) to get a living wage, (3) to gain protection against exploitation, (4) to limit hours of labor, (5) to secure safe and healthful working conditions, (6) to obtain compensation for accidental injuries received in the course of employment, (7) to provide against old age, and (8) to safeguard the principle of collective bargaining. In the pursuit of these objectives much has been accomplished through labor organizations, but more and more of late years the worker has turned to political remedies. That side of the labor question we shall briefly survey in the remaining sections of this chapter.

The Problem of Unemployment

Types of unemployment. Unemployment has become the great curse of the machine age. A generation ago the common opinion in the United States, and pretty generally throughout the world, was that no man able and willing to work need be permanently out of a job. That view is no longer valid. The machine age has converted labor into a commodity subject to all the vicissitudes of unbalanced and demoralized markets. The man without a job must now be treated as a ward of society, because economic conditions beyond his own control have largely deprived him of the means of caring for himself.

Students of the unemployment problem recognize three general classes of unemployment, termed seasonal, cyclical, and normal. Seasonal unemployment is a regularly recurrent feature of trades and indus-

tries like the dress industry or the canning industry, in which operations are adjusted to temporary or seasonal conditions. Cyclical unemployment is that which occurs in all occupations, in step with cycles of prosperity and depression. Normal unemployment is that which under all circumstances results from various factors of incapacitation or ill adjustment as between the man and the job.

Modern government has found it necessary to concern itself with all three kinds of unemployment. The most sincere and determined efforts of private enterprise and private philanthropy have proved as feeble and ineffective as private efforts to combat fire and flood. Everywhere throughout the world the state has been called to the rescue. The policies most generally followed in dealing with the unemployment problem have been: (1) direct or indirect financial aid to the unemployed; (2) the establishment of free employment agencies to help the worker find a job; (3) the inauguration of large programs of public works to stimulate employment in private industry and provide work in the public service; (4) the establishment of governmentally managed systems of unemployment insurance to provide income for workers out of jobs; and (5) the development of governmentally administered systems of old-age pensions to retire superannuated workers and make places for younger ones.

Unemployment policies in the United States. All of the foregoing policies have been followed in the United States. Our federal, state, and local governments all have tried to lessen unemployment by improving the processes through which the worker and the job are brought together. One of the first activities of the states in this direction was the regulation of private employment agencies. Commercial employment agencies were often found too inefficient, and sometimes they took the client's money without rendering any service in return. To combat these evils, most of the states enacted laws for the licensing and regulation of private employment agencies. The state of Washington in 1914 enacted a law abolishing private employment agencies, but this law was held unconstitutional by the United States Supreme Court. New Jersey in 1918 enacted a law requiring private employment agencies to procure a license from the state commissioner of labor, and stipulated that licenses were to be granted only on the condition of the applicant agency's filing a schedule of fees with the commissioner and collecting only fees approved by him. In 1928 the Supreme Court declared this law unconstitutional as a price-fixing measure. The Court has ruled, however, that the states have authority to license employment agencies and subject them to reasonable regulations, and, moreover, that free public agencies may be established in competition with them. Many cities and some of the states

have established such free agencies. These now work in coöperation with the United States Employment Service.

The federal government first became concerned about employment agencies during the First World War, when there was a great scarcity of labor and war industries could not obtain sufficient workers to maintain production. To meet this emergency, Congress created the United States Employment Service, with a system of labor exchanges located in the principal centers of population. There was a certain amount of coördination between this service and the several state and local employment services, but not enough to provide a thoroughly unified system of public employment agencies for the nation as a whole. The economic crisis of 1929 and succeeding years resulted in steps being taken to reorganize and improve the public employment services of the country. In 1933 Congress enacted a measure creating a new United States Employment Service. To secure better coördination of federal, state, and local agencies, this act provided generous grants-in-aid to state and local agencies meeting federal standards. The system at once proved its worth and was strengthened and expanded. During World War II its operation was placed entirely in the hands of the national government. The operation of the service was returned to the states after the war. It is now, as in the past, an invaluable means of finding jobs for workers, particularly in the seasonal occupations; but the problem of depression-made unemployment is largely out of its range.

During the so-called depression period from 1929 to 1939, more people were out of work and unable to obtain employment than ever before in American history. The National Industrial Conference Board estimated that there were more than 14,000,000 unemployed in 1933. These figures were disputed both by those who thought them too high and those who thought them too low. The first official census of the unemployed was taken by the federal government in 1937, after there had been a very considerable industrial recovery. This census showed that there were then 5,821,035 persons totally unemployed and wanting work, and 3,209,211 partially unemployed and wanting full-time jobs. If there were nine million wholly or partly unemployed in 1937, when business conditions, from a statistical standpoint, were as good and in some ways better than in 1929, this figure could only mean that normal unemployment had grown to huge proportions.

Nobody knew how to solve this problem. The government had to act, and in so doing it selected the following general lines of policy: (1) to provide financial assistance for the unemployed, (2) to make jobs, and (3) to stabilize the income of the working classes by social security measures.

The dole. Direct financial relief was provided by expenditures from the treasuries of the national, state, and local governments, the national government carrying about four-fifths of the load. These moneys were given directly to unemployed persons for the payment of rent and the purchase of food, clothing, and other necessities. It is estimated that an average of about $500,000,000 a year was devoted to such uses. This form of unemployment relief was known as the dole. It was not regarded as a sound public policy, and an effort was made to keep it at a minimum and to meet the needs of the unemployed as far as possible by work relief.

Public works. To create jobs for the unemployed two general policies were followed. One line of attack was to stimulate enlarged employment in private industry by creating a huge demand for basic industrial products. The principal steps in this direction were the Tennessee Valley Project, the public works program, the housing program, and the flood-control program. Outlays aggregating some ten or twelve billion dollars were made to encourage various kinds of construction work. In many instances the federal government itself carried on the work; in others it made outright gifts of money to state and local governments for construction purposes, requiring in most cases that federal funds be matched by a certain amount of state and local funds; in still other cases it made easy loans to governmental subdivisions, public corporations, private corporations, and private individuals. The total amount of employment provided by these activities cannot be accurately computed. The Public Works Administration reported in 1939 that it had completed 30,068 projects and had 4,351 under construction, at a total outlay of nearly three billion dollars. It estimated that these projects had provided more than ten billion man-hours of employment. It was not expected, however, that this program would be continued on the same scale in the future.

Work relief. The second line of attack was the work-relief program, which began with the establishment of the Civil Works Administration in November, 1933. Under this plan unemployed workers were paid for doing almost any useful work that could be found for them at the time—raking leaves, shoveling snow, and odd jobs of various kinds. The Civil Works Administration was discontinued in February, 1934, and the work-relief program was handed over to the Federal Emergency Relief Administration. In July 1935, the Works Progress (the name was later changed to Work Projects) Administration was established. This came to be the major agency of work relief. Its job was to carry on a program of socially useful public works and other enterprises to provide employment for persons on relief. Some of the projects were car-

ried on directly by the W.P.A. and others by local government agencies after approval by the W.P.A. A project must be one of permanent social or economic utility, and must be of such a nature that a large proportion of the money spent on it would go for wages. The work had to be of a kind that could be done by persons on relief; only unemployed persons physically and otherwise qualified to work must be hired; and projects were allocated to local communities in proportion to the number of persons on relief. The scope and variety of W.P.A. projects was amazing. It financed bridge building, road construction, sewer construction, the construction of public buildings, the building of recreational facilities, adult education, theater companies, orchestras, art projects, and literary work. Prior to the labor scarcity caused by the enormous expansion of war industries, the W.P.A. annually provided employment for about 2,500,000 persons. The absorption of the unemployed in the war industries led to a great curtailment of the W.P.A. program, and the Work Projects Administration was dissolved in December, 1942. But the W.P.A. took care of employable workers only, and not of all of them.

Also terminated by World War II were the Civilian Conservation Corps (operative from 1937 to 1943) and the National Youth Administration (1935–1943). The former provided work relief each year for about 300,000 young men. The national government created most of these jobs in connection with forest conservation, flood control, and soil erosion projects. The Youth Administration helped some 400,000 young persons to attend schools or colleges each year.

Unemployment insurance. Stabilization of income by unemployment insurance and old-age pensions was one of the results sought by the Social Security Act of 1935. Though extensively practiced in other countries, unemployment insurance is relatively new to the United States. Wisconsin and one or two other states had enacted unemployment-insurance laws before the federal measure was enacted, and the primary purpose of the federal enactment was to induce all of the states to do so. The Social Security Act provides for the establishment of a federal unemployment-insurance fund, financed by a federal payroll tax on all employers of eight or more persons, with the exception of wages from certain types of employment. It is provided, however, that up to 90% of this tax may be remitted to employers in states having unemployment compensations laws approved by the Social Security Board. It is also provided that federal grants-in-aid to cover administrative costs shall be made to states having approved unemployment-compensation laws. These incentives quickly brought all of the states into line. The state laws vary in detail, but all follow the general pattern prescribed by the federal government. By means of a payroll tax a reserve fund is accumu-

lated, and each worker during his periods of employment establishes credits in that fund. Upon being thrown out of work through no fault of his own, he receives weekly payments, up to a certain maximum, from the unemployment compensation fund. This system is now in full operation, and benefit payments are being made to unemployed workers in all states. It is hoped that in course of time the unemployment-insurance system will greatly reduce the relief burdens of the government.

Old-age pensions have a dual purpose. One is to retire elderly workers from competition with younger ones, thus relieving unemployment. The second, and more important, is to safeguard the worker, employed or unemployed, against the economic hazards of advancing years and diminished earning power. This subject will be more fully discussed later in this chapter (pages 512–513).

The Problem of the Living Wage

It is not enough that the worker should have a job; he must also have a living wage. By a living wage we do not mean one which will just provide the necessities of existence, but one which will sustain him at a decent level of comfort and enable him to enjoy certain social advantages. American industry on the whole has paid high wages, though not high enough oftentimes to keep ahead of the cost of living or keep up with rising standards of living. In certain branches of industry, however, wages have always been indefensibly low. Because the workers were not organized, because cheap foreign labor accustomed to a low scale of living could be had, because women or children could be employed at lower wages in the place of men, because of a great labor surplus and the willingness of men to work for any wage at all, or because of some other condition adverse to the worker, employers have been able to beat down wages and keep their employees on rates too low for decent existence. In spite of all that could be done by organized labor through collective bargaining, such conditions continued until governmental remedies were applied.

State wage laws. State legislation relative to wages has concerned itself with three principal objects: the direct establishment of minimum wages in certain fields of employment, the elimination of wage-cutting competition in certain fields, and the limitation of hours in such a manner as to raise wages. Minimum wages have been prescribed by state legislation in two general classes of employment: first, on work done by or for the state; second, in the employment of women and children. In most states the law now requires that on all work done by or for the state or any subdivision thereof no less shall be paid than the current local rate for

the same work. This has the purpose and possibly the effect of keeping contractors from bringing in outside labor at lower than local rates.

The story of minimum wages for women and children is an interesting illustration of changing opinion. Massachusetts in 1912 enacted the first minimum-wage law for women and children. This law was not mandatory, but other states soon enacted mandatory laws. The question of the constitutionality of such legislation was then raised. It was alleged that the laws were contrary to the due-process clause of the Fourteenth Amendment. In 1917 the Supreme Court of the United States, by a tie vote of four to four, allowed the Oregon minimum-wage law to stand. It was then assumed that minimum-wage laws were constitutional. In 1923, however, the Supreme Court held the minimum-wage law of the District of Columbia unconstitutional. Since this decision was based on the Fifth rather than the Fourteenth Amendment, there was uncertainty as to the status of state minimum-wage laws. Some of the states repealed their minimum-wage laws; others continued them on the books but made no attempt to enforce them. In 1936 the Court, by a five-to-four decision, declared the New York minimum-wage law contrary to due process of law and therefore unconstitutional. This verdict seemed to mark the end of minimum-wage legislation, but the state of Washington disregarded the decision and continued to enforce its minimum-wage law. This persistence brought another case before the Supreme Court in 1937. The Court, by a five-to-four decision, upheld the Washington law and expressly overruled its former decisions against minimum-wage legislation. Thus it was clearly established that the minimum-wage principle is constitutional. Nearly half of the states have such legislation.

The elimination of certain forms of competition tending to keep wages low has also been a common object of state legislation. In part this object has been the motive behind the laws adopted in a number of states forbidding the employment of children under fourteen or sixteen years of age; child labor is always cheap labor. The same object is also the main motive behind the laws now found in a majority of the states forbidding the employment of convict labor and the sale of goods manufactured in state prisons or other institutions in competition with private industry.

Every state of the union has laws limiting hours of labor in some occupations. Usually these limitations are based on the hazardous nature of the industry or the danger to health in its operations. Limitations of hours for women and children have been placed on similar grounds. But indirectly most of these laws have had the effect of raising wages per hour, because the total daily wage is rarely reduced in proportion to

reduced hours of employment. The courts frequently have intimated that they would be obliged to declare such laws unconstitutional if wage raising were their primary purpose, but they find no fault if it occurs incidentally. This fact is one that labor leaders do not overlook.

Federal wage legislation. Prior to 1933 the federal government did not deal directly with wages, the one notable exception being the Adamson Act of 1916, which was passed to avert a nation-wide strike of railway workers. Although it forced the railways to meet the wage demands of the workers, this measure was justified as an extraordinary use of the commerce power to meet a national emergency and not as basically a wage-control measure. The National Industrial Recovery Act of 1933 was avowedly a measure to increase employment and raise wages. By code provisions, approved by the President, wage scales were more or less arbitrarily fixed in 557 codes of fair competition. Refusal to obey the wage regulations of the poultry code resulted in a prosecution which brought the constitutionality of the Recovery Act before the Supreme Court for decision. The Court found the Act unconstitutional, thus ending that particular attempt of the federal government to regulate wages. A somewhat more limited attempt to control wages was made by means of the Government Contracts (Walsh-Healey) Act of 1936. This law provides that all contracts by the federal government for the purchase of supplies, materials, and equipment of any sort shall contain stipulations guaranteeing that the manufacturer or dealer has observed or will observe certain standards as to maximum hours, minimum wages, child labor, and safety and health. The required standards are to be proclaimed and enforced by the Secretary of Labor. This Act has given the federal government extensive control over wages, hours, and other matters in industries supplying the government.

The most recent attempt of the federal government to control wages, hours, and other matters is the Fair Labor Standards Act of 1938. This measure declares that certain low labor standards are a burden on interstate commerce, interfering with the free flow and orderly marketing of goods in interstate commerce. It then provides that wages in all industries (with certain specified exceptions) making goods for sale in interstate or foreign commerce shall be not less than 25 cents an hour and that the maximum working week shall not exceed 44 hours. It also provides that children under 14 years shall not be employed in such industries, except under their parents and in work not detrimental to their schooling; that children under 16 years shall be employed only under certificates granted by the Department of Labor; and that children under 18 years shall not be employed in hazardous occupations. Provision is also made for gradually increasing minimum wages and decreas-

ing maximum hours. Under these provisions the 40-hour week became effective in 1940 and the 40-cent minimal hourly rate in 1945.

The child-labor provisions of the Government Contracts Act and the Fair Labor Standards Acts were designed to curb a vicious kind of wage-cutting competition in interstate and foreign commerce. Other federal measures designed to a similar end were the Hawes-Cooper Act of 1929, effective in 1934, and the Ashurst-Sumners Act of 1935, which prohibited the shipment of prison-made goods in interstate and foreign commerce where the sale of such goods was forbidden by state laws and authorized the states to put the same restrictions on the sale of prison-made goods manufactured in other states that they put on goods made in their own prisons.

Protection against Exploitation

State legislation. The wage worker is subject to many forms of exploitation at the hands of rapacious and unscrupulous employers. It used to be a common practice in the coal-mining regions for a mining company to operate a general store in the mining town and pay its employees partly in the form of store orders. This practice forced the workers to trade at the company store. There was constant complaint that company stores took advantage of the situation to charge higher prices than other stores; that the company store was simply a device for making a double profit out of the employee; and that it was a devious means of keeping wages low and employees subdued. In response to the demands of organized labor the legislatures of many states have passed laws requiring the cash payment of wages and specifically forbidding store orders. In some states mining companies, and sometimes other industrial concerns, have been forbidden to own and operate mercantile establishments, the idea being that the evil could not be cured by simply requiring cash payment, as the company could find plenty of other ways to coerce employees into trading at its own store. These laws have been held unconstitutional in some states, on the ground of interference with freedom of contract; but generally they have been upheld.

Another practice of employers to which workers have bitterly objected is holding back part of the wage as a guaranty that the employee will not leave without notice. The labor view is that this practice is a gross invasion of their rights, and is in reality a device to forestall strikes. Many state legislatures have come to the aid of the workers in this matter by the enactment of laws requiring the payment of wages in full once or twice a month. Although some state courts have held these laws unconstitutional, others have upheld them, as has the Supreme Court of the United States.

Job racketeering, as it might be called, is another form of exploitation to which workers are frequently subject. This has been more common in the building trades than elsewhere. The seasonal nature of the work and the irregularity of employment, owing to the fact that building operations are not continuous even in the building season, make it imperative for the worker to get a job when there is employment to be had. Unscrupulous contractors and corrupt labor leaders not infrequently conspire to cheat the worker out of part of his wages by forcing him to pay for the privilege of getting and holding a job. The employer agrees to hire only men "okayed" by the labor leader on the understanding that he shall have a share of the "gravy." The job-seeking worker then discovers that before he will be hired he must "fix things up," which means that he must agree to pay part of his weekly wage to the labor chief under the guise of dues or something of the sort. Should he fail to pay, he loses his job; should he "squeal" he stands in danger of being beaten up or even murdered by the paid "gorillas" of the contractor or labor leader. Most of the states have enacted laws severely penalizing such practices, but they are difficult to enforce because it is rarely possible to secure evidence on which to convict.

Federal legislation. Until recently the federal government has not done much to protect workers against such forms of exploitation. The relation of employer and employee was assumed to be a matter for state regulation. Only in cases where the states could not act did the federal government venture into this field of legislation. Because of the need for uniform legislation for the protection of seamen and the manifest impossibility of securing uniform and effective state legislation on the subject, Congress in 1915 enacted the La Follette Law, which stringently regulated treatment of seamen on American vessels. Among other things it was provided that wages must be paid in full within twenty-four hours after the unloading of the cargo or four days after the discharge of seamen; that seamen might demand half the wages then due at any foreign port where the vessel might load or discharge cargo; that seamen discharged without fault of their own before the expiration of a voyage must be paid extra wages; that deductions might not be made as payment to any persons securing employment for seamen; and that wages might not be paid in advance.

Hours of Labor

From the 72-hour and the 60-hour to the 45- or 40-hour week is a change that has taken place pretty generally throughout the United States during the last quarter century. It is a change of vast significance

to the working class, and for which it is much indebted to governmental solicitude. Hours of labor have been shown to have a direct bearing on the health and safety of the industrial worker. When the labor period is too long, the worker's vitality is lowered and his nervous coördinations are impaired. He becomes more susceptible to colds and other infections which undermine his health, and is more likely to make mistakes which cause accidental injuries to himself or his fellows. Overlong working hours have been shown to have a distinct connection with morals as well. The overfatigued worker, denied sufficient time for recuperation and recreation, becomes an easy victim of the drink habit, the narcotic habit, the gambling habit, and other vicious practices. The worker's chances for self-improvement through education and otherwise are also curtailed by the long work day. Finally, it has become important to reduce working hours in order to multiply jobs and thus decrease unemployment.

State laws limiting hours of labor. The crusade for shorter working hours was begun by the labor unions, and to them belongs much of the credit for its successful culmination. But without the aid of government it could not have been carried forward as rapidly and successfully as it has. Government regulation of hours of labor in this country began with state laws limiting hours in specially hazardous industries. In the case of *Holden v. Hardy* in 1898 the Supreme Court opened the way for extensive state legislation in this field by upholding the Utah eight-hour law for the mining industry. Prolonged periods of labor underground being clearly a menace to health and safety, the Court declared the eight-hour limitation a proper exercise of the police power. The same principle was extended to many other employments involving hazards to the health and safety of the workers or the general public. Practically every state now has laws limiting hours of labor for railway workers of all classes, street-railway employees, laundry workers, sawmill workers, employees in electric-light plants and others engaged in specially hazardous occupations. For a time it was thought that state power to limit hours was confined to industries involving peculiar hazards to health or safety, but in 1917 the Supreme Court sustained the Oregon law establishing a ten-hour day in all mills, factories, and manufacturing establishments, and a number of states have since enacted similar legislation. For women and children a good many of the states have established a shorter working day than for other classes of employees, and these laws have been upheld as being necessary to protect the physical welfare of the race. Most of the states have also passed laws fixing an eight-hour day in all state employments and some extend the limitation to work done for the state under contract.

Federal laws on hours of labor. In 1907 Congress enacted a law to the

effect that no person employed in the movement of an interstate train should be obliged to work more than sixteen consecutive hours. This prohibition was basically a safety measure, designed to lessen the danger of railway accidents due to the fatigue of overworked railway operatives. In 1916 Congress passed the Adamson Act prescribing an eight-hour day on interstate railroads. As noted above, this was an emergency measure and was upheld as a proper exercise of the commerce power under the circumstances. It was contended that the eight-hour feature was in reality a device to raise wages, as the workers would receive no cut in pay for the shorter working day. The Supreme Court held that the emergency justified the action, regardless of its incidental consequences. As may be noted, however, in neither of these cases did the Court consider the question of whether the government would have power to regulate wages under nonemergency conditions.

Later endeavors of the federal government to restrict hours of labor have been described earlier in this chapter (pages 505–506).

Working Conditions

Up to 1900 or thereabouts the worker had to put up with whatever equipment, housing, and other working facilities the employer supplied. If his health was endangered by foul and dust-filled air, contaminated drinking water, and filthy toilet facilities, he could quit and get another job where conditions might be as bad or worse. If he were in constant danger of being maimed or killed by unguarded belts, cogwheels, saws, and other mechanical apparatus, his alternative was precisely the same. If he were obliged to work with materials or equipment which, in the absence of proper precautionary measures, would induce occupational diseases such as lead or phosphorus poisoning, he had no escape. If he had to stand on damp floors, inhale scalding steam, face the heat of blazing furnaces, or perform other duties which rendered him susceptible to respiratory diseases, that was likewise his bad luck. When he took the job, he took all the risks that went with it, and few employers felt obligated to incur any expense to cut down those risks.

The worker of today is much more fortunate. The modern mine, factory, and mercantile establishment, though not always a model of safety and sanitation, provides incomparably better working conditions than its predecessor of the last generation. In part this change has resulted from the militant endeavors of labor unions; in part also it is attributable to the growing enlightenment and humanitarianism of employers; in part also (indeed, in very large part) it is a consequence of mandatory governmental enactments. Had it not been for the part played by govern-

ment, labor-union agitation would have been largely unavailing and employer philanthropy of much slower growth.

Protective legislation. Credit for the improvement of working conditions goes primarily to our state governments, for the federal government has not been able to extend its jurisdiction to these matters until very lately. Most of the industrial states have enacted comprehensive codes of law covering health and safety conditions in mines, fisheries, sawmills, steel mills, factories, department stores, office buildings, and so on. These require the installation of approved safety appliances, protective devices, and sanitary equipment, and make provision for regular inspection by state or local officials to see that the law is faithfully observed. Since it is impossible for the law to enumerate all the conditions to be remedied, a number of the states, of which Wisconsin, New York, and Ohio are good examples, rely upon administrative orders to fill the gaps in the statutes. The law lays down general rules as to sanitation and safety in various industries, and the state labor department or other enforcing agency frames specific rules which, following a prescribed public hearing, are promulgated as law. Inspectors are given power in most states by specific order to compel an employer to remove or safeguard a dangerous machine or to correct objectionable sanitary conditions.

The laws of many states now prohibit or restrict sweatshops, that is, concerns which let out work to be taken home by the employee and finished there. Many also regulate or forbid the use of substances known to cause occupational diseases, and some provide for the payment of compensation for occupational diseases. Suction pipes, specially constructed hoods, and exhaust fans are required to be installed for the removal of dust and fumes that might cause occupational diseases or other impairment of health. In certain types of work, especially where women are employed, it is required that seats be provided for operatives and also properly equipped rest rooms.

In regulating working conditions the federal government has confined itself mainly to interstate and foreign carriers. The automatic coupler, the block signal system, and other safety appliances on interstate railroads have been hastened by federal legislation giving the Interstate Commerce Commission power to order the introduction of such equipment. A similar advance in safety conditions for seamen has been brought about by the work of the Steamboat Inspection Service, the Bureau of Lighthouses, and other federal agencies dealing with water transportation. The licensing and inspection of aircraft by the Civil Aeronautics Board of the Department of Commerce has likewise done much to improve safety in air transportation. Workers in the mining industry must credit part of the improvement of the sanitary and safety conditions of their employment to

the research and technical assistance of the Bureau of Mines. In a similar way the investigational and advisory services of the Department of Labor have contributed to the betterment of working conditions in American industry as a whole. The Government Contracts Act of 1936 requires compliance with the sanitary, safety, and factory inspection laws of the state in which the work is performed.

Compensation for Accidental Injuries

Worker's position at common law. Under the English common law as transplanted to this country a workman injured in the course of his employment had no recourse against the employer and no right to compensation unless he could prove that the employer had been negligent in the performance of his duty to use due care in providing for the safety of the employee. The employer's duty in this respect was much attenuated, however, by three corollary rules of law. One of these was called the rule of *assumption of risk*, and was to the effect that an employee in accepting hazardous employment assumed the risks naturally involved therein. Another, called the *fellow-servant rule*, was that an injured employee could have no claim against his employer for an injury resulting from the negligent act of a fellow worker. The third was known as the *rule of contributory negligence*, and held that an injured worker could have no recourse against his employer if it could be shown that his own negligence had contributed to the accident. Under these three rules it was generally possible for the employer to escape responsibility for accidental injuries to his employees. If he were sued by the employee, he could usually get a favorable judgment, and if not, he could generally appeal on technicalities and keep the case tied up in the courts until the employee's resources were exhausted.

From the standpoint of the worker this status was little short of exploitation, because it meant that the cost of industrial accidents had to be borne by the worker and his family, who of all members of society were least able to stand the burden. Technically the worker might have assumed the risk when he took the job, but in reality he merely assumed risks that were inherent in a mechanized industry and that he was compelled to assume in order to have a job at all. Technically, too, the immediate fault might lie with a fellow servant or with the injured worker himself, but in reality conditions in industry were such that no amount of caution could prevent the occurrence of a certain number of accidents. Even today, despite all the progress that has been made in safeguarding industrial processes, there are on the average about 75,000 fatalities a year in the United States from industrial accidents and nearly 2,000,000 permanent or tem-

porary disabilities. Slowly the conviction sank into the American mind that industrial accidents were part of the price that must be paid for a mechanized civilization, and that the old principles of law which assessed the cost wholly upon the working class were ethically unjustifiable and economically unsound. Then our legislatures began to act.

Employer's liability and compulsory state insurance plans. Beginning with Massachusetts in 1903, some forty special commissions have been created by state legislatures to investigate the problem of industrial accidents and recommend legislation, and by 1935 forty-six states had enacted legislation on the subject. Three general types of legislation have resulted. Some states have adopted the employer's liability plan, which requires the employer to carry liability insurance. When an accident occurs the state liability commission or state labor department makes an investigation to determine authoritatively who was at fault. Should the employer be found to blame he is ordered to compensate the employee and the claim is paid from his liability insurance. A few states also have adopted the compulsory state insurance plan. Under this plan each employer is obliged to pay into an insurance fund administered by the state government a stated annual tax, graduated according to the risk of his business and the number of workmen he employs. From this fund benefits are paid to injured workers regardless of the blame for the accident. A definite schedule of payments for different injuries is set up, and the investigation by the state authorities is merely to determine the character and extent of the injury and the amount of the compensation.

Workmen's compensation laws. The most widely adopted plan, however, is called workmen's compensation. This is now used in about two-thirds of the states. Under this plan the employer is obliged to compensate the employee regardless of fault. The law sets up a schedule of benefits for various injuries and compels the employer to compensate every injured workman according to the provisions of this schedule. The state industrial-accident commission or other enforcing agency investigates each case to ascertain the extent of the injury and the amount of payment due and then orders the employer to pay. The employer gives up his common-law defenses and the workman surrenders his right to file a personal injury suit against the employer. The schedule of payments fixed by the law becomes in fact a schedule of agreed damages between employer and employee, and the investigation and award by the state commission takes the place of the usual litigation to determine liability and fix damages. Some states have made the workmen's compensation plan compulsory; others have made it elective, allowing employers and employees to choose between the compensation plan and the old system of common-law liability.

All three of the foregoing plans have been attacked in the courts as unconstitutional, the gravamen of the attack being that they amounted to an arbitrary deprivation of liberty (of contract) and property without due process of law. State supreme courts and also the Supreme Court have taken the position that the old principles of liability have been rendered obsolete by changes in the nature of industry, and that legislation which "has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, is a matter of sufficient public concern" to be justified under the due-process clauses of the Constitution.

Federal compensation laws. Federal legislation on the subject of compensation for accidents is meager compared to that of the states. In 1908 Congress enacted a statute introducing the employer's liability plan for all railway employees injured in interstate commerce. In 1920 the benefits of this measure were extended to seamen, and in 1927 a compensation law was passed for the benefit of longshoremen and harbor workers. In 1928 the scope of the workmen's compensation law of 1927 was amplified to include all employees in the District of Columbia. Congress has also enacted legislation providing a workmen's compensation system for all federal employees.

Security in Old Age

Economic security for old age, a sufficiently difficult problem for all classes of people, is extraordinarily so for the worker. His income seldom allows a great margin for savings, and when he does save money he seldom knows what to do with it. He can of course buy himself a home, and many workmen do; but that home will not keep him in old age. Just when he needs his home most desperately it may be taken from him because of his inability to pay the taxes. In addition to his home, however, he needs investments which will provide an income for his declining years. But the average workingman is not a competent investor. How can he be? Investment is a science which, as events have shown, thousands of bankers have not mastered. The ordinary industrial employee with his limited education, knowledge, and contacts cannot be expected to be a prudent investor. Nor can he be expected to have much better judgment in selecting investment advisers. To make matters worse, he must now accumulate his savings in a much shorter earning period than ever before in history. Modern industry wants only young workers. When they have reached the age of forty-five or fifty they are ready for the discard—not because they are physically worn out, but because they have lost the speed, suppleness, and adaptability demanded by modern machinery.

Various expedients have been tried to provide the worker with an assured and adequate income for old age, but none has proved wholly satisfactory. Many labor unions and fraternal orders maintain homes for the aged, but these can care for only a small percentage of those really needing help and are but a poor makeshift at best. A number of such organizations have also tried the experiment of building up pension funds to care for their aged members, but it has been found difficult to keep these funds actuarially sound and solvent. A great many business concerns during the past twenty-five years have established pension systems for their employees, but these on the whole have not been well managed. The depression wiped out a great many of them and materially curtailed the expectancies of all. Private insurance companies during the past decade or two have begun to write very attractive combination insurance and annuity policies, but these as yet are more suited to the business and professional classes than to the workingman. Private philanthropy, once chiefly relied upon to care for the aged, has come to be wholly inadequate.

Almshouses and doles. For the foregoing reasons, the responsibility for the care of the aged has more and more devolved upon the government. Traditional American methods of provision for aged indigents have comprised the county almshouse or poor farm and the dole (disguised under the more ingratiating title of outdoor relief). Neither of these methods is appropriate for modern conditions. Self-respecting old people do not want to go to the poorhouse to reside, and will suffer unspeakable privations to avoid it. Neither do they want to go on the dole, and have occasional gifts of cash and supplies dished out to them by callous placemen at the county courthouse or city hall. What they want is something they can rightfully call their own, to which they can feel justly entitled, and which they can accept without loss of self-respect. Furthermore, the administration of almshouses and other public institutions for the aged has been so costly, so shot through with peculation and graft, and so deficient in proper standards and methods of care that popular confidence in them has been greatly undermined. Such, briefly, are the facts which account for the old-age-pension movement in the United States.

Old-age pensions. Old-age-pension laws in one form or another have been in vogue in Germany, Great Britain, France, Sweden, Denmark, and several other countries for many years. The first old-age-pension law in this country was enacted by the state of Arizona in 1914. It was poorly conceived and was immediately declared unconstitutional. The next attempt was made in the Territory of Alaska, which adopted a

limited plan of old-age pensions in 1915. A concerted drive for old-age pension legislation began in the 1920's and culminated in the pension provisions of the National Social Security Act of 1935. Under this law, as subsequently amended, provision is made for a system of joint federal and state pensions for aged persons. No state is obliged to enter into this scheme, but those which do set up programs acceptable to the federal Social Security Board are entitled to subsidies from the national treasury. No federal funds will be advanced to a state, however, unless its pension laws meet the following general requirements: (1) The state system must be mandatory and state-wide in operation. (2) The state must share the cost of financing. (3) The qualifying age fixed by the state must not exceed sixty-five years. (4) Citizens of the United States must not be disqualified by laws obliging the applicant to reside in the state more than one year and more than five of the nine years preceding his application. (5) The state law must restrict old-age pension grants to needy persons. (6) The state law must provide an assured method of financing the state's contributions. (7) The state law must be administered by a single authority for the entire state.

To states meeting these requirements, the federal government will pay an amount equal to one-half of the total sum granted to each individual up to a federal-state total of not more than $40 a month. All of the states have enacted laws presumptively meeting the federal requirements, but there have been difficulties owing to the failure of some states to meet the precise stipulations of the Social Security Board.

Old-age survivors' insurance. The old-age-pension system of the Social Security Act was intended to serve as a temporary expedient to provide financial assistance for the aged and needy portion of the population whose working years were already past. As soon as this generation of aged workers had passed on, it was believed that old-age pensions would no longer be necessary. Oncoming generations would be taken care of by the system of old-age and survivor's insurance. As its name implies, this is a plan of social insurance. It is administered entirely by the federal government through the Social Security Board. The plan provides for monthly benefits (beginning January 1, 1940) for retired employees insured under the system and for the dependents and survivors of such employees in the event of their death prior to eligibility to receive such benefits. The plan is made obligatory upon all industrial and commercial employments except agricultural labor, domestic service, casual labor not in the course of the employer's trade or business, service on foreign vessels, employment by nonprofit institutions (chiefly of a religious, educational, charitable, or scientific character), certain part-time or itin-

erant employments, and service for the federal, state, and local governments. Railroad workers are also exempted, as they have their own retirement systems.

Employees are eligible to receive benefits under the system when they reach the age of 65. The monthly benefits are based on the worker's average monthly wage during the period of his insurance under the system. He receives 40% of the first $50 of the average monthly wage, plus 10% of the next $200, plus an addition, for each year in which he earned $200 in a covered employment, of 1% of the sum of the first two computations. The benefits are paid from the proceeds of a trust fund which is financed by equal taxes on employer and employee. This tax is known as the payroll tax. The total tax is collected from the employer, who in turn deducts the worker's portion from his pay. The tax rate starts at 1% and is to be gradually stepped up to 3%. The sums collected from this tax go into a trust fund which is supervised by a board consisting of the Secretary of the Treasury, the Secretary of Labor, and the Chairman of the Social Security Board.

Collective Bargaining

More prized by union labor than almost any other objective for which it has struggled is the right of collective bargaining. Union leaders and union members feel that nothing is so important in the battle for better remuneration, shorter hours, and improved working conditions as the solidarity of the working classes. The individual worker, they point out, is helpless in dealing with great corporations and mighty aggregations of capital; but organized workers, presenting a solid front and dealing as one man, are not. They have power equal to the task of battling the employer on his own ground and forcing concessions in the interest of labor. But union methods of collective bargaining early struck troublesome snags in the law. The right of workers to organize for mutual aid and assistance in a fraternal way has never been in doubt, but their right to organize for the purpose of carrying on strikes, boycotts, and other activities harmful to the business or property of the employer or the public has been denied by the courts. There was a rule as old as the common law against combinations in restraint of trade; also against enticing away a servant, conniving at the breach of contracts, trespassing on private property, and various other things incidental to collective bargaining as conceived by labor. Whenever a labor union was guilty of one of these acts, it was sure to run afoul of the law. Its officers and members might be prosecuted criminally, sued for damages, or enjoined by a court order.

Legalization of collective bargaining. Labor's first necessity, therefore, in respect to collective bargaining was the legalization of those coercive methods which experience had shown to be effective in bringing employers to recognize the union and make agreements with it. Many states have legalized collective bargaining, and it was the major purpose of the National Labor Relations Act of 1935 to extend this legalization to interstate and foreign commerce. This law forbids, as unfair labor practices, the following employer tactics against collective bargaining: (1) interfering with labor's right of self-organization, (2) dominating a labor union whether organized by the employer himself or by the workers, (3) discriminating against an employee or discharging him for union activities, (4) refusing to deal with an accredited representative of employee organizations, (5) penalizing an employee in any way for filing charges or giving testimony in proceedings under the Labor Relations Act. The decisions of the Supreme Court have put real teeth into this legislation. The Court has also held that state antipicketing laws may not prevent peaceful picketing on the part of workers desiring to bring pressure on an employer by influencing public opinion.

Difficulties under the Sherman Anti-trust Act. In securing the right to use its two favorite weapons—the strike and the boycott—in interstate commerce, labor had some difficulty. Congress in 1890 passed the Sherman Antitrust Act forbidding combinations and conspiracies in restraint of interstate and foreign commerce. This Act was not aimed at labor and its possible effects on labor were doubtless not foreseen at the time. But it was not long before embattled employers were appealing to the federal courts to enjoin striking workers, dissolve labor organizations, and award damages for boycotts. The federal courts took the position that a mere refusal to work was not in itself a violation of the Sherman Act, but when striking workers undertook to stop or interfere with the movement of persons, goods, or intelligence in interstate trade, doing so was such a violation. With regard to the boycott the federal courts ruled that any agreement not to buy from or sell to another person in interstate trade for whatever reason, was contrary to the Sherman Act and punishable under its terms. Labor's demand for the liberalization of the Sherman Act led to the inclusion in the Clayton Act of 1914 of two sections designed for the benefit of labor. These declared that the antitrust laws should not be interpreted to forbid labor unions or to prohibit union members from carrying out the legitimate purposes of such organizations; that labor organizations should not be regarded as combinations or conspiracies in restraint of interstate trade; that labor was not to be held a commodity, wherefore it followed that no combination or agreement to increase the price of labor could be in viola-

tion of the Sherman Act; and that ceasing to patronize or employ any party to a labor dispute or peaceably persuading others to do so should not be considered a violation of the law.

The problem of the labor injunction. However, neither state nor federal enactments for the legalization of labor unions and their collective bargaining methods countenanced violence or destruction of property. Union members and officers could still be jailed for such acts, held civilly liable, or, what was more important from the labor point of view, judicially restrained from taking steps which might lead to such acts. Thus arose the controversy over the use of the writ of injunction in labor disputes. The employer, alleging that there was imminent danger of violence or destruction of property in connection with a strike, could appear before the judge privately in chambers or at his home and apply for a judicial order restraining the striking workers and their leaders from committing certain acts tending toward violence or destruction of property. Violation of such injunctive orders was contempt of court, punishable by an arbitrary fine or jail sentence without a jury trial. Labor objected to the injunctive process on several counts. It was, they said, a wholly one-sided proceeding. The judge heard only one side of the controversy, and that in private, and took the employer's word as to the danger of violence or property damage. The restraining orders, they contended also, were usually couched in such broad and sweeping terms as to prevent acts which were not only innocent but absolutely necessary to the success of collective bargaining. Worse than that, any violation of these orders, however slight and innocent of wrongful intent, invited summary punishment in a star-chamber proceeding wherein the offender had no chance of a fair trial. And they were strongly persuaded, furthermore, that judges as a class were prejudiced against labor unions and their objectives and unduly sympathetic with the propertied interests.

Again the political power of labor was brought into play, and again legislative bodies capitulated. Many of the states, among them such great industrial commonwealths as Illinois, New York, New Jersey, Wisconsin, and Ohio, abruptly curtailed the power of their courts to issue injunctions in labor disputes. The judge was forbidden to issue restraining orders without hearing both sides, was required to make the order explicit and definite in scope, and was denied the power to punish for contempt without a jury trial save in cases of contempt committed in the presence of the court. Congress likewise fell into line and provided in the Clayton Act of 1914 that federal courts should not issue restraining orders in disputes between employers and employees unless

such orders were necessary to prevent irreparable damage to property or property rights. This provision not being interpreted to the satisfaction of labor, Congress in 1932 enacted the Norris-LaGuardia Law which drastically abbreviates the power of federal courts to issue injunctions in labor disputes. Under this law, restraining orders issued without a hearing in open court may run only five days, and no order, temporary or permanent, may be issued unless it be clear that the civil authorities cannot or will not afford the necessary protection to property threatened with damage.

The "yellow-dog" contract. Another particular in which labor has sought, and largely secured, relief from laws deemed unfair and oppressive is in relation to the so-called "yellow-dog" contract. Many employers not desiring to have their plants unionized and wishing to avoid all dealings with labor unions, have required their workers as a condition of employment to agree not to join any labor union or other organization not sanctioned by the employer. Violation of the agreement constituted grounds for dismissal. Union labor protested mightily, and a number of state legislatures outlawed such contracts. The Supreme Court in 1915 ruled that the Kansas law making it a crime for an employer to discharge an employee for refusing to sign a "yellow-dog" contract was unconstitutional. Labor then addressed itself to the task of reversing this interpretation of the Constitution. In 1930 the Supreme Court handed down a decision upholding a restraining order forbidding a railroad company to dismiss or threaten to dismiss its employees for participating in union activities to select representatives to bargain for them. This verdict was looked upon as an indirect disavowal of the 1915 decision. In 1932 the Norris-LaGuardia Act declared the "yellow-dog" contract to be contrary to public policy and provided that the federal courts should grant no legal or equitable relief in sustaining them. The National Labor Relations Act conclusively outlaws the objectionable "yellow-dog" contract.

Settlement of labor disputes. The settlement of labor disputes is a matter of great importance to both workers and employers, but even more so to the general public which often suffers more than the parties themselves. For a long time the common attitude in this country was that a strike, a lockout, or a boycott was a private fight between capital and labor in which public authorities should intervene only when necessary to prevent violence or damage to property. Bitter experience has done much to change this view. No labor dispute of any magnitude can continue long without serious inconvenience, if not positive suffering and loss, to all the people. Hence the government, as the agent of the

general public, has been obliged to adopt measures to prevent the undue prolongation of labor disputes and to accomplish if possible a speedy and equitable settlement.

State legislation. Nearly all of the states have enacted some sort of legislation to facilitate the settlement of labor controversies. The methods used in the different states vary greatly, though all rely upon the principles of investigation, conciliation, mediation, and arbitration. Several of the states have laws for the compulsory investigation of labor disputes. A state board or commission is set up for this purpose. Before a strike, lockout, or other coercive measures may be invoked the parties to the dispute must give this body advance notice of thirty days or more. It then proceeds to conduct investigations and hold hearings. These finished, it renders a judgment, which is in reality nothing but an advisory opinion, as it is not binding on either party. But it does have great value in the shaping of public opinion, and also in forcing recognition between the parties themselves of the real rights and wrongs of the affair.

Facilities for conciliation and mediation are provided by the laws of about three-fourths of the states. The state labor department or a permanent state board of mediation or conciliation is authorized to offer its good offices at once to the parties of a labor dispute. In some cases it may do nothing but offer its services, but in other cases the parties are obliged to consider its offer and give reasons for refusing to accept. Should the offer be accepted, the state authorities serve as a medium of communication between the disputing parties and endeavor to bring them together for conference and discussion. The state authorities take part in these discussions and may propose terms of settlement. They may not, however, coerce the parties into accepting any proposed settlement.

A number of states also make provision for the arbitration of labor disputes through state agencies. The state labor department, industrial commission, board of mediation or arbitration, or other designated authority is empowered to intervene and propose arbitration. It cannot force disputants to arbitrate. If they agree to arbitrate, the state authorities supervise and assist in preparing the articles of agreement and in selecting or setting up a tribunal of arbitration. It is usually provided that the decision of the arbitral body shall be binding upon both parties for a certain period after the award.

Kansas in 1920 attempted to introduce judicial settlement of industrial disputes. The law created a state industrial court and gave it compulsory jurisdiction over disputes between employers and employees in certain basic industries. The court could compel the parties to appear

before it, could conduct an investigation and hearing, and could then hand down a decision binding upon both parties. The Supreme Court of the United States in 1923 held this law unconstitutional as to those provisions authorizing the court to fix wages and hours of labor without regard to the wishes of the parties, but in 1926 upheld those portions of the act giving the court power to stop strikes and lockouts. Because of the doubtful validity of judicial settlement no other state has tried the experiment.

Federal legislation. A great deal of legislation to facilitate the peaceful settlement of labor disputes has been enacted by the federal government likewise. In 1898 Congress passed an act providing for a system of mediation and conciliation to apply primarily to the railroads. It called for measures of conciliation by designated federal officials, and also, if necessary, for boards of arbitration. This system continued until 1920, and was moderately successful. When the Department of Labor was created in 1913 Congress authorized the Secretary of Labor "to act as mediator, or to appoint commissioners of conciliation in industrial disputes whenever in his judgment the interests of industrial peace require it to be done." To effectuate this authority the United States Conciliation Service was established in the Department of Labor, and has had a very useful career in arranging voluntary settlements. The Transportation Act of 1920 created the Railroad Labor Board, consisting of three representatives each of employers, workers, and the public. It was given authority to intervene, investigate, and render decisions in various types of railway-labor disputes. Its decisions were not binding and were sometimes ignored. Congress in 1926 abolished the Railroad Labor Board and created the United States Mediation Board. This in turn was superseded in 1934 by the National Mediation Board and the Railroad Adjustment Board. The Adjustment Board is organized into four divisions whose members are drawn equally from employers and employees. It undertakes to adjust routine disputes on wages, hours, and working regulations by the conference method. If one of the divisions becomes deadlocked on a question, the division may appoint a referee to sit with it and make the award. The Adjustment Board reports annually to the National Mediation Board. The principal work of the Mediation Board is to mediate differences between railroads, express companies, Pullman companies, and airlines and their employees. It has no compulsory power, but when a dispute arises it has power to investigate and use its good offices to effect a peaceful settlement. It has authority to appoint arbitrators and referees to act with the consent of the parties.

By executive order in 1940, the President created the National Defense Mediation Board. This body was to act as a conciliating agency in

labor disputes in defense industries. It was not very successful, and was supplanted in 1942 by the War Labor Board, likewise created by executive order. The procedure of this Board, according to the order, was to be as follows: If the parties to a dispute could not reach an agreement by direct negotiations, and the conciliators of the Department of Labor had been unable to bring them to an agreement, the Secretary of Labor was to certify the dispute to the War Labor Board, though the Board might take jurisdiction of its own motion. Once it took jurisdiction, the Board was to settle the dispute by mediation, voluntary arbitration, or arbitration under rules established by the Board.

One of the purposes of the National Labor Relations Act was to facilitate the settlement of labor disputes. The National Labor Relations Board and the regional authorities under it are authorized to serve as agencies of conciliation and adjustment. The Department of Labor has a Conciliation Service which is empowered to perform a similar function. The Secretary of Labor may serve in person as a mediator or may appoint special commissioners of conciliation whenever in his judgment the interests of industrial peace require it. As a rule the secretary appoints one of the conciliation staff of the Department of Labor.

Regulation of labor unions. The objective of most state and national legislation in support of collective bargaining has been to free labor of legal shackles and place it in an equal bargaining position with management. There is now a widespread opinion that much of this legislation has succeeded too well. It has not only raised organized labor to the level of management in bargaining power but to the point where it could (and did) apply capricious and tyrannical coercion both to management and the general public. Labor leaders proved unequal to the responsibilities of labor's new status. Gross abuses appeared in connection with the closed shop, jurisdictional strikes, organizational strikes, and even in connection with wage strikes. Labor unions often refused to recognize the sanctity of contracts they had voluntarily entered into, and they were not amenable to suit for breach of contract. Union finances and business operations were frequently mismanaged and sometimes descended to the level of sheer racketeering.

The upshot of these developments was a general public demand for legislation to curb the powers of labor unions and subject them to government regulation and control. The first response came in the states. There two definite trends emerged in the years between 1942 and 1947. A number of states, usually by popular initiative, adopted measures outlawing the closed shop. The purpose of this was to break the legal monopoly of organized labor. Another group of states adopted measures requiring labor unions to submit periodical financial reports and supply

other important information to a designated state official, and some required all persons soliciting union memberships to be licensed by state authority. The object of these measures was to bring organized labor under closer public scrutiny and control.

In June, 1947, over the veto of President Truman, Congress passed the much debated Taft-Hartley Act, which was designed to supplement the National Labor Relations Act of 1935, correct abuses which had sprung up in its administration, and subject organized labor to controls which would curb the arbitrary power of the "czars of labor." Applying to employer-employee relations in interstate and foreign commerce with the exception of railroads, air lines, agriculture, domestic service, government (federal, state, and local) service, government corporations, and nonprofit hospitals, the new law contained the following significant provisions:

1. A new National Labor Relations Board, with greater power in some respects and less in others, was established.

2. Decisions of the Board were made enforceable by the federal courts, the use of the writ of injunction being authorized under stated conditions.

3. The list of unfair practices was revised, and the revision included many declared to be unfair labor practices by unions against employers. Whereas the old law empowered the union but not the employer to complain to the Board and initiate action to stop alleged unfair labor practices, the Taft-Hartley Act gives the same right to the employer. Among the unfair practices against which the employer may proceed are jurisdictional strikes, the secondary boycott, "featherbedding," refusal to bargain collectively with an employer, coercion or restraint of one's right not to join a union, coercion to force industry-wide bargaining, and striking or terminating a labor contract without 60 days notice.

4. Previous limitations on damage suits against unions were much relaxed, making it possible for unions to be sued more easily, particularly in instances of damages alleged on account of jurisdictional strikes and strikes in violation of a "no strike" agreement.

5. Closed shop contracts were made illegal 60 days after the new law went into effect.

6. The automatic check-off, whereby the employer agreed to deduct and remit the dues of union members to the union, was forbidden.

7. Forcing the employer to agree to preferential hiring of union members was invalidated by implication, if not expressly.

8. Union shop contracts were made permissible only when approved by a majority of the employees voting in an election supervised by the National Labor Relations Board; likewise the maintenance of membership contract, wherein the employer agrees to discharge any one who cancels or loses his union membership.

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CHAPTER 22

GOVERNMENT AND SOCIAL AMELIORATION

Government and the Good Life

The expression "social amelioration" is here employed as a convenient descriptive term to cover an important category of governmental activities which are primarily noneconomic in purpose. They have to do with the physical, mental, or moral welfare of the individual and community as distinguished from strictly economic considerations. Life, to be sure, is a whole, and in the actual process of living the economic, the social, and the political are never separate or fully separable. But writers of books must be conceded a certain liberty in subdividing a subject for the benefit of the reader, and this particular classification of subject matter, to our way of thinking, is a very simple and useful one.

Government, as we have frequently affirmed, is not an end of itself, but an instrumentality which society has evolved as a means to the attainment of whatever ends may be held sufficiently important to justify resort to collective authority and power. There was a time when the propagation of religion was deemed the first necessity of society, and when government was largely used for that purpose. There was a time also when the maintenance of feudal rights was regarded as a thing of paramount importance, and government was largely used for that. In more modern times political liberty and individual freedom in the ownership and use of property have been thought supremely important, and government has been mainly devoted to those objectives. At the present time we are in a period of transition to another view. Private property and individual liberty are still highly prized, but gradually we are coming to the view that the most important thing after all is a society which seeks the good life for everyone.

This newer view is reflected in the modern attitude toward government. Though we still insist that government shall safeguard property and make men materially prosperous (if it can find a magic formula for so doing), more emphatically yet do we insist that it shall strive to make men healthy, enlightened, virtuous, and secure. More passionately than ever before do we yearn for social amelioration—for a society in which disease and ignorance and poverty and immorality shall be banished. But unfortunately the more we yearn, the more distant seems our

Utopia; for our sensibility of the need for social amelioration proceeds from the growing complications of machine-age society which in turn greatly enlarge the problem of social welfare.

Naturally, then—indeed, necessarily—we turn to government for action to promote social amelioration. The job is too big for voluntary altruism, too costly for the resources of private welfare agencies, too intricate and ramified for private endeavor to encompass. Does society have a responsibility for your health and mine? Does society have an obligation to counteract immorality? Does society have a duty to the dependent and defective classes? Our answer to these questions is unqualifiedly yes, and further that it is the business of government to assume such functions and carry on such activities as may be needful to fulfill these responsibilities. That government thus becomes involved in many things formerly left to individual initiative is no matter. Social betterment we must have if social existence is to be worth having. Government must do its part to this end.

Let us now consider the work of American government in social amelioration.

Government and Health

Whatever boons may have been vouchsafed to mankind by Nature and by Nature's God, to borrow a phraseology much favored by our forefathers, health was not among them. Nature assures men neither health, wealth, nor wisdom; by their own efforts mostly do they secure these superlative desiderata, health no less than the other two. Nature gives some men better physical equipment than others and endows some with special immunities from disease; but all are subject nevertheless to impairment of health from a multitude of causes, and causes which individual effort and private coöperation are in many cases powerless to combat or control. This latter fact was not clearly perceived until medical science revealed that many of our most destructive ills originate in or are disseminated by causes latent in the character of our community life. Such causes could be removed or counteracted only by community effort, which meant necessarily government effort. So during the last half century, and especially during the last two or three decades of that period, there has been a striking development of governmental health functions and agencies. In this indispensable service all branches of our government have participated, though until very lately it might be said that the chief benefits came from the work of state and local governments.

State and local health services. Our various state and local governments at the present time engage in five basic forms of health work: (1) sani-

tary control, (2) disease control, (3) regulation of occupations affecting health conditions, (4) provision of facilities for promoting and safeguarding public health, and (5) research and education.

Sanitary control involves the enactment and administration of laws to correct insanitary conditions which constitute a menace to health. All state and municipal governments have enacted such laws in great profusion, and likewise many other local government units. Sanitary legislation has become so minute and multifarious that in many instances practical convenience has dictated the compilation of elaborate sanitary codes. These touch upon such subjects as water supply, milk production and distribution, food preparation and handling, plumbing and sewerage, and disposal of refuse material, and air pollution. While some of these sanitary laws apply only to particular lines of business activity, many of them extend to every individual and to every domestic or business establishment in the community. They prohibit and penalize the maintenance of certain conditions deemed inimical to health, set up arbitrary and mandatory standards which must be followed in the production and sale of certain commodities, require the installation and use of certain kinds of sanitary equipment, and prescribe a multitude of specific duties for everyone.

It is forbidden to expectorate in public places, to throw garbage in the streets or alleys or leave it uncovered on one's own premises, to keep swine, cattle, horses, or goats in certain localities, to dump rubbish where anyone wills, to contaminate public water supplies, and so on and on. Milk dealers have to comply with certain specifications as to the production, handling, and quality of their product; likewise bakers, meat packers, confectioners, canners, restaurant operators, and many others engaged in the preparation and sale of foodstuffs. A home, factory, store, or office building must be connected with a public sewer system and must have approved types of plumbing and toilet equipment. These and many other exactions are enforced upon the people of all parts of the country by their state or local sanitary laws. A small army of sanitary inspectors, building inspectors, factory inspectors, food inspectors, and other health officials is on the job to see that they are lived up to.

Disease control embraces the activities of government to prevent, check, and stamp out various forms of disease, notably contagious and other communicable diseases. State laws and local ordinances require practicing physicians and visiting nurses to report communicable diseases to the health officers without delay. It is the duty of the latter to take such steps as the law may prescribe or permit for the control of the disease in question. For diseases such as smallpox, measles, diphtheria, scarlet fever, and others known to be contagious the law prescribes quarantine

and various protective measures during quarantine and upon release therefrom. The health officers are empowered also to order the vaccination or immunization of all persons that have been exposed through association with the patient. Under emergency conditions they may extend such orders to all the people in a given school, factory, office, or department store, and may even quarantine a whole city or large districts thereof. For diseases such as typhoid fever and others which are communicable but not highly contagious different measures are employed. These diseases are usually transmitted through some carrying medium such as water or milk, or even by human carriers. The health authorities enforce precautionary measures to prevent the transmission of the disease from the sick person, and then try to run down the source from which he came by it. They have full authority to make all necessary examinations of premises, property, and persons to accomplish this purpose, and also, when necessary or possible, to eliminate the source of infection when found. Human carriers have been kept in isolation for months or years under the orders of health officers.

There are examining and licensing boards or departments in all states for regulation of professions and occupations related to health, the examining and licensing of physicians, healers of all kinds, pharmacists, dentists, opticians, nurses, barbers, plumbers, and many others whose work in one way or another bears on public health conditions. To practice such occupations without a license is a criminal offense. The purpose of the examination is to weed out the unfit, and of the license to establish control over those admitted to practice. Failure to live up to the requirements of the law is ground for the revocation of the license.

The provision of health facilities too costly to be supplied by private enterprise has come to be one of the most important of governmental functions. It seems that the more we learn about the nature and treatment of disease, the more we require of expensive apparatus, drugs, and institutions to apply the knowledge that science has given us. The private purse is no longer equal to the strain, nor even the purse of the person in fairly comfortable circumstances. Private enterprise has built many fine hospitals, clinics, and sanatoriums, but very few of these have or can have the financial backing necessary to give unlimited service at moderate costs, and also a larger amount of free service. State and local governments, particularly cities and counties, have invested huge sums of money in the construction and operation of general hospitals, tuberculosis sanatoriums, surgeries, serological laboratories, X-ray laboratories, and other institutions of kindred character. These are largely tax-supported, and are staffed and operated by public functionaries.

Medical research and medical education are also very costly. To a

large extent they are financed by private enterprise, but state universities and state health departments are coming to assume a constantly larger part of this burden. The average medical school of a state university is better equipped and better financed than the average private medical school. Only a few of the very wealthy private institutions can compare with them. The same may be said of the research laboratories of state medical schools and state health departments. In addition to this, state and local health agencies perform a valuable service in popularizing medical knowledge through the publication and distribution of articles and pamphlets, and by organizing and conducting health exhibits and displays at various fairs and other public exhibitions. Some state and city health departments publish regular bulletins which are of decided value both to the medical profession and the general public.

Federal health services. Federal work for the protection of health is of four principal kinds: (1) combating hazards to health arising in interstate and foreign commerce, (2) the establishment and operation of hospital and medical services for persons in the federal services and others to whom the federal government has special obligations, (3) research, education, and information, (4) subsidizing and standardizing state and local health programs.

Most of the foregoing tasks are centered in three agencies of the national government: the Public Health Service (a unit of the Federal Security Agency), the Food and Drug Administration (likewise in the Federal Security Agency), and the Division of Health Services of the Children's Bureau of the Department of Labor.

The principal duties of the Public Health Service are to enfore the inspection and quarantine laws to prevent the introduction of disease from abroad; to coöperate with state and local health officials in preventing the spread of disease in the United States; to license, inspect, and test the products of laboratories manufacturing and selling in interstate and foreign commerce products used in the prevention and treatment of disease; to carry on research in the cause, prevention, and control of diseases; to operate hospitals and other institutions for the care of certain types of patients who are legally entitled to medical treatment by the federal government; and to disseminate in all feasible ways valuable information on matters of public health. The National Institute of Health, a research agency under the Public Health Service, carries on a continuous and elaborate program of medical research and industrial hygiene. Under the Social Security Act of 1935 the Public Health Service administers a program of both financial and technical assistance to the states and their political subdivisions in establishing and maintaining better health services.

The Food and Drug Administration enforces federal legislation prohibiting interstate and foreign commerce in unhealthful, adulterated, or misbranded foods, meats, drugs, cosmetics, and beverages. In connection with this work it has a large staff of field inspectors who constantly check on sanitary conditions in meat-packing and other establishments engaged in manufacturing or processing foods, drugs, and other commodities for interstate and foreign commerce. It operates laboratories in which authoritative tests of commercial foods and drugs are made. Adulteration and misbranding are also fully investigated. Violators of the law, when detected, are prosecuted in the federal courts.

The Children's Bureau administers federal grants to state and local health agencies. Such grants are made to help support such institutions and activities as maternity clinics, conferences on the pre-school health problem, health services for school children, and a variety of services for crippled children. The Bureau also provides consultation services for state and local health agencies in connection with their programs of obstetric, pediatric, and orthopedic work. Another of the Bureau's health services is administering the funds provided for the emergency care, in maternity and infant cases, of the wives and babies of aviation cadets and of men in the four lowest pay grades of the armed forces.

On November 19, 1945 President Truman sent a special message to Congress urging the enactment of a measure designed to provide medical care through a federal agency, for virtually every person in the United States. Simultaneously with this message, bills to carry out the President's proposal were introduced in both houses of Congress. The failure of the bills to pass did not stop the movement to initiate a program of universal medical care administered by the national government.

Government and Education

The average American knows far more about public education than private education. The majority of Americans, in fact, have had no experience with any but public education. There are, of course, many private schools and colleges in the United States, but they enroll only a small fraction of the total schoolgoing population. The American people have become so deeply convinced that society owes educational opportunities to all that they have built up a system of public educational institutions so complete that in most parts of the country a student may go from the primary school through high school, college, and graduate or professional school without crossing the door of a private institution; and most Americans actually do spend all of their school years in public educational institutions.

State and local school systems. These institutions are the creatures of state and local governments. The first public schools in this country were established by local units such as towns and boroughs, but when it became the general conviction that every boy and girl was entitled to at least an elementary education, state governments made provision for the organization, operation, and support of public elementary schools everywhere throughout the state. The state did not actually conduct these schools itself; that was left to local subdivisions such as towns, municipalities, and school districts. What the state did was to authorize or require the establishment of schools in these local units of government, make provision for the levy of taxes to support them, provide for the grant of state funds to supplement local school revenues, and regulate in a general way the curricula and administration of public schools. Later, when the idea of secondary education at public expense was generally accepted, similar steps were taken for the establishment and maintenance of public high schools throughout each state. Normal schools and teachers' colleges were established to train teachers for the public schools; state universities were founded in most states to round out the educational system and provide higher education and professional training for the many who could not attend the great privately endowed institutions; agricultural and mechanical colleges were established to further agriculture and industry and also to take advantage of the federal aid provided by the Morrill Act of 1862.

State educational systems now comprehend almost every form of education—cultural, vocational, professional, postgraduate, full-time, part-time, correspondence, day schools, evening schools, and what have you. These many diverse forms of public education are not administered by a single state educational authority, but through a complex and cumbersome combination of state and local agencies. State law controls the finances, curricula, and organization of public schools as well as many lesser matters. Local school boards, superintendents, principals, and teachers are subject to certain degrees of direction and supervision by county and state school officials, but each local school board is, within the limits of its legal powers, a self-governing authority and conducts its schools according to its own plans and ideas. The same may be said of the governing boards of higher education institutions also. The state department of education is not, as is the case in most European countries, the supreme controlling and directing head of the state school system. It is merely one of many educational authorities, and has assigned to it very definite and limited supervisory and coördinating functions.

The great dilemma of American education at the present time is where to get the money to carry on. Education is a costly enterprise, and most

American states and local communities have been more than lavish in their educational outlays. Shrinking property values and declining public revenues have often conspired to produce a situation which makes it virtually impossible for public educational institutions to be operated on the generous scale desired. Drastic retrenchment has been necessary at times, going to the extreme sometimes of closing the schools temporarily, shortening the school term, cutting out many features of the curriculum, postponing needed repairs and improvements, and reducing teachers' salaries to pathetic levels. As temporary expedients, economies of this sort may be unavoidable, but if they are to continue long our public educational system will be permanently crippled. Thoughtful students of the problem are of the opinion that we are face to face with the necessity for drastic reforms in the organization and administration of our schools and even more drastic reforms in our system of tax revenues for educational purposes. It is pointed out that our decentralized scheme of educational organization and administration is inordinately loose and wasteful, and that our tax system throws the burden on species of property which are unable to sustain the load and fails to tap sources of revenue which might materially lighten the load now thrown on the owner of real property.

Brief mention should be given to public educational institutions other than schools, particularly libraries. Practically every municipality of any consequence, many counties, and a goodly number of states support and operate libraries. These have been enormously useful in supplementing the work of the public schools and in serving the educational and informational needs of the adult population. Public libraries are now in the same financial predicament as public schools. It would be a serious blow to public education if their sphere of usefulness should be permanently curtailed.

Federal education services. The educational activities of the national government are of three kinds: (1) establishing and maintaining educational institutions, (2) fostering and stimulating education through aid to the states, and (3) research and the diffusion of information.

Educational institutions supported and operated by the national government include the United States Military Academy at West Point, the United States Naval Academy at Annapolis, several special schools for members of the military and naval services, Indian schools and colleges in different parts of the country, Howard University for Negroes, and numerous observatories, museums, and research institutions such as the Smithsonian Institution, the National Museum, the United States Geographic Board, and many others. The Library of Congress should also be mentioned in this category, for though established primarily for the

use of Congress, it has come to be a great national library and performs indispensable services for public and private libraries all over the land.

Aid to state educational systems is supplied by the national government in a variety of ways. A number of the states when they came into Union were given large grants of land for educational purposes, the condition of the benefaction being that the proceeds, by sale or otherwise, of these lands should be used for the support of schools. By careful management of these landed estates several of the states have built up huge funds to supplement the ordinary tax revenues of the schools. For the establishment of agricultural and mechanical colleges the national government also gave the states land or the equivalent in cash, and has continued to make large annual appropriations for the aid of these institutions. Under the Smith-Hughes Act of 1917 the federal government established a system of grants-in-aid to promote the teaching of trades, home economics, and industrial subjects. To obtain this money the states, or local school districts so authorized by the state, must match the federal gifts dollar for dollar. By similar legislation in 1920 the federal government provided for grants to the states for aid in vocational training and rehabilitation of persons injured in industry or otherwise.

Research work in education is extensively carried on by the Office of Education in the Federal Security Agency. It makes studies of all sorts of educational problems, collects information as to educational practices in the United States and foreign countries, conducts surveys of state and local educational institutions, renders advisory services to state school officials, promotes educational conferences and supplies speakers for such meetings, and publishes and distributes tons of educational literature.

The newest and largest educational undertaking of the national government is the program for the vocational rehabilitation, retraining, and education of the veterans of World War II. Acts of Congress provide that any honorably discharged veteran who has lost employability as a result of service-incurred disabilities is entitled to occupational rehabilitation at the expense of the federal government. Any honorably discharged veteran who served ninety days or more is entitled, regardless of service disabilities, to education in an approved school, college, or university for a period of one to four years, depending on the length of his service. The government pays the veteran a monthly allowance for subsistence and also defrays the cost of tuition, books, and educational supplies up to a fixed maximum. The main burden of administering this program falls on the Veterans Administration. The instruction is provided in hundreds of local, state, and private educational institutions which the Veterans Administration approves and makes arangements with.

Government and Morals

Government regulation of morals has not been attended with conspicuous success, and many admirable citizens believe it is a serious mistake to invoke government action for the amelioration of moral conditions. Nevertheless there are always certain dangers to morals which seem to require measures beyond the scope and power of any private agency or institution. No one would agree, for example, that government should tolerate sexual vices such as might undermine the moral integrity of the family and the home, but millions would agree that government should ignore such a vice as gambling. The problem is where to draw the line. There are certain things which the government manifestly must do for the promotion and protection of morals, and certain other things which it evidently cannot hope to undertake with success. Nor do theoretical considerations help us to determine which is which. In theory there was every justification for prohibition, but in practice it fell far short of theoretical expectations. Experience seems to be the only guide we can follow, but, as we have often discovered, experience is sometimes a most painful and costly tutor.

State and local legislation. State and local regulation of morals centers around the protection of the family. Nearly all laws regulating marriage, divorce, and sexual relations have this as a fundamental object. The same may be said of laws regulating gambling and liquor; it is not the harm to the individual but the harm to his family and dependents that they seek to prevent. Extensive legislation on all of the foregoing subjects is found in every state. The steps necessary to contract a valid marriage are nearly always rigidly prescribed by law, and likewise the necessary qualifications of the contracting parties. A number of states have enacted so-called eugenic marriage laws, designed to prevent the marriage of persons physically or mentally disqualified. In these states a medical certificate must accompany the marriage license before the ceremony can be performed. A great many states have also enacted "gin-marriage" laws. These usually require a stated period of time to elapse after the issuance of the marriage license before the ceremony may be performed, the object being to prevent the hasty marriage of persons under the influence of intoxicants. Divorces, though easier to obtain than ever before, are strangely enough more subject to detailed regulation. Formerly there was often no way to obtain a divorce save by an act of the legislature; if divorces might be granted by the courts, the justifying causes were so few and the procedure so difficult as to discourage the bringing of actions. Now that divorce has been made fairly easy, the law

goes into much more detail as to causes, procedures, settlements, and so forth.

Gambling and sexual vice are under the ban of state and local legislation almost everywhere. Not all forms of either are totally outlawed, and some forbidden forms are actually tolerated by lax administration of the laws. Generally the laws bear harder on commercialized gambling and commercialized sexual irregularity than upon the more casual types. Experience has shown, however, that some types of commercialized gambling, as for example betting on horse races, are next to impossible to stamp out. A number of states, therefore, have recently repealed their antiracing laws and now license horse racing under state supervision designed to minimize the evils connected with the sport. Similar reversals are to be expected with regard to other forms of gambling. With respect to prostitution, public opinion still demands the policy of suppression. Licensed prostitution was not uncommon in this country some years ago, and was so objectionable that state legislatures and city councils practically all passed laws calling for the entire suppression of prostitution. Licensed prostitution disappeared, but prostitution continued and, some think, became a more serious evil than before because of its wider dissemination in the community. The enforcement of laws against prostitution is exceedingly difficult. Not only is the offense a most elusive one, but the corruption and racketeering connected with it tend to destroy the efficiency of the police.

Another form of legislation for moral amelioration is the regulation of public amusements. Under the laws of most states and local communities, theaters, dance halls, cabarets, night clubs, pool and card rooms, and various other commercial amusement enterprises are regulated and licensed by public authorities. The license fees swell the revenues of the city or state, but the main object is regulation.

Federal legislation. The federal government does not function as a general custodian of morals, but has enacted a large number of laws against interstate and foreign commerce deemed to be of an immoral character. Lottery tickets, contraceptive information, obscene and indecent publications, fraudulent matter, and other specified things are excluded from the mails and also from other forms of interstate commerce. Interstate transportation of women for immoral purposes is also forbidden under heavy penalties. More stringent than all others is the federal legislation against narcotics. All dealers must have a federal license and comply with minute sales regulations, likewise all producers and importers. Physicians are definitely limited in the prescription of these drugs and are subject to heavy penalties for violation of the law.

By the repeal of the Eighteenth Amendment the regulation of the liquor traffic from the morals standpoint was returned to the states. The national government imposes regulations for revenue purposes and to prevent unfair practices, and undertakes to stop the illicit transportation of liquor in interstate and foreign commerce. This task, along with the enforcement of revenue legislation bearing on alcoholic beverages, is in the hands of the Bureau of Internal Revenue of the Department of the Treasury. State systems of liquor control vary from complete prohibition of all manufacture and sale to state monopoly. All states allowing the liquor traffic in any form have some system of licensing and regulating the retail and wholesale sale of alcoholic liquors. Federal agencies, particularly the Department of the Treasury and the Department of Justice, coöperate with the authorities of every state in the enforcement of its liquor laws. However, the Twenty-first Amendment gives each state full authority to make laws governing both its own internal liquor traffic and the transportation and importation of liquor from the outside. This means that the nature of federal authority over interstate and foreign commerce in liquor is determined by the widely differing laws of the several states.

Government and Recreation

Recreation is a factor in health, education, and morals. That is why it is a matter of public concern. Medical science has made it clear that exercise and outdoor living are important factors in the prevention and cure of many human ills; also that relaxation and play are indispensable in the treatment of a great many nervous disorders. Educators have made the discovery that recreation is an important ingredient in education—not merely that it is desirable to develop the body as well as the mind, but that the development of the mind is greatly dependent upon that of the body. It has further become apparent in recent years that recreation of the right kind is just as positive a force in the building of self-control, coöperativeness, clean habits, and other behavior traits making for morality as the wrong kind of recreation is destructive of those things. But how to make sure of the right kind and combat the wrong kind? How to provide the needed facilities for recreation among congested populations? How to insure intelligent and constructive educational programs? These are problems which have called government into the field of recreation.

State and local policies. State and local governments engage in three general forms of recreational endeavor: (1) the regulation of commercial recreation, (2) the provision and administration of recreational

facilities, and (3) the development and carrying on of recreational programs.

The regulation of commercial recreation has been mentioned in the section on morals. State and city governments are the principal authorities regulating commercial recreation. As leisure increases with shorter working hours, and as the varieties of commercial recreation multiply, this problem becomes constantly more difficult. More, rather than less, regulation is in prospect in the future, with the likelihood that it will not all be soundly conceived and wisely administered. It will not be enough simply to forbid and, by police methods, to try to eradicate vicious forms of recreation. Salutary substitutes must be supplied to take their place.

Facilities for public recreation must be provided. The growth of cities and the enclosure of the countryside for farms and private estates have made it necessary for governmental agencies to supply these needs. Nearly all of our state governments now are embarked on a program to conserve and propagate fish and game and regulate hunting and fishing. Although this is undertaken partly for the benefit of certain industries, the chief purpose is to provide outdoor recreational opportunities for the whole population of the state. Many of the states also have established state parks, forest reserves, and game preserves which are for the use of the whole population for camping, picnicking, and other recreational purposes. All cities of any size now maintain parks, playfields, beaches, swimming pools, zoölogical gardens, auditoriums, stadiums, and other recreational facilities. A good many counties are found to be engaged in similar activities. School districts have also become generous providers of recreational advantages. The school without a gymnasium and a playground is now an anachronism, as also is the school without some sort of athletic program. Modern school buildings likewise commonly include an auditorium which can be used for theatrical and entertainment purposes not only by the pupils but by the whole community.

To secure the fullest and best use of the facilities provided, and also to promote recreation of a constructive and beneficial character, it has been found necessary to institute and carry on under governmental direction extensive recreational programs. City parks and playfields not only have custodians and caretakers but instructors, supervisors, and directors of recreational activities. Schools not only have recreational facilities, but also athletic directors, coaches, and teachers of dramatics and music. Regular programs of games, contests, and performances are organized and carried through. As many as possible are encouraged to take part, and extensive instruction is given without cost by public recrea-

tional employees. The city boy or girl may now learn to swim, box, wrestle, fence, play tennis, golf, baseball, basketball, football, and other games under competent instruction provided in the schools or through other city departments. Similar advantages are to a large extent available to the adult population of our cities also. The country boy or girl does not have quite so many advantages, but consolidated schools are rapidly making them possible. Mention should also be made of military drill, which though not strictly recreational does provide physical training and disciplinary experience for a large number of boys in schools and colleges and for a great many city youths in National Guard units.

Federal recreation policies. The recreational work of the national government chiefly consists of the establishment and management of national parks. Says the *Congressional Directory:*

> Making the parks available for the enjoyment of the people involves the building of roads, trails, bridges, and administrative units; the installation of lighting and sanitary systems; the operation of public automobile camps; and the inducing of private capital to operate the necessary utilities for visitors under strict Government supervision. The provision of these various accommodations in the parks makes necessary careful surveillance by a force of architects and landscape architects to insure protection of harmonious blending of developments with scenery and other important features.

These duties, with many others, fall to the National Park Service in the Department of the Interior.

Government and the Handicapped Classes

One of the most baffling problems of modern society is what to do with the insane, the mentally deficient, the crippled, the blind, the deaf, and the indigent. In the simpler and slower-moving society of former years these unfortunates were both less numerous and more able in many ways to adjust themselves to the conditions of life. Now they constitute a problem which only government can solve, if it is to be solved at all. Private endeavor has long since confessed its inability to cope with the difficulties involved.

The insane. The startling increase of insanity is one of the most ominous features of the industrial age. Science has not yet fully penetrated the mysteries of insanity. The causes of a few forms of mental disease are established, but in most cases they remain more or less obscure, though it is suspected that the growing tensions of life are largely responsible. So with regard to the treatment of insanity, in some instances, science knows fairly well what to do and whether there is any hope of recovery, but in most cases the only thing we know to do is to

restrain the afflicted person and give him as good care as possible. One thing we have learned most conclusively, however, is that the danger of having the insane at large is greater than ever before. In this accelerated age, dependent upon automobiles, airplanes, and potentially dangerous mechanisms of every sort, the insane are a constant menace not alone to their immediate associates but to every member of the community. Consequently we are more than ever conscious of the necessity for confining the insane and keeping them out of the whirl of life. This job has devolved upon our state governments. Counties and cities used to look after the insane and a few still maintain institutions for their care; but the job has become too big for most local governments. All of the states now maintain at least one insane hospital or asylum, and several have two or more. County courts are given authority to commit persons to these institutions. Such a committal means that the insane person must be confined in the designated institution until officially released. A large staff of doctors and other attendants is maintained for the care and treatment of these unfortunates. A great many recoveries are made, but the releases do not begin to equal the committals. As a consequence most of our insane hospitals are filled to capacity and beyond. In many instances uncured persons are released to make room for more serious cases coming in. For this reason most of our states face the necessity of greatly enlarging their present hospitals or building new ones.

The mentally deficient. The mentally deficient, sometimes called feeble-minded, constitute almost as serious a problem as the insane. There is a certain proportion of mental subnormality in every population, and the ratio is probably no higher today than in the past. But in former times all but the most extremely deficient could find a simple occupation and adjust themselves to social conditions fairly well. Today it is very difficult for the mentally deficient to support themselves or accommodate themselves to the fast pace at which we move. Many of them accordingly develop criminal or degenerate tendencies, and others are chronically unemployed. What to do with them? This problem, too, devolves upon our state governments. Until relatively recent times nothing was done for the mentally deficient except to imprison them when they turned criminal or send them to the poorhouse when there was no one to support them. That is still very much the policy in some sections of the Union, though a more enlightened and humane policy is on the make. Special courses and classes have been established for the mentally deficient in the public schools of many cities. These relieve the half-wit and dim-wit of the necessity of competing with normal children and offer training appropriate to the capacities of the subnormal mind. Many of the mentally deficient, it is found, have the ability to learn certain

trades by which they can partly or wholly support themselves. Those not so capable must be provided for in some way. Left to live among normal persons, even their own kinfolk, a great number of them develop social maladjustments which deflect them to crime and degeneracy. For the benefit of defectives of this type several of the states and a few of the larger cities and counties have established special farm colonies or homes where they may live among their own kind and be given occupations and care suited to their abilities and needs. From the standpoint of society it is highly important to prevent the reproduction of mental defectives. To make this prevention possible, laws have been passed in many states authorizing the sterilization of certain types of criminals and mental defectives.

The physically deficient. The crippled, the blind, and the deaf suffer handicaps which unfit them for normal participation in society and often render them a heavy burden on families financially unable to care for them properly if at all. Nearly all of the states now have established special schools for the blind and the deaf. A few cities also have such institutions, and the federal government maintains like institutions in the national capital. In these schools the blind and the deaf are taught useful vocations and are given training to enable them to overcome their handicaps as largely as possible. For the crippled, not much has been done through government agencies until recently. The system of grants-in-aid for the vocational rehabilitation of crippled persons, which was inaugurated by the national government in 1920, has resulted in the adoption of such a program in at least forty-four states. To obtain the federal funds the states appropriate sums equal to the federal grant and set up a rehabilitation program approved by the Office of Education in the Federal Security Agency. This is carried out by the state authorities in conjunction with the federal authorities. The approved programs are not the same from state to state. Some concentrate on orthopedic work, others specialize in special vocational training for cripples, and some endeavor to combine the two.

The poor. Pauperism is a thing that society has long called upon government to combat and which government has never succeeded in overcoming. There are two major classes of paupers: (1) the shiftless, incompetent, and defective (physically or mentally), who would be paupers in the very best of times; and (2) those impoverished by misfortunes such as unemployment, loss of savings, or protracted illness. Until lately our governmental policies were almost exclusively designed for the first class, ignoring the second class who are both numerically and sociologically more important. For the born pauper there is little that government can do except care for him and put him to work if any

work can be found that he can do. This work is still left very largely to local units of government and consists chiefly of temporary cash assistance and institutional care. Local authorities often refuse to aid transients, and the burden of caring for these has been partially assumed by the national government.

For those impoverished by the vicissitudes of our capitalistic system government has just begun to do things in a large way. State and local governments have found this task too big and have largely resigned it to the national government and now function as coöperating agencies in the federal program. Billions of dollars are now being expended by the federal government, and additional billions by state and local governments supplementing the federal outlays, for the purpose of providing relief for the poor, finding or making jobs for the unemployed, refinancing farm and home mortgages, salvaging bank deposits, protecting insurance policies, and similar activities to aid the needy and safeguard their slender resources. While much of this endeavor is of emergency and presumably temporary character, there is no doubt that a great deal of it will continue. As described in the preceding chapter, we are now embarked on a nation-wide movement for government-administered and government-financed unemployment insurance, old-age-retirement insurance, and old-age pensions. For indigent widows with families to rear many of the states have long provided widows' pensions. This movement is also spreading.

Government and Corrections

The enforcement of criminal law and the punishment of criminal offenders have always been among the chief responsibilities of government. To these modern thought has added another—corrections. We are not satisfied that the law should be enforced and the offender punished; we believe it to be the duty of society, if possible, to rehabilitate the criminal and restore him to society as a useful and law-abiding citizen. Also we have come to believe it to be the duty of society to get at the causes of crime and remove them if possible. These tasks, naturally, we have thrust upon our governmental institutions.

Prison reform. The first matter to receive attention in this quest for a prophylactic criminology was the conduct of prisons. The old type of prison richly deserved the epithet "durance vile." It was vile in every respect—filthy, insanitary, and a breeder of disease, crime, and criminals. A vigorous prison-reform movement was launched in the United States about a century ago, but it had much to overcome and was slow in bringing results. Comparing present-day prisons with those of our grand-

parents' time does enable us to perceive, however, that enormous progress has been made. As the old prison buildings have been replaced by new, most of the conditions engendering filth and disease have been corrected. Except for county and city jails in the smaller places, the average American prison of today is a model of sanitation. Great progress has also been made in planning prisons so as to facilitate the segregation of prisoners for specialized treatment. A great many small local prisons now have separate sections for male, female, and juvenile offenders, and all of the state and federal prisons either have separate buildings or entirely separate institutions for different classes of criminals. We can also notice great improvement in the methods and objectives of prison management, especially in state and federal institutions where confinement is for a longer period than in county or city jails. Inmates do not merely languish in prison, as the old phrase had it; they are kept active and busy so far as possible, though unfortunately many of our prisons are so crowded that it is impossible to provide occupations for all. Nevertheless all the better modern prisons offer educational opportunities, industrial training, and even recreation and entertainment. Despite the frequently voiced objections of some critics to the "coddling" of prisoners, experience has proved the wisdom of most of these reforms. Not only do they contribute much to the betterment of prison morale; they have been the means of helping many a prisoner to readjust himself so as to "go straight" after his release. Prison riots and other troubles are not caused by that sort of coddling, but rather by lax discipline, dishonest administration, incompetent prison officials, and indecent and intolerable treatment.

No small portion of the improvement that has taken place in the character and management of our prisons has been due to the elimination of politics from prison administration. Almost every badly managed prison is the victim of politics. Wardens chosen for political reasons rather than character, ability, and knowledge of penology have a fatal faculty for making a mess of things, and when the whole staff of prison guards and attendants is of the same quality such a result is inevitable. With a view to securing nonpolitical prison administration, many cities and several of the states have put all prison employments under civil service. Others have abolished the local- or independent-board system of prison control and placed all penal institutions under a commissioner or director of public welfare responsible to the governor or mayor. Still others have created central boards of control for all welfare institutions, including prisons, the personnel of these boards being rotated so that complete domination by a single party is made difficult.

Corrective penology. The second point of attack in the drive for

corrective penology was the indiscriminate treatment of offenders regardless of age, sex, mental or physical background, or the circumstances of the crime. To function as a corrective, penology must deal with each offender as a separate case, prescribing appropriate treatment much as the physician does for each patient. Both the states and the federal government have introduced a number of basic reforms intended to advance the cause of scientific penology. Among these are the suspended sentence, the indefinite sentence, the indeterminate sentence, the habitual-offender sentence, the release of prisoners on parole, and the establishment of special institutions for certain types of offenders.

The suspended sentence lays the foundation for a probation method of handling offenders. The courts are authorized in certain cases to suspend the execution of the sentence and put the convicted person on probation. Instead of being sent to prison, he is given a conditional release which requires him to report regularly to the judge and satisfy various other requirements. Should he fail to abide by these conditions the suspension is set aside and he is sent to prison. The indefinite sentence is one without fixed limits. A prisoner under an indefinite sentence may be released by order of the court whenever it may be deemed prudent to do so. This makes it possible to vary the penalty as may appear wise after the offender is imprisoned. The indeterminate sentence commits the offender to prison for a term not to exceed a stated number of years. It has much the same purpose as the indefinite sentence, but fixes an upper limit to the penalty. The habitual-offender sentence is designed for the irreclaimable criminal, the professional who has become so habituated to criminal ways that he cannot be reformed. The penalty operates with progressive severity. For the second conviction it is more severe than for the first, for the third more than for the second, and for the fourth conviction a life sentence is usually prescribed. Parole is the release of a prisoner before the expiration of his sentence on condition of good behavior and regular reports to the prison authorities or to some private sponsor to whom the prisoner is paroled. Generally a prisoner is not eligible for parole until he has served a stated portion of his sentence and then not unless he has a good prison record. Special institutions have been established in many states for different classes of offenders. Some states have separate institutions for the criminally insane; others provide insane wards in the regular prisons. Most of the states have special reformatories or training schools for juvenile offenders, and many have special prisons for women.

All of the foregoing reforms have been severely criticized, and in many cases deservedly. But experience has shown that faults arise not so much because these reforms are wrong in principle as from the fact

that they are often administered by officials unqualified by education, experience, and character to apply them intelligently and honestly. The parole system, for example, is a most valuable expedient in the selective treatment of prisoners, but when it is administered by politicians with a view to political considerations it does more harm than good. The suspended sentence is equally useful, except when administered by a politically minded or otherwise incompetent judge.

Government and Conservation

Conservation of natural resources is an economic as much as a social-welfare function of government. Its direct economic benefits, however, redound mostly to the owners of property, whereas its welfare benefits are for the good of the whole population. The conservation of wild life, for instance, though of inestimable value to the fur and fishing industries, is not carried on for their special benefit but to minister to the physical and psychological needs of the whole population. The conservation of forests, though a direct economic boom to the lumber industry, is undertaken to prevent a decline of the habitability of the land, which would be disastrous to all. We may say the same of the conservation of soils and of petroleum and mineral deposits. The exhaustion of these resources would, of course, ruin the industries dependent upon them, but more serious even than that would be the havoc wrought upon the essential fabric of our social life. Therefore we treat conservation as a part of the problem of social amelioration.

The conservation movement in this country began in the latter part of the last century, and was first directed toward the conservation of fisheries and forests. The states were not interested in the movement at the outset, and hence the federal government led the way. The United States Bureau of Fisheries was established in 1871 and the Bureau of Forestry a few years later. The United States Geological Survey followed in 1888. The first national forest was set apart in 1891. In due time came the Reclamation Service, the National Park Service, the Bureau of Mines, and the Bureau of Chemistry and Soils—all largely concerned with conservation matters. In 1908 a great impetus was given to the conservation movement by the creation of the National Conservation Commission to study the whole problem and make recommendations to Congress.

Federal conservation policies. The conservation work of the national government today embraces forests, minerals and petroleum, reclamation, water power and flood control, and soils.

The Forest Service in the Department of Agriculture administers the

154 national forest reserves totaling about 178,000,000 acres and comprising about a fourth of the standing timber of the country. This requires constant patrol of the national forests to ward against fire and prevent unlawful cutting, and also to further a program of scientific silviculture. In addition, the Bureau conducts a variety of useful experiments, fights destructive forest pests, and coöperates with private timber owners and state governments in promoting forest conservation. Grazing in the national forests is also under the supervision of this agency.

Federal attempts at conservation of our mineral and oil resources have been confined to the national domain. In 1910 Congress authorized the President to withdraw mineral lands from entry and settlement, and provided that they might be sold at low prices to mining prospectors. In 1920 this policy was reversed. The law now is that mineral and oil lands may be leased but not sold. The leasing company or individual must comply with the restrictions of the lease as to production and development and must pay the government a royalty on its output. This legislation is administered by the General Land Office in the Department of the Interior. The Bureau of Mines in the Department of the Interior is primarily an advisory and research agency. It makes valuable studies bearing on mineral conservation and other problems of the mining and petroleum industries, and coöperates with private companies and state mining departments in promoting conservation policies. The prodigal waste of our oil resources has long been a matter of alarm to thoughtful persons. State legislation restricting production seemed to be unenforceable, and the central government hesitated to act.

No part of the federal conservation program has been more scorchingly condemned or more stoutly defended than the reclamation of arid lands. The critic denies that reclamation has any proper place in the conservation program, contending that it is wholly unnecessary and adds to our already excessive farm acreage. The western booster maintains that it is not only a proper and necessary policy for the development of the western states, but is indispensable for flood control and hydroelectric development. Torn between these views, it has been difficult for the government to arrive at a sound and consistent policy. However, in an interview-article in the *Saturday Evening Post*, December 23, 1933, Secretary of the Interior Harold L. Ickes announced a new departure in reclamation policy. In the future, said Secretary Ickes, for every acre of tillable land brought into production by the construction of federal irrigation works five acres of marginal or submarginal land will be withdrawn from cultivation. The government proposes to purchase these inferior lands, settle their owners elsewhere, and return them to forests, grass, or some other use that will not add to agricultural production.

The legitimate development of western states having arid lands of high potential production will go forward, and at the same time poor lands that should never have been farmed will be retired and devoted to uses to which they are suited. This sort of reclamation is true conservation.

Conservation of water power, and its proper development, goes hand in hand with flood control. The central government is now engaged in a nation-wide program of power development and flood control. The history of this development goes back to 1920 when Congress created the Federal Power Commission and gave it control of the use and development of water power on the public lands and navigable streams of the United States. This body was given no authority to develop water power, but was merely to license, regulate, and control private developments. It did not accomplish a great deal even in that, but the controversies it succeeded in stirring up focused attention on the power question and had not a little to do with the later trend toward government construction and ownership of power developments. The development of the Colorado River Basin by the construction of the Boulder Dam was the first major federal power project. This was authorized by an act of Congress on December 21, 1928, as a combined reclamation, flood control, and power development, and was carried to completion under the Bureau of Reclamation. The year 1933 saw the federal government launch similar projects on the Tennessee River, the Columbia River, the Arkansas River, and various other streams. In all of these the development of power is combined with flood control, or reclamation, or both.

The conservation of fish, game, and other wild life is the chief function of the Fish and Wild Life Service of the Department of the Interior. It administers the federal game-conservation laws, such as the Migratory Bird Treaty Act, the Hunting Stamp Act, the Bald Eagle Act, the Whaling Treaty Act, and the Wild Life Restoration Act. It supervises commercial fisheries in Alaska, establishes and maintains refuges for game, operates fish-breeding stations for the propagation of useful species, and tries to coöperate with state and local authorities in the control of predatory animals. It also carries on extensive researches regarding all species of wild life and fish, and publishes a vast amount of useful information on those subjects.

Soil conservation is carried on through the Soil Conservation Service of the Department of Agriculture. It strives to accomplish its purpose by researches and investigations and by diffusing information as to the results of its studies. It has devoted a great deal of attention to the problem of soil erosion, and advises farmers as to effective methods of counteracting erosion. It also analyzes, maps, and classifies the soils of

the United States, and supplies information as to the treatment necessary to the retention of their fertility. It was reported in 1945 that forty-five states had enacted soil conservation district laws and that 1,440 such districts had been organized to work in close coöperation with the technicians of the United States Soil Conservation Service.

State conservation policies. Much later to take up conservation than the central government, the states (at least a goodly number of them) have been making notable advances in the past twenty years. Forty-two states now have some sort of forestry program and a department, bureau, or office to carry it forward. Several of the states own large amounts of forest land which are administered in much the same fashion as the national forests. Some of the states whose forests have been depleted have entered upon ambitious programs of reforestation. Congress has provided for grants-in-aid for states which coöperate with the federal Forest Service in fighting forest fires, and some forty states have entered upon this coöperative program. State forestry bureaus, in coöperation with agricultural colleges and schools of forestry, carry on invaluable educational work, such as assisting land owners to plant timber crops, distributing seedlings for reforestation and explaining how to get the best results, giving instruction as to methods of dealing with tree disease, and advising logging operators how to conserve and utilize their properties to the best advantage.

State protection of fish and game is universal. Licenses are required for hunting and fishing; seasons are limited; bag limits are fixed; the sale of protected fish and game is forbidden; and fish hatcheries and game farms are operated for purposes of restocking. Game and fish wardens or protectors patrol practically every county, and in most states are under the direction and control of a state department, board, or commission.

State conservation of mineral and petroleum resources has not been a notable success. All of the mining states have established a state bureau of mines devoted to the prevention of mine accidents, the development of mines, and the marketing and utilization of mine products. Through technical services these agencies have been of some value in promoting mineral conservation. On the whole, however, the states had little desire to conserve their mineral resources and enacted no legislation to that end. One or two states, facing the depletion of their natural-gas deposits, enacted laws forbidding the exportation of natural gas from the state; but these were held unconstitutional by the Supreme Court. With respect to oil deposits the same condition prevailed until the overproduction of oil threatened the whole oil industry with ruin. Several of the major oil-producing states then enacted laws restricting the drilling of

wells and limiting the amounts of oil that could be produced or withdrawn from storage. A proration program was worked out among the major producing companies, and the states affected undertook to enforce this by legal means. To do this proved next to impossible; hence Section 9 of the National Industrial Recovery Act regulating oil production. Under this authority a code of fair competition for the oil industries was worked out and approved. It established a proration program which allocated production among the several states, limited imports of crude oil and oil products, restricted withdrawals from storage to amounts needed to meet consumer demand, regulated the shipment of petroleum and petroleum products from individual states, and controlled the development of newly discovered fields.

In the conservation of water resources, controlling the development of water power, promoting reclamation, and aiding in flood control, many of the states have made great advances in recent years. Most of the arid states have undertaken to regulate the storage, flow, and use of irrigation waters not under federal control, and some have devoted large sums of money to the construction of irrigation works. New York, Pennsylvania, Wisconsin, and several other states have recently enacted laws strictly regulating the development of power sites on waters not under federal control. The purpose of the legislation in most of these states is to establish control over private power developments rather than to provide for state-owned developments. State and local governments receive federal grants for approved flood control projects under the Flood Control Act of 1938.

As mentioned above, most of the states are collaborating with the federal government in soil conservation work. Practically all of the states also promote soil conservation through their state agricultural colleges and experiment stations.

Housing

One vitally important measure of social amelioration is slum clearance and the provision of adequate housing for low-income groups. Prior to the entry of the national government into this field in 1934, the housing problem was left to private enterprise and the scattered efforts of state and local authorities. The federal acts of 1934, 1937, and 1940 have inaugurated a national housing program. Direct construction of housing by the federal government has been one feature of this program, but not the most valuable. Much more important have been the services of the national government in stimulating, assisting, and guiding state, local, and private housing activities. In this connection the federal government

makes long-time loans on easy terms to state and local housing authorities; makes annual contributions to the upkeep of low-cost housing projects, provided the state and local authorities make matching contributions; makes loans to state-chartered private housing companies; insures the loans of banks and other lending agencies on low-cost housing projects; fosters and assists in the formation of mortgage associations to facilitate the financing of such projects; conducts the Federal Savings and Loan Insurance Corporation; and endeavors as far as possible to harmonize and standardize construction requirements and processes throughout the country. The National Housing Agency has been established to administer the federal housing program.

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CHAPTER 23

NATIONAL DEFENSE

Permanent Problems of National Defense

The perennial danger of war. On December 28, 1933, speaking at the ceremonies commemorating the birthday of Woodrow Wilson, Franklin D. Roosevelt put forth a formula for world peace. Let every nation, he suggested, agree never to send any of its armed forces across its borders into the territory of another nation and let each further agree to a progressive reduction of weapons of offense, retaining only the right to fortify its own domestic borders with nonmobile defenses. He was confident that such an agreement would insure universal peace, because ninety per cent of the people of the world, in his opinion, "are content with the territorial limits of their respective nations and are willing further to reduce their armed forces tomorrow if everybody else agrees to nonagression and arms reduction." As for the ten per cent not reconciled to their existing territorial limits, Mr. Roosevelt thought they could be easily educated to the view of the vast majority.

Just a few days less than eight years after the announcement of this simple plan for international peace came the treacherous attack on Pearl Harbor which plunged the United States into the most stupendous war in the annals of mankind. The Japanese coup at Pearl Harbor was not unforeshadowed. There were men who had foreseen its coming, not for days or months, but for years. Indeed, there were men who saw it as an inevitable consequence of a pattern of international relations in the Far East which began to take form at the close of the Russo-Japanese War in 1905. Certainly the Japanese nation from that time forward had given the world abundant evidence that it was not ready for a nonagression program.

It is misleading to classify peoples as aggressors and nonaggressors. Perhaps only ten per cent of the world's people in 1933 were not content with their national boundaries; perhaps ninety per cent would have been willing to agree to nonaggression and a reduction of armaments if everybody else would do the same. Those were merely guesses. Nobody knew then and nobody knows today what portion, if any, of the inhabitants of the earth definitely and finally belongs in either category. Nations seldom have fixed attitudes on peace, war, or anything else. Na-

tional attitudes change as national circumstances, both internal and external, change. There is little evidence that the general mass of plain people in any country are ever eager for war, but there is plenty of evidence that there are many situations in which they will choose war rather than peace. Moreover, situations have developed in the experience of every nation in which the people as a whole manifestly have preferred to make war aggressively rather than to accept a peaceful alternative which would involve the surrender of some highly cherished possession, right, privilege, interest, or ambition. Confronted with such a situation, any nation may be, as every nation at some time has been, an aggressor nation. Confronted with a different situation, the same nation may be, as every nation has been, a nonaggressor.

Although there is an extensive body of international law and a vast amount of international organization, these have not yet provided adequate ways and means of avoiding or adjusting conflicts which may carry nations to the point where they would rather fight than yield. In a static world it would be much easier to develop the necessary mechanisms and processes of peaceful and orderly adjustment than in the explosively dynamic world in which we are placed. The continuously profound and revolutionary changes which characterize the modern era very often offer a choice between war and peace only if peace is to be bought at a price that independent nations never have been willing to pay. When the price of peace is one that will be paid only under compulsion, the avoidance of war through international organization and law not only is extremely difficult to accomplish but is a very unreliable substitute for adequate national defense. It makes no difference, under those conditions, whether a nation's primary interest is to keep what it has or take what it wants—non-belligerent modes of international adjustment are seldom equal to its own conception of its needs.

For this reason every nation can expect at some time, often unforeseeable, to be involved in situations inviting attack by other nations and probably in situations in which it may prefer to be the attacker. Preparation for war, however it may come, is, therefore, not only a major problem but also a permanent problem for every independent nation. Each nation has its own special problems of defense. No two are exposed to precisely the same dangers, have identical interests to defend, or have the same geographic, economic, and political factors to consider. Nor can any two equally benefit from any alliance or other arrangement of mutual aid for defense. International endeavors to banish war from the earth may eventually succeed, but, until that time comes, every nation must largely provide its own security.

Geographical factors. The geographical situation of a nation in relation

to conceivable enemies, the nature of its frontiers and coastlines, its position with reference to necessary routes of transportation, the location of its outlying possessions, and various other geographical facts always have been and always will be basic factors in its program of national defense. There is little justification for the opinion that recent or soon-expected developments in the use of atomic energy for military purposes are going to cancel out all geographic factors in national defense. Quite the contrary. The intense consideration now being given to the Arctic regions in the calculations of both professional and amateur strategists shows that geography certainly has not been annihilated by the rocket bomb. Future warfare undoubtedly will develop, as large-scale warfare always has, in the more populous and industrially advanced portions of the globe. And future lines of attack and defense, like those of the past, will seek every possible geographical advantage. Atomic warfare may convert former advantages into liabilities or former weak points into strong ones, but it is not likely ever to lessen the vital importance of geography as a factor in national defense.

What is true of atomic weapons is equally true of airplanes, tanks, submarines, and other revolutionary armaments. From the geographical standpoint they are revolutionary, not in the sense that they have eliminated geography from the defense equation, but rather in the sense that they have replaced old geographic factors with entirely new ones. Modern nations must shape their defense policies in the light of geographic values to which they are not only unaccustomed but which may add up to a very different answer than the old ones. It probably will be found, when the final reckoning is made, that some nations will have lost and others will have gained geographic advantages as a result of the recent technological revolution in the science of war.

American defense policies, like those of every other nation, have always taken account of geographical factors. The answer we used to get from the sum of our geographical advantages was eminently gratifying. Having two broad oceans between us and any potential enemy nation of great strength, and having no cause to fear attack by any nation in our own hemisphere, we came to feel that our defense problem was exceedingly simple. Possessed of a Navy strong enough to beat back any invading force, we could forget everything else. A large standing Army was not deemed necessary, and intensive fortification and patrol of our frontiers and coastlines was likewise thought superfluous. We had no overseas ambitions, and all of our valuable territorial dependencies save the Philippines lay in areas close at hand and relatively easy for our Navy to defend. Whether we would even attempt to defend the Philip-

pines was uncertain. We had voted them independence in 1946, and had assumed no continuing obligation to defend them as before.

American geographic security was so ample that many Americans exaggerated its value—assumed that this nation was practically invulnerable to external attack, an assumption which had never been true. A little common sense and a knowledge of history should have made it plain that the United States could be invaded by an overseas force any time a determined and resourceful enemy cared to take the risk. The British did it during the War of 1812, captured the city of Washington and burned the Capitol and the Executive Mansion, occupied important points on the coast of Maine, and set ashore a powerful expeditionary force at New Orleans. We had a capable Navy in that war, but it would have taken an almost impossibly large Navy to have prevented a successful landing somewhere on our far-flung coastlines. Our real geographic security lay not in immunity from invasion, but in the fact the invader could not hope to make permanent conquests without long-continued support from home, which support was made almost prohibitively difficult and costly by the huge oceans which must be traversed.

Many Americans now have gone to the other extreme. Seeing the revolutionary possibilities of atomic weapons, they maintain that the last vestige of our geographic security is gone. Their fears evoke an imaginary picture of an America devastated and prostrate within an hour after the beginning of the next war. It would be foolish to underrate the terrible potentialities of the new methods of warfare; but is it not equally silly to exaggerate them? Even though there may be no defense against atomic weapons (a point not yet conclusively proved), the insecurity of the United States cannot be greater than that of any conceivable attacker unless we deliberately allow it to become so. In the past, nations never have started wars they expected to lose, nor even wars in which they expected to suffer as much damage as they inflicted. Perhaps this rule no longer holds good. Perhaps there are nations today that would gamble on the chance of launching a successful surprise attack with atomic weapons. Which ones are they? We do not allow ourselves to say. We know very well, however, that no nation or national leaders would take such a risk if they could see any possible chance of failure. The penalty for failure in an atomic surprise attack would be swift and terrible. That has not been true of surprise attacks in former wars. The aggressor could take a long chance; he could risk the total failure of the surprise attack and still have a chance to win the war. As things stand today, he must be absolutely certain that his surprise attack will be instantly successful. It lies within the power of the United States to render any possible aggressor highly un-

certain of the outcome of any attack upon us. We have more of the means of creating such uncertainty than any other nation.

What we need, and undoubtedly what we shall eventually have, is a complete reappraisal of the geographic elements in our defense situation. Such a reappraisal in the light of the new techniques of attack and conquest will enable us to organize a defense capable of utilizing our geographic situation as effectively as ever.

Industrial factors. Total war in the modern sense is an industrial as well as a military struggle. It is just as necessary to outproduce the enemy in the indispensable materials and equipment for fighting as to beat him on the field of battle. Modern defense programs must always include, therefore, such vital factors as essential raw materials, industrial organization, management, labor, and convertibility from peacetime production to war production.

Everyone is aware that a nation without adequate supplies of iron, coal, oil, copper, tin, rubber, and certain other vital industrial necessities is gravely handicapped in making war. No nation is entirely self-sufficient in each of these necessities. In fact, only a few nations possess or control them in such quantities as to be able to attain the rank of great powers. Each of the great powers, however, is deficient in one or more, and is obliged to devise ways and means to remedy its deficiencies. An intelligent defense program necessarily involves a careful survey of a nation's own industrial resources, comprehensive plans for the full utilization of these resources, and equally effective plans to meet the deficiencies in the nation's war resources.

The character of a nation's industrial organization—whether in large units which can be readily regimented to war production or in small, independent units which are difficult to link together for war production; whether devoted to the production of "heavy" goods basically similar to war goods or to miscellaneous articles for general consumption—is a most important factor in working out a rational defense program. The same is true of the character of industrial management and of the working population which must supply not only the energy but the skill and experience necessary to successful industrial operation of any kind. War plans, whether offensive or purely defensive, are seriously defective if they do not reckon with every phase of industrial operation which has a bearing on the ability of a nation's industrial system to produce war goods in adequate quantities. The conversion of industry from a peace to a war footing must also be planned in a way to avoid as far as possible waste of time and materials.

Some nations have given far more attention than others to the industrial factors in modern warfare, and hence have been better prepared in

advance for the outbreak of war. Some have carefully stocked and hoarded in times of peace deficiency materials such as iron, oil, and rubber; some have made provision for large-scale production of synthetic substitutes for materials not available to them in natural form; some have deliberately regulated their peacetime industrial units, managerial systems, labor practices, and output of goods so as to be ready for quick conversion to war requirements. The phenomenal success of their achievements in industrial planning for war has caused all other nations to follow suit.

The food factor. A popular slogan in the United States in the First as well as in the Second World War was, "Food will win the war." Food has won, and lost, more than one war. Adequate and dependable food supplies are especially important in modern warfare for two reasons: (1) The increased range and destructive power of commerce-destroying surface and undersea vessels has greatly enlarged the ability of belligerent nations to cut off an enemy's imports from abroad. (2) A major portion of the population of every modern industrial nation consists of city dwellers whose food supplies must be produced by others than themselves. A nation whose defense plans do not envision the proper feeding of both its military and civil population for a long period of virtual blockade is by no means adequately prepared for war.

Very few countries are self-sufficient in foodstuffs. Defense plans, therefore, must of necessity give attention to the direction and control of both production and distribution of foodstuffs. Shortages must be provided against, and substitutes must be found. In the management of national food supplies relative to war conditions the practices of a few countries have set an example which others find it necessary to follow.

The transportation and communication factor. In some countries, railroads, motor highways, canals, air lines, ocean shipping, and wire and wireless communications have been definitely planned with a view to military as well as civil use. The importance of this preparation is obvious. Neither defensive nor offensive warfare can be successfully carried on without adequate and suitable facilities for transportation and communication. Countries which have made such programs an integral part of their defense plans have always been better prepared for war than those which have not.

The population factor. It has always been recognized that manpower is one of the absolute essentials of national defense. This proposition does not mean, however, that a large population gives assurance of national security. Of course there must always be sufficient population to supply the necessary manpower for both the military and the industrial activities requisite for a huge war effort; but a huge population without the

kind of education, skills, and social adaptability to carry on the sort of industrial and military operations demanded in modern warfare is worse than helpless.

Planning for national defense today means planning also programs of education and training which will fit the great masses of people to play their part successfully. While this does not necessarily mean universal military training, it does mean universal education adapted to the qualifications of the individual for some kind of useful service in his country's defense program. Indeed, it means more than that; it means that every needed service must be anticipated as far as possible and provision made to train ample numbers of persons to perform it competently.

The diplomatic factor. Everybody knows that the job of defending a country depends to a large extent on its foreign policies and the way in which its foreign relations are conducted. Professional military men do not start wars; their job is to fight the wars started by the political leaders and diplomatic representatives of their respective countries. Indeed, if the starting of wars were left to members of the military profession, a great many of them never would have happened. Military experts have seldom been rash enough to plunge their country into a war for which they knew it to be unprepared. They are trained not to take unnecessary risks. Not so do the politicians approach the question of war or peace. Political, not military, expediency actuates their decisions.

Perhaps political and military expediency can never be fully harmonized, but in a rational defense program they should be much more closely coördinated than is usual in the practice of modern nations. At least there should be enough consultation between the political and military authorities to provide intelligent guidance for both. A foreign policy or a course of diplomatic procedure in disregard of sound principles of national defense may at times be unavoidable, even positively wise; but no such policy or procedure should be undertaken in ignorance of its probable results.

The institutional factor. Institutions for war and defense are established in the governmental system of every nation. The character of these institutions and their relation to the other parts of the governmental system play a tremendous rôle in the defense program. It may be said, in truth, that no country without proper defense institutions is likely to deal intelligently with the basic factors of the defense problem and develop a soundly conceived and administered program for national defense. By defense institutions, we mean not only organized forces but the overhead organs of policy making, planning, direction, and command. We also include the basic statutes and constitutional provisions

which condition and control defense activities. The remainder of this chapter is devoted to an examination of American defense policies and institutions.

The Legal Bases of National Defense

The location of the war power. It was obviously the intention of the authors of the Constitution to deprive the states of all power to initiate or engage in war without the consent of Congress, but not of all power of self-defense. The states are forbidden (Article I, section 10, paragraph 3) to keep troops or ships of war in time of peace or to engage in war, without the consent of Congress, "unless actually invaded or in such imminent danger as will not admit of delay." In other words, in emergencies the states have the right to defend themselves, but in order to possess in advance the means of defense they must have the approval of Congress.

Never has Congress permitted the states to have professional military forces. The militia might possibly be classed as troops or ships of war within the meaning of the Constitution, but they are not full-time professional forces, being composed of private citizens who drill once a week and are subject to call in emergencies. Congress undoubtedly has ample power to place the militia entirely under federal control, but it has not seen fit to do so. The militiamen come under complete federal control when called into the service of the United States, but otherwise, except for a certain amount of federal inspection and standardization, they are left under the control of the respective state governments. In practice this situation means that the states, by virtue of the acquiescence of Congress, do have important functions in national defense. The strength and equipment of the militia depend largely upon appropriations made by the state legislatures; recruiting is left almost wholly to the states; the governor of the state is commander in chief of the militia, except when they are in federal service; the governor appoints the adjutant general, who is the actual administrative chief of the militia; and the governor, as permitted by the state constitution, may order the militia to take the field and perform duties prescribed by him.

The division of war powers. The war powers of the United States are divided between Congress and the President. Congress is given power to authorize the establishment of military and naval forces and to provide money for their support; it is also given power to make rules for the government and regulation of such forces, and to make certain rules as to the conduct of warfare. To minimize the danger of military domination over the civil authorities, Congress is forbidden to make any ap-

propriation of money for military purposes for a longer period than two years. And, curiously enough, although Congress is given power to declare war, it is given no power at all to conclude peace. Congress is given power to provide for calling the state militia into the service of the Union, and to make provision for organizing, arming, and disciplining the militia and for governing such militia bodies as may be employed in the service of the United States. It also stated in the Constitution (see Article I, section 8) that the authority of appointing the officers and the authority of training the militia shall be reserved to the states, subject to the discipline prescribed by Congress. This arrangement, taken together with the previously mentioned proviso that the states may keep no troops or ships of war without the consent of Congress, gives Congress abundant power to put the militia under complete federal control if desired.

The Constitution (Article II, section 2) provides that the President shall be commander in chief of the Army and Navy of the United States and of the state militia when called into the actual service of the United States. The President's power of command is limited, of course, by other provisions of the Constitution, but these limitations are not very extensive. The President may not create and finance military forces, nor may he entirely control their organization and government. But as commander in chief he has full discretion as to their actual use in the field, and has larger power to supplement the general rules and regulations prescribed by Congress. With the advice and consent of the Senate, the President appoints all of the officers of the Army and Navy. Furthermore, the President, by virtue of his power (Article II, sections 2 and 3) to appoint ambassadors, consuls, and other public ministers and his power to receive and, inferentially, to dismiss ambassadors and ministers from foreign countries, has the decisive voice in shaping the course of foreign relations. The President may not declare war upon a foreign country, but he may so conduct our foreign relations as to leave Congress no alternative but to declare war, and he may so employ the Army and Navy as to bring on hostilities without a declaration of war. Once war is declared, the President has all the extraordinary powers that the practices of war allow a commander in chief. He is the judge of what constitutes military necessity; peace may not be concluded without his sanction; he disposes of the military and naval forces as he sees fit, and no action of Congress can control his military discretion so long as war continues. The only thing Congress can do is to refuse him money.

Apparently it was the intent of the Constitution that the general policies and agencies of national defense should be determined and controlled by Congress, through the enactment of appropriate legislation,

but that the detailed execution of such policies and the specific employment of such agencies should be vested in the President. That, on the whole, is the way the division has worked out. In times of peace there are not many serious deviations from this fundamental scheme of dual responsibility and control. But it has not always been possible to adhere to it strictly in the presence of imminent or actual war. Although Congress has ample constitutional authority to assert itself just as fully in war as in peace, it is seldom advisable for Congress to do so. War brings on emergencies which cannot be effectively met by a deliberative body, and consequently Congress is usually inclined, in the event of war, to "support" the President. Which commonly means that Congress gives the President just about what he asks for, follows his leadership in foreign affairs and military policies, and rarely challenges his right to exercise extraordinary powers.

Military law. There are three distinct varieties of military law. First, there are the general statutes enacted by Congress and the several state legislatures making provision for military and naval forces and determining how they shall be organized and regulated. Second, there are the rules and regulations issued under the authority of the President and the governors of the states for the direction and control of the forces under their command. Third, there is what is usually called martial law, which is the law prescribed by military authority for areas in which, for military reasons and under proper military powers, the civil law has been suspended.

Statutory enactments for the organization and regulation of military and naval forces are both numerous and elaborate. Congress has enacted a bulky code of military statutes, and each state has a similar body of law supplementing the acts of Congress. These broad statutory enactments not only determine what military and naval forces shall be established and maintained, and how they shall be organized and governed; they also define and determine the duties and obligations of the individual citizen as to military service. In 1898, for example, Congress enacted a law declaring that all able-bodied male citizens of the United States and foreign persons who have declared their intention to become citizens, if they are between the ages of eighteen and forty-five years, shall constitute the national forces and shall be liable to perform military duty in the service of the United States. In 1916 it was enacted that the militia of the United States should consist of all male citizens or foreign persons as above described, and that it should be composed of the National Guard, the Naval Militia, and the Unorganized Militia. These laws still stand. Every able-bodied male citizen or declarant of the stated ages, if not a member of the Regular Army, the National Guard, or the

Naval Militia, is a member of the Unorganized Militia and as such is subject to military service. He is called into service under such legislation as Congress may enact for that purpose. During the First World War, conscription was the method used, and the validity of that method was upheld by the Supreme Court. Conscription of wealth probably would be equally valid.

Compulsory service. Though compulsory military service was resorted to in the Civil War and in the First World War, never in American history prior to 1940 had American citizens been drafted for military service in time of peace. The Selective Service Act of 1940 was reluctantly enacted by Congress because the international situation was so threatening that an immediate enlargement of the armed forces seemed urgent. The Act applied the compulsory principle to the recruitment of men for the Army but not the Navy. It was extended to the Navy in 1943.

Under the original terms of the Selective Service Act all male citizens between their twenty-first and thirty-sixth birthdays were required to register and stand ready for the call to service. After the United States became involved in the war the age limits were extended to include all males between their eighteenth and sixty-fifth birthdays, but only those between twenty and forty-five were subject to call for active duty. In November, 1942, this range was extended to include eighteen- and nineteen-year-olds. The law specifically exempted from all service or from active combat service certain classes of persons, and the local selective service boards were given authority to exempt others or defer their period of service. The original period of service liability was one year. Later this term was extended to two and a half years at the discretion of the President and the Department of War, even though the nation was not at war. When the United States entered the war the term of service became indefinite.

At the end of World War II the compulsory service law was repealed and the Selective Service Administration placed on a stand-by footing. It was believed that voluntary enlistments would provide the manpower requisite for our greatly reduced armed forces. In 1948, however, a new draft law was enacted and put into force. Deterioration of our international relations had caused the President to recommend a material expansion of the armed services and to insist upon compulsory service as the method of supplying the manpower. The new law applied to men 18 through 25 years of age, and operated in the same manner as the wartime draft laws. Men inducted under this act were required to serve 21 months on active duty and were subject to reserve duty thereafter.

The Selective Service Administration is a civilian agency of the federal government. It is not under the authority of the War and Navy

departments, but reports and is directly accountable to the President. There is a national headquarters under a Director of Selective Service, who may be a civilian or a member of the armed forces. The governor of each state and the corresponding officer in the territories is responsible for the enforcement of the Selective Service Act in his state or territory. He appoints a state director and a local board for each county or subdivision thereof to be taken as a unit of administration. Legal and medical advisory boards are associated with each local board and with state headquarters. Appeals are taken from local to state boards and thence to national headquarters. Rulings come down through the same channels.

Law for the armed forces. The organized military and naval forces are governed by two bodies of law—the statutory enactments of Congress and the state legislatures and rules and regulations put out by their commanders in chief. The President, through the War and Navy departments, and the governors, through the adjutant general of the militias, promulgate innumerable orders, rules, and regulations which are legally binding upon the members of the organized military and naval forces. The authority to issue and enforce such laws comes from two principal sources: (1) the power of supreme command given by the national and state constitutions, and (2) the ordinance power of the executive, which is an implied power that the executive always has to supplement legislative enactments.

Martial law. Civilians are usually more affected by martial law than members of the armed forces. It is an ancient principle of constitutional government, recognized by the Constitution of the United States and by all of the state constitutions, that under emergency conditions the regular law may be suspended and temporarily replaced by martial law. When this change occurs the military authorities take over the government of the territory affected, proclaim such law as they think the situation requires, and set up military agencies to administer and enforce this law. There has never been any doubt as to the constitutional authority of a military commander in time of war to establish martial law in any area where military operations are going on or are likely to take place. The courts have said that it is not permissible, even in wartime, for a military commander to establish martial law in areas outside the field of actual or probable military operations; but it has been done a number of times, and the courts have been unable to intervene in time to prevent or stop it. A much more difficult question is whether martial law may be used as a means of suppressing domestic violence in times of peace. The courts have not answered this question very clearly. The President and the state governors are constitutionally bound to "take

care that the laws be faithfully executed." May they, in pursuance of this duty, call out the troops and place disturbed areas under martial law? Although the Supreme Court has held that only Congress may suspend the writ of *habeas corpus* in times of peace, it has upheld the right of the President to use the army to quell disorders interfering with the enforcement of federal law. The same tribunal has held that it would be a violation of the due-process clause of the Fourteenth Amendment for a governor to resort to martial law where no real exigency existed, which still leaves a good deal of discretion to the governor. A few of the state constitutions explicitly limit the power of the governor to call out the militia and declare martial law.

The National Military Establishment

An ample description of the armed forces of the United States must await a period of greater permanence than the present. Since the end of World War II our system of national defense has undergone more sweeping changes than at any previous period in American history, and there are indications that the end is not yet in sight. This country entered the second world conflict with a military establishment which had not been substantially altered since World War I and in some respects not since the Civil War. It was immediately apparent that drastic improvements and innovations were needed, but these could not be successfully introduced while the war was on. Between 1941 and 1945, by executive order, certain fundamental changes were made in the organization and procedure of the line forces, but it was impossible to extend these to the top levels of the military structure. There was not time to give adequate consideration to such questions without awarding them priority over the far more urgent problems of fighting the war to a successful conclusion. Moreover, no radical reconstruction of the higher military organization could be effected without action by Congress, and Congress was unwilling to undertake such a task in the midst of war.

The chief problem was the total unification of the armed forces, which, since the founding of the Union, had been organized under two separate and coördinate departments. The President had no authority to consolidate the War and Navy departments. Congress did have the authority, but was subject to so many contrary pressures from both military and civilian sources that it hesitated to act. At the end of the war, however, President Truman vigorously urged Congress to take action and was instrumental in bringing about a working agreement among the leading officials of the two departments in favor of unification. On the basis of this agreement Congress, in the summer of 1947, enacted a law creating a

single defense agency called The National Military Establishment. This agency is headed by the Secretary of Defense, who is given a place in the President's Cabinet. The Establishment consists of three coequal departments, named respectively the Department of the Army, the Department of the Navy, and the Department of the Air Force. Each of these departments is headed by a secretary who does not have cabinet rank but has direct access to the President nevertheless. The chain of command and of administrative procedure originates with the President as commander in chief, and then progresses, theoretically, through the Secretary of Defense to the three departmental secretaries. But the latter are not in all respects fully subject to the administrative direction and control of the Secretary of Defense, with the result that the consolidation is as yet imperfect.

In addition to the three military departments, the Act of 1947 created three agencies for coördinating national security matters in general and four to facilitate coördination within the National Military Establishment. The three general coördinating agencies were the National Security Council (consisting of the President, the Secretary of State, the Secretary of Defense, the three military department secretaries, and the chairman of the National Resources Board); the National Resources Board (a civilian agency designed to perform the same functions as the War Production Board in World War II); and the Central Intelligence Agency (a body designed to gather information relative to national security). The four agencies directly affiliated with the National Military Establishment were the Joint Chiefs of Staff, the War Council, the Munitions Board, and the Research and Development Board. The first named of these is a board made up of the Army Chief of Staff, the Chief of Naval Operations, the Chief of Staff of the Air Force, the President's personal Chief of Staff, and designated subordinate officers. The War Council is composed of the Secretary of Defense, the three military secretaries, and the chiefs of staff of the three services. The Munitions Board is composed of specially designated officers from all three services, and the Research and Development Board, which deals with the scientific aspects of warfare, is composed of both civilian and military officials.

The land forces. The ground or land forces, under the Secretary of the Army, are composed of the Regular Army, the National Guard, the Officers' Reserve Corps, and certain other reserve units. The Regular Army is composed of men on active duty full time for the duration of their compulsory service periods or terms of enlistment. The National Guard, created in 1916 to replace the old state militia, is a joint state-federal enterprise. The units are organized under state and federal laws, are supported by funds from both state and federal sources, and are subject to

both state and federal command. Normally, in the time of peace, National Guard units are under the command of the governor and adjutant general of their respective states. Upon declaration of a national emergency, they may be called into federal service by the President, incorporated in the Army of the United States, and made subject to the exclusive command of the President for the duration of the emergency. In order to receive federal funds, National Guard units must comply with federal standards and submit to federal inspection. National guardsmen occupy a civilian status in peacetime, and their military duties consist only of their regular weekly drill periods and certain special training activities. They become full-time soldiers only when summoned to active duty by the governor or President.

The other reserve components of the land forces are skeleton units made up of men on inactive duty. The most important of these is the Reserve Officers' Corps, which consists of men appointed by the President who have served in past wars in the Regular Army or the National Guard or have graduated from the Reserve Officers' Training courses which are offered in many schools and colleges. Reserve officers hold commissions which subject them to call for active duty under specified conditions and require them to undergo a certain amount of military training annually.

The highest commanding officer of the land forces is the Army Chief of Staff. The Army General Staff is a body of officers detailed from the various branches of the Army for duty on this body. It is the body which makes and executes all war plans.

The sea forces. Prior to 1940 the prevalent opinion in the United States was that a strong one-ocean navy, moved back and forth through the Panama Canal, was entirely adequate for our national defense. By the end of World War II, however, we had built an all-ocean navy, the greatest and most powerful ever possessed by any nation in history. After the war the United States Navy was greatly reduced in size, but it still remains the world's largest navy, and it seems to be our policy to keep it as such.

The Department of the Navy is functionally organized to operate fleets of all kinds, manage naval bases, carry on the construction and repair of ships, and handle a great variety of matters of finance and personnel. The top commanding officer of the Navy, under the Secretary of the Navy, is the Chief of Naval Operations. The Office of Naval Operations, of which he is the head, corresponds with the General Staffs of the Army and the Air Force.

Associated with the Navy is the renowned Marine Corps, a relatively small but highly trained body of "soldiers of the sea," who are used for

shore duty in connection with naval warfare. The Marine Corps was established in 1798 and has been recognized ever since as one of the most valiant and efficient units of the armed forces of the United States. Mention should also be made of the United States Coast Guard, which operates under the Department of the Treasury in time of peace but as a part of the Navy in war. The peacetime work of the Coast Guard includes the prevention of smuggling, the enforcement of customs and immigration laws, the saving of life and property at sea, the protection of maritime fisheries, and the enforcement of miscellaneous laws involving maritime activity. It continues these duties in time of war, but takes on additional work of a specialized nature. Also serving as an auxiliary of the Navy in time of war is the American Merchant Marine which embodies the American merchant fleet. This fleet is not incorporated in the Navy even in time of war but is controlled and operated by the United States Maritime Commission. However, in wartime it becomes for all practical purposes a working partner with the Navy.

The air forces. The most radical innovation effected by the consolidation act of 1947 was the establishment of a unified and independent air force. In World War II the United States had two principal air forces and several minor ones. There was considerable rivalry and sometimes lack of effective coöperation between the air forces of the Army and the Navy. It was also found to be unfortunate in many instances that both were subject to the command of officers whose major concern was not with air operations but with land or sea operations. Convinced that warfare in the future would be chiefly conducted in the air, Congress set up in the National Military Establishment the Department of the Air Force with its own secretary, general staff, and line forces. These operate now as a unified national defense force, assisting the Army and Navy as determined by the Joint Chiefs of Staff and other agencies of high command, but also making and executing their own war plans and strategies without dependence on the ground or sea forces. Indeed, it is now believed by many students of military science that the Air Force is destined to become the principal reliance of the United States in future wars and this view now has strong support in Congress.

Training, education, research. Extensive provision has been made for the education and training of both Army and Navy officers. The United States Military Academy, located at West Point, New York, is the leading institution for the education of Army officers, and the United States Naval Academy at Annapolis, Maryland, holds the same position in the education of officers of the Navy. Both institutions offer a four-year course including a basic general education as well as specialized courses of a professional character. The Army operates three general service

schools—the Command and General Staff School, the Army War College, and the Army Industrial College—in addition to the special service schools, one for each arm or service. These are schools for officers and enlisted men in the service, and are designed to give training for special kinds of duty. The Naval War College is a similar institution for the special training of officers for high command and staff service. The Navy also operates a number of technical schools and training stations for the training of enlisted men, apprentice seamen, and noncommissioned officers.

Schools and courses for flying had been established by both services many years before the United States was drawn into the Second World War. As that emergency approached the number of such schools and training courses was rapidly multiplied and this growth continued after we entered the war. Numerous schools were also established by all branches of both services for the training of officers and technicians. The facilities of many colleges and universities were wholly or partly utilized for this purpose. How much of this expansion of military and naval education and training will be permanent cannot now be determined.

The Political and Economic Front

Modern total war is a struggle not only between opposing armies, navies, and air forces but also between opposing political and economic systems. It involves the marshaling of resources and energies not only for combat but for industrial production, political unity, and home defense. This aspect of modern war is strikingly reflected in the large number of nonmilitary war agencies called forth by the activities of our government in the Second World War. We shall briefly describe the functions of the principal temporary agencies of this sort. Most of them were discontinued soon after the war or were regrouped with other agencies for postwar purposes. A few were retained for special reasons.

The Council of National Defense. This is a permanent body, created in 1916 to advise and assist the President, both in peace and war, in coördinating the resources and industries of the nation for national defense. It consists of the Secretaries of War, Navy, Interior, Agriculture, Commerce, and Labor. Its work is mainly advisory, and it has very little to do with the actual administration of war programs.

The Office for Emergency Management. This office was established in 1940 as a unit in the Executive Office of the President. Its principal function has been to serve as a liaison organization between the President and various special-purpose agencies. Within the framework of this office numerous agencies for particular purposes have been set up, modified,

and abolished as circumstances have seemed to require. The President has been given authority to do this by executive order.

The Office of Civilian Defense. This agency was established within the Office for Emergency Management in 1941. Its chief duties were to coordinate federal, state, and local civilian-defense activities, to plan and carry out programs for the protection of civilian life and property, to promote activities for the improvement of civilian morale and the enlargement of civilian participation in the war effort.

The Board of War Communications. This was an *ex officio* body composed of the Chairman of the Federal Communications Commission, the Director of Naval Communications, the Chief Signal Officer of the Army, the Assistant Secretary of State in charge of international communications, and the Assistant Secretary of the Treasury. Its chief task was to make plans for the coördination of all wire and wireless communication facilities.

The Office of Defense Health and Welfare Services. This agency was set up in the Office for Emergency Management to work with all existing health and welfare services, federal, state, and local. The purpose was to secure better teamwork in the war effort.

The Division of Defense Housing Coördination. This also was set up in the Office for Emergency Management. Its job was to assist in correlating the work of all agencies having to do with war housing problems and needs. It was supposed to formulate and submit to the President plans to avoid housing shortages in defense centers and to promote the speedy execution of housing construction programs.

The Office of Inter-American Affairs. This unit of the Office for Emergency Management had as its principal task the promotion of programs of commercial and cultural relations with the nations of the Western Hemisphere.

The Office of Lend-Lease Administration. The major job of this office, also a unit of the Office for Emergency Management, was to administer the legislation under which the President was empowered to lend, lease, transfer, sell, or otherwise dispose of war materials and articles to the governments of our allies.

The National War Labor Board. The purpose of this unit of the Office for Emergency Management was to investigate, adjust, and if possible settle labor disputes which might interrupt the prosecution of the war program.

The Office of Price Administration. This office was first established in 1941 but was reorganized and given enlarged powers in 1942. Its main function was to stabilize prices and to prevent profiteering, hoarding, speculation, and price manipulation. It was given full control over the

rationing and distribution of commodities through retail sales and other modes of transfer to the ultimate consumer.

The War Production Board. This body was organized within the Office for Emergency Management to direct the procurement and production of war supplies, materials, and equipment. It had authority to determine the policies, methods, plans, and procedures of all federal departments, agencies, and establishments in respect to contracting, purchasing, construction, plant conversion, plant expansion, and financing. It also had authority to establish priorities in the use of all essential material in private industry and to stop the production of articles for civilian use in order that the materials might be diverted to war production. It was succeeded in 1945 by the *Civilian Production Administration*, which had the duty of guiding the transition of government and industry from a war to a peace footing.

The War Manpower Commission. This agency was set up in the Office for Emergency Management to formulate and administer plans and policies to secure the most effective mobilization and utilization of the manpower of the nation in both industrial and military activities.

The Office of Scientific Research and Development. Also in the Office for Emergency Management, this agency was charged with the duty of coordinating war research programs and making provision for adequate research facilities on the scientific problems related to war.

The Office of Defense Transportation. The job of this unit of the Office for Emergency Management was to correlate and direct all rail, motor, coastwise, and inland-waterway transportation in order to avoid congestion and insure the proper movement of men, materials, and equipment to points of need.

The Office of Censorship. This office had the duty of censoring all communications passing between the United States and a foreign country during the war.

The Office of War Information. This unit of the Office for Emergency Management had the duty of overseeing and controlling the dissemination of war information to the public by radio, press, and other means.

The Board of Economic Warfare. Headed by the Vice President of the United States, this agency had the duty of making plans and policies to protect and strengthen the international economic relations of the United States from the standpoint of national defense.

The Committee on Fair Employment Practices. This agency in the Office for Emergency Management was responsible for seeing that no agency of the government and no person contracting with the government discriminated against any employee or job application on account of race, creed, color, or national origin.

The Office of Alien Property Custodian. This unit of the Office for Emergency Management had the duty of taking control of property owned by enemy governments or their nationals and holding it or disposing of it according to law.

The Office of War Mobilization and Reconversion. This office was established by act of Congress in 1944 to serve as the top agency of direction and coördination over all federal departments and agencies in matters concerning the war effort and reconversion to a peacetime economy.

The War Assets Administration. This agency was established in the Office for Emergency Management in 1946 to administer the disposal of surplus government property.

The War Shipping Administration. This agency was established in the Office for Emergency Management to have charge of the operation, purchase, charter, requisition, and use of all ocean vessels under the American flag except those operated by the Army, the Navy, the Coast Guard, and the Office of Defense Transportation.

The Petroleum Administration for War. The duty of this office was to establish and oversee the execution of policies to provide adequate supplies of petroleum products both for war and civilian uses, and to secure the proper distribution of the same.

The War Contracts Price Adjustment Board. The work of this body was to determine the principles, policies, and procedures for the renegotiation of contracts between government agencies and private concerns.

The Office of Economic Stabilization. This unit of the Office for Emergency Management was responsible for the execution of acts of Congress designed to stabilize the cost of living by "freezing" wages, salaries, profits, and agricultural prices.

The Director of Liquidation. The function of this unit of the Office for Emergency Management was to make proper arrangements and preparations for the winding up of the affairs of all of the temporary agencies created for the purposes of the war.

Veteran Care

The problem. The aftermath of war presents a problem as difficult in its way as that of national defense. It is really a part of the defense problem, because it is a recognized obligation of the nation to make provision for the care of its war veterans. As to the nature and extent of that obligation, there have been wide differences of opinion. War service, according to one view, is a patriotic duty for which no special monetary reward should be expected. That is the minority view in the United States. The opposite view is that any man who dons a uniform

thereby earns the right to special consideration and special compensation from the national treasury for himself and his dependents. Judging from the character of much of the veteran legislation enacted in this country, the latter is the majority view. A third view is that the ex-serviceman, though he deserves much from his country, is not entitled to indiscriminate and unlimited favors and rewards regardless of individual merit and need. That view has been widely espoused in theory, but has never been rigidly adhered to in practice.

The question of what the nation should do for its war veterans cannot be separated from the question of what it is able to do. The United States not only has paid the members of its armed forces on a much higher scale during their periods of service than most other countries in the world, but has been far more lavish in post-service pensions and benefits of all kinds. Generosity was the keynote of all our policies respecting men who had worn the uniform of the United States in war, and we could easily afford to be generous. Our wars had been few and far between, had not been unbearably expensive, and the proportion of veterans to the total population was relatively small. We are now rapidly approaching the time when it will be far more difficult to pursue the policy of open-handed generosity than ever before in our history.

American veteran legislation. Following each war the veteran legislation of the United States has started on the principle that veterans should be dealt with according to individual merit and need, but that principle in each case has ultimately given way to the principle that the sky is the limit. Pressure politics by veteran organizations has always been the leading force in this invariable shift from moderation to prodigality, but the American people have always been indulgent with this particular variety of pressure politics. What matter if the favored veterans did not need the money (as many did not)! We could afford it. Federal taxes were not heavy, and nothing was too much for men who had offered their lives in the service of their country.

The first veteran legislation in American history was a resolution of the Continental Congress in 1776, promising pensions at the rate of half the monthly rate of pay to all officers and soldiers disabled in the War of Independence. Until 1818 pensions to veterans of the Revolution were granted only on the basis of disability and were called "invalid" pensions because the recipients presumably were invalids. In 1818 Congress passed a measure giving pensions to all indigent Revolutionary veterans regardless of injury or disability. These were "service" pensions because they were granted on the basis of service in the Revolutionary armies. In 1836 service pensions were given to widows and other dependents of Revolutionary veterans. The last veteran of the American

Revolution died in 1869, but pensions were paid to widows and dependents of such veterans until 1908. In other words, the veteran costs of the struggle for independence extended over a period of 132 years.

Veterans of the War of 1812 were granted invalid pensions immediately following the war, but service pensions for them and their widows and dependents were delayed until 1871. The last veteran of that war died in 1905. Widows and dependents of the War of 1812 were still being carried on the pension rolls 125 years after the conclusion of that war. Invalid pensions were given to Mexican War veterans in 1846, and service pensions for them and their widows and dependents were granted in 1887. Ninety-five years after that war was over pensions were being paid to more than a hundred widows and dependents of Mexican War veterans. The last actual veteran of that war died in 1929.

Civil War veterans were given invalid pensions before the war had ended, and the terms of the granting legislation were rapidly liberalized after the war. In 1890 it was provided that any Union veteran who had served ninety days and could prove disability (not necessarily disability acquired in or incidental to his war service) resulting from other causes than his own vicious habits was entitled to a pension. The same benefits were extended to widows and dependent children, provided they had no means of support other than their own daily labor. In 1920 Congress authorized the payment of $50 a month to *all* veterans of the Union armies and $72 a month to those so nearly helpless as to require special care and attention. Seventy-five years after the close of the Civil War more than 3,000 veterans and more than 50,000 widows and dependents of such veterans were drawing pensions from the federal government.

Spanish-American War veterans were given invalid pensions immediately after the war. Service pensions were given in 1920, and widows and dependents were made eligible to receive the same benefits. Forty years after the war more than 165,000 Spanish War veterans and more than 55,000 of their widows and dependents were receiving pensions. Veterans of the several Indian wars and their widows and dependents have been given similar pension benefits. Although no Indian war of any consequence has occurred since 1890, more than 6,000 veterans, widows, and dependents were on the pension rolls fifty years later.

Congress in 1917 provided for service-connected pensions to veterans of the First World War and their widows and dependents. These were invalid pensions, and it was necessary to show some disability acquired in or resulting from war service. This requirement was soon modified so that any disabled veteran could claim a pension. More than 400,000 of these veterans and more than 100,000 of their widows and dependents are now drawing pensions. In 1936 Congress appropriated approximately

$3,500,000,000 as a bonus to veterans of the First World War. This was called "adjusted compensation" and was supposed to represent the difference between the pay they received as soldiers and what they would have received if they had remained in civil life. Pressure for more generous benefits of all kinds for veterans of the First World War is still being carried on by veterans' organizations.

In 1933 Congress enacted that when a person who has served in the armed forces of the United States, whether in war or in peace, dies as a result of disease or injury which was incurred in or aggravated by his military service, his widow, children, and dependent parents are entitled to receive pensions at rates ranging from $15 to $83 a month. In 1941, after the United States entered the Second World War, it was enacted that any veteran otherwise entitled to receive a pension under the general pension laws and regulations shall be entitled to receive certain special rates for disability resulting from injury or disease in the line of duty.

The veteran legislation enacted by Congress during and subsequent to World War II provided a munificent program of monetary benefits, financial assistance, vocational rehabilitation and training, education, insurance, medical treatment, and hospital and institutional care. In addition to the federal program, many of the states enacted legislation granting bonuses or other special benefits to veterans of this war.

The federal program today. Federal legislation at the present time accords the following principal aids and benefits to veterans: (1) loans to veterans of World War II for the purchase or construction of homes, farms, or business property; (2) readjustment allowances for veterans of World War II who are unemployed or self-employed; (3) vocational rehabilitation for the veterans of World War II; (4) education or special training for the veterans of World War II; (5) pensions and compensation in claims for the veterans and dependents of veterans of all past wars; (6) the continuation of low cost and specially advantaged insurance to members of the armed forces of World War I and World War II; (7) medical treatment, surgery, dentistry, hospitalization, domiciliary care, and outpatient treatment for the veterans of all wars.

The loan program enables any qualified veteran within ten years after the termination of World War II to negotiate a loan from an approved bank or lending agency and have the federal government guarantee the loan up to 50% of the total, the top guarantee being $4,000 for real estate loans and $2,000 for nonreal-estate loans.

The readjustment allowance provides for the payment of unemployment compensation of a possible maximum of $20 a week for each week of unemployment following the veteran's discharge. The veteran may receive such payment for a total of fifty-two weeks. This privilege is not

to extend more than five years after the termination of hostilities, and the unemployment must occur not later than two years after the veteran's release or discharge or the termination of the war, whichever is the later date.

The vocational rehabilitation program is primarily for disabled veterans. The veteran who establishes the fact that his employability for his old job or for a new one has been lost or impaired by a service-incurred disability is eligible for a course of vocational training and rehabilitation running up to a maximum of four years. During the training period the veteran is entitled to his pension and other benefits plus a subsistence allowance. A base figure is set for the allowable combined income from pension, benefits, and subsistence pay. Above this figure the monthly amount receivable by a veteran is governed by whether he has one or more dependent children or parents. The increment for dependents declines with each additional one. The United States also pays the cost of tuition, books, and supplies.

The educational program provides education in an approved school, college, or university for any qualified veteran of World War II who served at least ninety days. He must apply for this within four years after his separation from the service and not more than nine years after the termination of the war. The veteran is entitled to not less than one year and not more than four years of schooling, depending on the time he spent in active service. For the period of his educational training the veteran receives a subsistence allowance which varies according to whether he has a dependent. Tuition, books, and supplies up to a total of $500 a year are also taken care of by the government.

Disability pension benefits are paid to veterans or their dependents who can qualify under the various acts of Congress on this subject. These benefits go to the veterans of all wars and to those of peacetime service as well. The laws distinguish between disabilities which are service-connected and those which are not, the benefits being greater and more easily obtainable in the former case than in the latter. Service pensions, regardless of disability, are paid to certain classes of veterans or to their widows or dependent children. These go to the veterans of wars prior to World War I.

The insurance program applies only to the veterans of the two world wars. Congress set up an insurance program for persons who served in the armed forces in World War I. This provided for insurance in any amount, in multiples of $500, from $1,000 to $10,000. The rates were lower than private insurance and the terms were specially adapted to the situation and needs of the service personnel. Under this system more than two billion dollars of policy obligations have now accumulated. A separate system of insurance for the service personnel of World War II was

established by the National Service Life Insurance Act of 1940. This system has been extended to cover not only the military and naval personnel but also the officers of the Coast Guard, The Coast and Geodetic Survey, and the Public Health Service. The amounts of insurance allowed are the same as for World War I, but the terms and options of the policies are more liberal. Congress also provided that the policies of insurance issued by private companies to members of the armed forces in World War II should not lapse for nonpayment of premium. The government guaranteed the premiums while the insured remained on active duty.

The medical and hospitalization program includes the operation of veterans' facilities, hospitals, homes, centers, and other institutions in every part of the country. In addition the federal government makes arrangements for the use of many state, local, and private institutions for the care and treatment of ex-service men and women. This care includes not only hospitalization, but laboratory and clinical service, surgery, medicine, nursing, and many other services and benefits. A large part of this service is entirely free and all of it is lower than outside cost. Other special benefits include free transportation or reduced rates to and from homes and hospitals; under some conditions free clothing and supplies are provided.

The Veterans' Administration. Most of the laws relating to veteran privileges, rights, and benefits are administered by the Veterans' Administration, an independent agency which in 1930 took over the functions of the former Bureau of Pensions, United States Veterans' Bureau, and the National Home for Disabled Volunteer Soldiers. The chief of the Veterans' Administration is called the Administrator of Veterans' Affairs. The agency is organized into divisions dealing with the different veteran services, such as contact and administrative services, finance service, personnel service, special services, vocational rehabilitation and education service, claims service, insurance service, medical service, construction and supplies service. Regional offices, sub-regional offices, contact offices, and area offices are maintained in all sections of the country. The Board of Veterans' Appeals, associated with the Veterans' Administration, passes on appeals from the decisions and rulings of the Administration on claims preferred under the veteran laws and regulations.

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CHAPTER 24

FOREIGN AFFAIRS AND COLONIAL ADMINISTRATION

Factors in Foreign Relations

Gone is the day of the hermit nation. The time was when a nation that wished to have no dealings with outside peoples could retire into its own shell and, in the language of the old sentimental ballad, "Let the rest of the world go by." But now the rest of the world refuses to go by. It cracks open the shells of the hermit nations and compels them to give heed to the world about, forces them to take part in world affairs. There are reasons why modern nations cannot live unto themselves, and are never allowed to do so. Geographic isolation is no more. There is no longer any part of the world where a nation may exist without standing on highroads of international commerce. Railroads, steamships, airplanes, and rapid communications have annihilated time and space and brought out-of-the-way corners of the earth as close as the next county was a hundred years ago. Also gone is economic isolation. Many nations a century ago were economically self-sufficient and practically self-contained. Many would like to be so now; but despite the most determined efforts to achieve independence of foreign trade, none has found it possible.

The geographical revolution. Many circumstances force modern nations into constant daily intercourse with the rest of the world. Not the least of these is the geographic revolution wrought by the mechanical progress of the past century. The continents remain the same, also the mountains, rivers, and seas. But their meaning for the world is wholly changed. They used to serve as barriers and boundaries; now they are highways and gateways. We still have frontiers, but they are not what they used to be. Once they were walls against outsiders; now they are windows opening upon the world. A nation cannot retire behind its frontiers and ignore its neighbors, because now the fences are all down and cannot be rebuilt. Chinese walls are not only out of fashion; they are impossible to maintain. Adjoining its own borders and beyond are too many affairs of vital bearing on its internal life for a nation to immure itself within its own boundaries. When one cannot get away from

his neighbors, he must do his best to get along with them. That is precisely the situation in which the modern nation finds itself.

International capitalism. Modern capitalism is another factor making for enlarged intercourse among the nations. Great corporate enterprises with modern facilities of production and distribution look upon the whole world as their theater of activity. Home resources and home markets are not enough. Raw materials must be brought from the ends of the earth to meet the requirements of their factories, and finished products must be sold in the markets of two hemispheres to keep business booming and profits coming in. Capital must be found to promote and sustain business enterprise, and if not available at home, must be sought abroad. Accumulated capital must find profitable investment or prove a drag on prosperity, and when it cannot find investment at home, it must range abroad. The world, therefore, has tended to become a vast economic entity. Dislocations following the First World War threw the structure out of balance and caused many nations to strive for greater self-sufficiency by throttling import trade and promoting export trade by artificial aids; but instead of diminishing the international economic entanglements of nations, these policies have enormously multiplied them. In spite of their high tariffs, import quotas, and embargoes, none can dispense with foreign markets for its own goods, and must accordingly admit certain foreign goods into its domestic markets. The negotiation of international trade agreements under these circumstances becomes a horse trade in which each party endeavors to "outsmart" the other.

Nationalism. The rise of a virulent nationalism is a factor greatly increasing the importance of foreign relations for modern governments. Assertive political nationalism grounded in universal popular accord has been sharply stimulated by the developments of the machine age. The nationalism of past centuries was by comparison a feeble flame, fed chiefly by dynastic, ecclesiastical, and to some extent racial rivalries. The nationalism of today is a raging blaze of economic and political rivalries superheating the emotional drives of whole peoples. National conflicts and collisions are more dangerous now than ever before, more fraught with cataclysmic possibilities. And therefore foreign relations are of greater concern; they must be conducted with greater intelligence and skill, with more continuity and energy than ever before.

Race and religion. Race and religion and cultures still remain important considerations in international relations, though not so prominent as in times past. Race consciousness still flares up to complicate international situations, as in Nazi Germany and militant Japan, but is usually mixed with underlying economic and political factors. Religion still contributes to international antagonism and misunderstanding, as in the

relations between European and Asiatic countries, but is usually subordinated to more material interests. Cultural differences still excite friction and reciprocal suspicions among nations, as between the United States and Latin American countries, but are secondary, as a rule, to other differences. It must be remembered, however, that though race, religion, and cultures are comparatively less prominent factors in international relations than in former times, the prodigious multiplication of points of contact between nations and the ever-growing complexity of international dealings during the past hundred years have conspired to impart to racial, religious, and cultural differences explosive possibilities of great menace to peace. Though no longer likely to be basic causes of international war, they are more likely perhaps to play the part of a spark in the powder magazine. Hence they continue to be most vital factors in the foreign affairs of every nation.

International intercourse. Another factor of supreme importance in contemporary international affairs is the internationalization of modern life. Steam, steel, and electricity have converted the world into a compact community in which innumerable matters once of local concern have assumed international significance. Take, for example, the matter of health. This used to be purely a national problem; now it is an international problem. An outbreak of communicable disease is any part of the world is a menace to every nation on earth, and can be combated only by international action. Crime furnishes another good example. Certain forms of crime have become largely internationalized. The suppression of the opium traffic or the monstrous traffic in women and children requires concerted effort on the part of all nations. The rise of air transportation poses another serious international problem; likewise the progress of radio communications. Banned from the air in the United States, a certain broadcaster set up his plant in Mexico and proceeded to fill the air with objectionable advertising. Flyers cross international boundaries as though they did not exist, and of course can engage in illicit as well as in legitimate traffic. To cope with such problems and regulate such of their internal concerns as may be affected by them, nations are compelled to resort to international negotiations.

International relations are customarily classified into two great categories—peace and war. Relations between nations at peace are carried on by various forms of direct diplomatic intercourse; between nations at war by armies and navies and certain forms of indirect diplomatic intercourse. Our concern here is with the peaceful conduct of international relations. The customary types of peaceful intercourse are: (1) the conclusion of bilateral or multilateral international engagements, such as treaties, protocols, and executive agreements; (2) participation

in international conferences and congresses; (3) the exchange of diplomatic and consular representatives; and (4) coöperation through established international agencies such as the International Postal Union, the International Fisheries Commission, the Bank for International Settlements, or the League of Nations. We shall now see how these different forms of international intercourse are carried on by the United States.

The Conduct of American Foreign Relations

The President's rôle in foreign affairs. Nations—being, like corporations, collectivities composed of many individuals—can act only through agents. Every nation, therefore, maintains a definite representative authority to speak and act for it in foreign relations. In the United States that authority is the President.

The President is the sole mouthpiece of this nation for communications with foreign governments and the sole channel through which communications from foreign countries may be addressed to the United States. It is a serious criminal offense, punishable by fine or imprisonment, for any private person or any officer of the government not duly authorized by law or deputized by the President to have any communications or dealings on public matters with any foreign government or officer or agent thereof. Neither Congress nor the courts may carry on intercourse with foreign governments, nor may any other agency unless definitely so empowered. And as a matter of fact it is impossible under the Constitution for any agency or instrumentality of foreign intercourse to be endowed with power to override the President. Actually, of course, communications and negotiations between the United States and foreign countries are conducted through the Department of State, diplomatic representatives, and various special agents; but these all derive their authority from the President. He may disregard or override them, but they may never go around him or over his head.

In the negotiation of treaties the initiative rests entirely with the President. He may commence or discontinue negotiations at will. An act of Congress requiring the President to engage in specified negotiations, even though passed over the President's veto, would be a nullity; likewise a Congressional act ordering the President to discontinue negotiations. Neither could be enforced. Nor is the President obliged to take into his confidence in treaty negotiations any other organ, officer, or agent of the United States. He may proceed in utmost secrecy if he chooses, and he frequently does. Witness President Wilson at the Peace Conference, President Hoover and Prime Minister MacDonald in a tête-à-tête on a log by the Rapidan, or President Franklin D. Roosevelt

retiring to the privacy of his study with visiting ministers of foreign governments. Equally subject to the whim of the President are the terms of the treaty. No subordinate may accept terms not meeting his approval, and he may dictate every detail.

The rôle of the Senate. Negotiations ended and terms agreed upon, the treaty goes to the Senate, where it must be ratified by a two-thirds majority in order to be binding. But the President is not compelled to submit it to the Senate. He may withhold it and thus prevent it from becoming effective. It is also established that the President may withdraw a treaty before the Senate has voted on it. Refusal of the Senate to consent to a treaty is a rejection which the President cannot overcome. The Senate may insist upon amendments or modifications, causing the President to undertake fresh negotiations; or it may qualify its consent by attaching reservations to the treaty. In some instances it has approved a treaty without reservation but passed resolutions stating its interpretation of certain provisions. It is also possible for the Senate to refuse either to ratify or reject a treaty and thus put it in cold storage for an indefinite time. Ratification by the Senate does not automatically put a treaty into operation. There must be an exchange of ratifications with the other contracting government and after that a proclamation of the President declaring it to be in effect as the valid law of the land. Both of these steps are in the power of the President alone. By refusing to take them he may kill a treaty after the Senate has ratified it.

Abrogation of treaties. As to the abrogation of treaties various practices have prevailed. In several instances treaties have been denounced by proclamation of the President, and there is no doubt that he has this power.

There have also been instances of Presidential denunciation in pursuance of resolutions passed by Congress, but it seems to be clear that Congress cannot compel him to act. A Congressional resolution of denunciation without final action by the President is not sufficient to abrogate a treaty. In a few cases treaties have been abrogated by the President with the consent of the Senate. Congress has one means of rendering a treaty nugatory without formal abrogation. That is to enact a law in conflict with the provisions of the treaty. The courts have held that a treaty is no greater obligation than an act of Congress, and hence that an act of Congress in conflict with a prior treaty must be held paramount to the treaty.

Nontreaty agreements. Lesser agreements than treaties do not require the ratification of the Senate and consequently lie entirely within the power of the President. Various names are attached to agreements of this kind. Broadly they are all called executive or administrative agree-

ments, but special terms, such as protocol, *modus vivendi, compromis,* cartel, capitulation, armistice, exchange of notes, and diplomatic or "gentlemen's" agreements, have been used to differentiate the several types. All have one thing in common: they are agreements between the President, the Secretary of State, or some other competent official of our government and a corresponding functionary of another government, and are concluded not as formal acts of governments but as understandings and arrangements between government departments and agencies. Legally they do not always bind the whole nation as such, though actually, and morally too perhaps, they commonly have that effect. When authorized by legislation or treaty, as is sometimes the case, executive agreements are fully binding within the limits of the authority given. When not so authorized, their legal effect depends upon the subject matter and surrounding circumstances. Not so their political effect; in that respect their obligation is fully recognized. The so-called Lansing-Ishii Agreement, based upon an exchange of notes between the American Secretary of State and a Japanese Plenipotentiary, was determinative in shaping the policies of the two governments until it was superseded by the Washington treaties of 1921–1922.

The conduct of diplomacy. Diplomatic intercourse between nations begins with mutual recognition and ends with the formal rupture of diplomatic relations. The power to recognize foreign governments belongs to the President. Congress occasionally has laid claim to equal power with the President in this regard, but has never been able to make good on its claim. The power to receive and send diplomatic representatives is exclusively vested in the President, and, if he cannot be budged, Congressional recognition is of no avail. The President may likewise extend recognition in the face of Congressional opposition, and has not infrequently done so. The termination of diplomatic relations is also a Presidential power. Only he can dismiss diplomatic representatives of foreign powers and send them home. The conduct of diplomatic intercourse is quite as fully in his hands. Foreign diplomats in the United States may deal only with him or his approved spokesmen, and American diplomats in foreign countries must obey his orders and follow his instructions. Regular diplomatic representatives (ambassadors and ministers) of the United States are stationed in the capitals of all foreign countries. Special delegates and plenipotentiaries are sent to represent us in international conferences and assemblies. Confidential personal representatives of the President are also sent forth on special missions. All are subject to the control of the President either directly or through the Department of State. An example of the plenitude of the President's power occurred in connection with the London Economic Con-

ference in the summer of 1933. The United States was represented by a special delegation headed by the Secretary of State acting under explicit instructions from the President. In the midst of the conference the President hurried a special spokesman to London to countermand these instructions and give new orders which virtually brought the conference to an end.

The Constitution expressly confides the power to declare war to Congress. Only by a formal act of this organ of government may the legal state of peace be supplanted by the legal state of war. But the President may cause war. He may so conduct our relations with foreign nations as to lead us into war; may give other nations cause for war against us or develop grounds for us to make war against them. He can without consulting Congress send an ultimatum to another government and put Congress in the unenviable position of backing down if it fails to sustain him with a declaration of war. As commanding head of the military and naval forces he may carry on hostile operations against another country or its property or citizens without waiting for a declaration of war, and, as was illustrated by the American punitive expedition in Mexico in 1916, may continue those operations though no declaration of war ensues. When another nation levies war upon us the President, without waiting for Congress to act, may recognize the fact of war and take such steps as may be necessary to meet the situation. The termination of war is peculiarly a function of the President. Though Congress has the power to declare war, it has not the power by repealing its declaration to bring the war to an end. Such an act, without the acquiescence of the President, could have no international effect, because the President alone has power to treat with the enemy, order a cessation of military activities, or restore diplomatic relations. Treaties of peace must be ratified by the Senate, of course, but only the President can submit such a treaty to the Senate, and after its ratification it can have no force until put into effect by him.

Influence of Congress on foreign policy. The determination of the foreign policy of the United States is mainly in the hands of the President, though the Senate and also the House of Representatives do exert considerable influence. The courts influence foreign policies only as their decisions impinge upon foreign affairs in applying treaty rights to individual cases. The President may choose to be his own foreign minister and reduce the Secretary of State to the rôle of glorified clerk. In that case the whole of the foreign policy of the administration originates in the brain and will of the President. The more common practice, however, is for the President to lean heavily upon the Secretary of State and other advisers in the State Department and diplomatic service, and

allow them considerable leeway in formulating policies subject to his approval. The Senate, through its participation in treaty making, is an important factor in the determination of foreign policies, though its influence is more often negative than positive. The chairman of the Senate Committee on Foreign Relations is apt to be either a close adviser or outspoken opponent of the President in foreign affairs. Only the President and the Secretary of State eclipse him in prominence in matters of foreign policy. The House of Representatives exerts some little influence in the shaping of foreign policies. Where the execution of foreign policies requires legislation or the appropriation of funds the House has an equal voice with the Senate. The House maintains a standing committee on foreign affairs and takes an active interest in foreign relations. It is not uncommon for one or both branches of Congress to adopt resolutions touching foreign policies. These are in no degree obligatory upon the President, but may be very influential in shaping his course. Occasionally Congress seeks to make itself felt in foreign policies by attaching conditions to legislation. This strategy is sometimes very effective, as in the instance of the Washington Conference of 1921–1922 which was convened by the President in consequence of a rider attached to the naval appropriation bill.

The Department of State. The Department of State is the medium through which the foreign relations of the United States are carried on. It is the medium of contact between the President and foreign governments and diplomatists, and likewise between the President and the Foreign Service of the United States. The Secretary of State is the ranking officer of the Cabinet, and is third in line of succession to the Presidency. As head of the Department of State he directs the manifold activities of that organization, and through it he controls and directs the activities of the Foreign Service. Normally he is the President's chief adviser in matters of foreign policy, and very often it is he, not the President, who actually originates and develops the foreign policies of our country.

The Department of State is functionally organized with appropriate units for each important class of work. Next in rank to the Secretary of State is the Under Secretary of State and under him are several Assistant Secretaries of State, each having general supervision over certain kinds of work and having under his direction a group of subordinate offices. In 1947 there were eighteen principal offices in the State Department, and each of these contained two or more divisions with special functions to perform. Each office was headed by a director and each division by a chief. There were also a number of special assistants and advisers responsible directly to the Secretary and the Under Secretary. The Under Secre-

tary is in a sense the professional head of the Department, whereas the Secretary might be termed the political head of the Department. In the absence of the Secretary or when that office is vacant the Under Secretary becomes Acting Secretary of State.

The Foreign Service. Prior to 1924 the Foreign Service of the United States was made up of two separate services, known as the Diplomatic Service and the Consular Service. The Rogers Act of 1924 merged these two services for administrative purposes, though keeping their functions distinct. Diplomatic and consular officers now constitute a single corps known as the Foreign Service. Diplomatic officers represent our government in political matters, consular officers in commercial matters. In the national capital of every country with which we carry on diplomatic intercourse we maintain a diplomatic establishment called an embassy or legation—the former if it is headed by an ambassador, the latter if headed by a minister or minister resident. Ranking below the head of the establishment are usually a counselor, one or more secretaries, a military attaché, a naval attaché, and sometimes a commercial attaché. It is the duty of this diplomatic mission to receive and transmit communications between our government and the government to which it is accredited, to carry on negotiations (subject to the direction of the President and the Department of State) with proper officials of that government on matters entrusted to it, to gather all possible information about the policies and affairs of the government to which it is accredited and report the same to the State Department, to give protection and assistance to American citizens in that country, to represent the United States in the social amenities of international intercourse, and to carry on numerous other activities pertinent to the foregoing duties.

In most of the important cities of foreign countries with which we have diplomatic intercourse we station a consular officer. Of these there are four principal ranks: consul general, consul, vice consul, and consular agent. A consul general, in addition to the regular duties of a consul, has supervision over all consular offices in a given district or area. Consuls are stationed at the more important centers of trade and vice consuls and consular agents at the lesser places. The duties of consular officers may be summarized as follows: to act as commercial representatives of their government, gathering and reporting to the State Department information as to tariffs, quota restrictions, trade practices, business conditions, market trends, and similar facts which may be useful in promoting American foreign trade; to assist in the administration of the immigration, tariff, sanitary, and merchant-marine laws of the United States through the visa of passports, the certification of ships' papers, and the adjustment of controversies between the masters and sea-

men of American vessels; and to act as legal agent of the United States in authenticating documents, registering papers, approving various transactions, disbursing money, and assisting American citizens in distress.

All consular officers and all diplomatic officers up to and including the rank of counselor are now given permanent tenure and appointed on the basis of merit. Admission to the Foreign Service is by examination. Candidates passing the examinations are assigned to the Foreign Service School and given a period of intensive training. Then as vacancies occur they are appointed to posts in the Foreign Service. From these initial appointments it is possible to work up to the highest posts in the Foreign Service. Virtually all of our consular officers and a great many of our diplomatic officers are now "career" men. Ambassadors and ministers are for the most part political appointees, but a number of career men have been elevated to these top ranks. All matters having to do with the ranking, efficiency, promotion, transfer, and discipline of members of the Foreign Service are attended to by the Board of Foreign Service Personnel, and all matters having to do with the details of personnel administration in the Foreign Service are handled by the Division of Foreign Service Personnel.

American Foreign Policy

Conflicting views on foreign policy. Prior to the entrance of the United States into the First World War, public opinion in this country was sharply divided between those who thought the United States should stay out of the European struggle and those who thought we should go in. A similar conflict of opinion preceded our involvement in the Second World War. Those who favored staying out were called "isolationists" and those who favored going in were called "interventionists." After the United States entered the First World War the isolationists were silenced, but their views were not changed and they were far more influential at the end of that war and in the period between it and the Second World War than the interventionists. The isolationists were also silenced by the entrance of our country in the Second World War. Whether they were permanently silenced, as many would like to believe, cannot at the time of this writing be foreseen. There is much evidence to indicate that a strong revival of isolationism might occur in certain eventualities.

Isolationism and interventionism. The cleavage between the isolationist and interventionist points of view is not one which can be easily closed. Not only do the two terms involve radically different conceptions of the rôle of the United States in world affairs; they likewise involve equally

divergent ideas of the kind of national existence our country ought to seek. It is unfortunate that less misleading terms than isolationism and interventionism could not have been used in describing these opposing views. Sincere and thoughtful isolationists have no desire to transform the United States into a hermit nation, nor have sincere and thoughtful interventionists any desire to enmesh this country in detrimental entanglements with foreign countries.

Isolationists have claimed that theirs is the foreign policy bequeathed to this nation by Washington and Jefferson. This is no more true than the interventionist contention that the foreign policy of Washington and Jefferson was basically internationalist in principle. The policy of Washington and Jefferson was neither isolationism nor internationalism; it was simply hard-headed realism applied in a concrete world situation. The classic statement of that policy is found in Washington's immortal Farewell Address. The careful reader of that document will quickly discover that Washington did not advise that the United States should stand aloof from the rest of the world. It is true that he did say, "The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as possible." Did that mean that we should participate in the political affairs of the world only when such a course was unavoidable? Washington took special pains to make it clear that this was not his meaning. After pointing out that the primary interests of Europe and her frequent political controversies were not of immediate concern to us, he reasoned, therefore, that "it must be unwise for us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities." Clearly, Washington was not urging complete nonparticipation in the political affairs of the world. It was "artificial ties"—ties not natural for us and not justified by our situation—which he feared, just as it was the "ordinary," not the extraordinary vicissitudes of European politics in which he advised us not to become entangled.

Washington's position. That there would be circumstances under which it would be both necessary and wise for us to have political ties with other nations, Washington never doubted. But we should do so only as our own interests required, and we should make ourselves strong enough to enjoy complete freedom of choice in the matter of alliances. "It is our true policy to steer clear of permanent alliances with any portion of the foreign world," said Washington. Why? Because permanent alliances would limit our freedom of choice. But, "Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emer-

gencies." In other words, if, by "suitable establishments," we made ourselves strong enough to protect our interests, our geographical situation was such that we would never need to bind ourselves by permanent alliances.

The government of the United States never has followed Washington's advice in its entirety. Permanent alliances have been avoided and we have never implicated ourselves to any extent in the ordinary vicissitudes of European international politics, but we have wholly neglected to establish and maintain the powerful and ever-prepared armed forces which Washington thought essential to the success of the independent policy he prescribed. Geographical detachment and balance-of-power diplomacy in Europe and elsewhere throughout the world have luckily enabled us hitherto to enjoy much of the independence of action that Washington hoped for, despite the fact that never once in our history have we been even halfway prepared to defend that independence ourselves. If we had faithfully followed Washington's advice, we would have had a strong Army and Navy ready to strike instantly when our interests were jeopardized by the European conflict of 1914–1918, and we would have been fully ready to deliver decisive blows the moment our interests were endangered by the Axis countries in 1941. Certainly the history of the United States, and possibly the history of the world, would have been very different if, on these two occasions, the United States had possessed the immediate striking power to act as independently as she talked.

Washington wanted the United States to be free to remain aloof or take part in international politics and international wars according to our own independent judgment. And Washington realized that such freedom of action is not to be had merely by wishful thinking. We must ever be on a "respectable defensive posture"—one that other nations would respect—and we must have "suitable establishments" for that purpose. The crux of the issue between the isolationists and internationalists of the present time is whether the kind of independence sought by Washington is any longer realizable at all. The internationalist contends that no nation can have that kind of independence in the modern world. His view is that the modern world, especially with the coming of atomic weapons, has become too small in matters of time and distance for any nation to pursue an independent course. There is only one choice left to the United States, according to the internationalist view, and that is not only to take part unreservedly in world affairs but to assume the lead in organizing the world for peace instead of war. The isolationist does not concede that this country no longer has any freedom of choice in its international policy. He will grant that our geographical detachment is gone,

but he believes we can still enjoy a large degree of political detachment, and that it is wise that we should. He does not oppose American participation in international organizations and arrangements, provided no political commitments are accepted. The best way, according to the isolationist view, for the United States to serve its own interests and likewise the interests of the world at large is to keep itself free from entanglement in the political affairs of other countries.

The end of World War II found the United States a member of the United Nations and also deeply enmeshed in agreements with our principal allies. Few Americans, including many in high places, knew much of the nature and extent of our commitments under these agreements. Many of them were made secretly and informally, and it was widely said that there had been no full publication even of the ones which had been reduced to writing. It soon became evident that this country was not going to be able to withdraw and choose its own course, as it had done after World War I. Even if it had the desire to do so, it could not. More than any other country, the United States was responsible for the success or failure of the United Nations. To withdraw from that organization would be to doom it to instant death. The United States was also handcuffed to Great Britain, Russia, China, France, and other countries by numerous agreements, understandings, and arrangements made independently of the United Nations.

Representatives of this government in the postwar years took part in a seemingly endless series of conferences of heads of state, conferences of foreign ministers, and meetings of the United Nations. Possibly there was some progress towards the settlement of the questions which divided them, some agreement on the fundamental requisites for international peace. But the results were far from promising. Consequently, American opinion became increasingly impatient of internationalism. A return to isolationism was clearly impossible, but many began to wonder if it was not also impossible to go forward with internationalism.

The bases of American foreign policy. Our interests in foreign relations involve six basic considerations. First, we are concerned for the success of our foreign trade. Not only do we, like every other nation, desire to promote and upbuild our foreign trade; we are equally concerned to protect ourselves from adverse discriminations in the commercial policies of other countries. Second, we are committed to the protection of American citizens in foreign countries and on the high seas. We conceive it to be the duty of our government to see that American citizens living or traveling in foreign countries are not subjected to ill-treatment, and that the right of Americans to use the open seas shall not be violated. Third, we are committed to the proposition that no European or Asiatic nation

shall perpetrate aggressions against or acquire dominion over any portion of this hemisphere. Fourth, we are concerned to maintain our own political independence and territorial integrity, including of course our territories and dependencies. Fifth, we are concerned with the protection of our rights under international law, and particularly the right to choose and maintain our own democratic way of life. Sixth, as far as is consistent with the foregoing, we seek peaceful relations with all nations and prefer the harmonious adjustment of international disputes without recourse to war.

Looking out upon the world we discover that the realization of these objectives calls for different policies in different theaters of world politics, and likewise different policies for different times and occasions. We have been pretty thoroughly consistent in the pursuit of our interests and objectives, but have not always found it possible to be consistent in our programs and methods of pursuing them. In the aggregate our fundamental interests have not materially changed, but they have not been the same in Latin America as in Europe, not the same in Europe as in the region of the Pacific, not the same in the Far East as in the Near East, not the same in fact in any two spheres of international intercourse. Nor have conditions remained unalterably fixed in any single sphere of foreign relations. Our policies, therefore, have been constantly adapted to circumstances, though their ultimate purposes have always centered about the six major considerations stated above. To gain a clear conception of American foreign policies, then, it is necessary to review the policies we have pursued in the principal regions of world relations.

Latin America and the Monroe Doctrine. In the affairs of this hemisphere, particularly those concerning nations south of the Rio Grande, our interests have always been more direct, immediate, and vital than elsewhere. From the beginning of our government we looked with alarm and disfavor upon further colonization by European nations in this region, and 1823 President Monroe made bold to announce a three-point doctrine setting forth our position respecting the relations of European countries with the republics of Latin America. Briefly he stated that we should view as "the manifestation of an unfriendly disposition toward the United States": (1) any further European colonization in North or South America, (2) any interposition by a European power in the affairs of the nations of this hemisphere "for the purpose of oppressing them, or controlling in any other manner their destiny," and (3) any attempt by European powers to extend their governmental systems to nations of this hemisphere. Though not too seriously received in Europe at first, this Monroe Doctrine came to be the main axis of

American policy in the Western world and, by reason of the apparent willingness of the American people to fight to maintain it, finally won the acquiescence of all nations. Forcibly, and at times rather bluntly, we have told the rest of the world to keep out of this hemisphere. Only once—in the instance of the French intervention in Mexico during the Civil War—have our pretensions been seriously challenged, and then with the unhappy results for the challenger. We have never made war to enforce the Monroe Doctrine, but we have on several occasions manifested a clear purpose to do so if our demands were not met, and no nation has cared to put us to the test.

With the passing of the years the Monroe Doctrine has been greatly amplified. Our government has insisted that it applies to any transfer of American possessions from one non-American power to another, and to the alienation of territory on the part of an American nation by lease, sale, or otherwise. We have also claimed, and made good the claim, that it gives us a right to intervene in any dispute between a non-American power and a Latin-American country. And since we would not permit intervention by non-American nations, it has been said to place upon us the duty of intervention in the affairs of Latin-American nations in order to prevent or correct abuses justifying remedial action on the part of other nations. This latter extension of the Monroe Doctrine has aroused great resentment in Latin America. Not only do Latin-American countries fail to relish the tutelage of the United States, but they assert that we use the right of intervention to promote our own selfish interests. Repeatedly of late years have the countries of Latin America demanded a "pooling" or "Pan-Americanization" of the Monroe Doctrine, saying that when intervention is necessary it should be carried on as a joint enterprise of all the nations of this hemisphere. The American government has endeavored in divers ways to mollify Latin-American sentiment. President Franklin D. Roosevelt in his Wilson Day Address, December 28, 1933, made remarks definitely foreshadowing a new policy. President Wilson in 1913 had said that the United States would "never again seek one additional foot of territory by conquest."

To this Mr. Roosevelt added:

> It, therefore, has seemed to me as President that the time has come to supplement and to implement the declaration of President Wilson by this further declaration that the definite policy of the United States from now on is one opposed to armed intervention.
>
> The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance of law and orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all.

It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern, and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors.

The "good neighbor" policy. That it was the sincere purpose of President Roosevelt that our policy toward Latin America should be that of a "good neighbor" was shown in deeds as well as words. The Platt Amendment, a provision incorporated in the Cuban constitution at the insistence of the United States and giving us the right to intervene in that country, was abrogated through the negotiation of a new treaty with Cuba in 1934. In the same year the detachments of United States Marines which had occupied Haiti since 1915 were withdrawn, and Haiti was given control of her own finances. About the same time the State Department reversed our long-standing policy of refusing to recognize new governments in Latin America if we did not approve the means by which they came into power. Every effort was made by our government to promote Pan-American unity and coöperation. President Roosevelt in person opened the Inter-American Conference at Buenos Aires in 1936 and pledged the full coöperation of the United States with the other republics of this hemisphere in resisting aggression. A declaration of continental solidarity and one on principles were adopted by a similar conference at Lima in 1938, and these declarations expressly excluded intervention by one state in the affairs of another and the use of force as an instrument of national policy. Both of these principles were fully accepted by the United States as ingredients of the good-neighbor policy. After the outbreak of war in Europe in 1939, the government of the United States was increasingly active in trying to establish closer collaboration among the republics of this hemisphere. Meetings of the foreign ministers of the American republics were held at Panama in 1939 and Havana in 1940. The Havana meeting approved an agreement which recognized that the Monroe Doctrine was a "continental" policy rather than an exclusive policy of the United States. Further conferences were held after the United States entered the war, and we definitely committed ourselves to defend all nations in this hemisphere.

During World War II the United States sought not only to defend the countries of this hemisphere but to make them active allies. Our government made huge loans to them, supplied them with enormous quantities of goods both for military and nonmilitary purposes, provided technical aid and assistance in many fields, and used its good offices in their behalf in many other ways. With some we made arrangements for the use of territory, port facilities, and landing fields in connection with the

prosecution of the war. We endeavored in every way to align the Latin-American countries against the Axis, and in this we were largely successful. All of the Latin-American republics broke relations with Germany or Japan or both; all sooner or later declared war against one or more members of the Axis; one or two actually participated to some extent in the military operations of the war. The United States continued throughout the war to take a leading part in inter-American diplomatic conferences, and we were largely instrumental in bringing about the conference of American republics at Mexico City in March, 1945. This conference drew up an agreement known as the Act of Chapultepec which established an officially recognized permanent organization for the republics of this hemisphere, set up definite forms of coöperative procedure for them, and bound them to a common policy of defense against aggressor nations.

Relations with Europe. Our policies with regard to Europe, according to some commentators, have always been a muddle and have grown progressively more muddled since 1918. The most caustic of these critics have been ardent internationalists who could see little good in any policy short of active participation in European affairs. It is undoubtedly true that the American people have been more strongly isolationist with respect to Europe than any other portion of the world. This attitude was deeply rooted in disillusioning experiences extending far back into colonial times, and it was greatly strengthened by our experiences during and following the First World War. It may have been a grossly mistaken attitude, but there was nothing muddled about it. The average American was as clear-headed about foreign policy as the average citizen of any other country—and far better informed. He read more newspapers, magazines, and books in which foreign affairs were extensively discussed; he listened to more lectures, attended more conferences, and belonged to more organizations with an international outlook; took more courses in American schools and colleges on all phases of European history and politics than were offered in the educational institutions of any European country. To picture Americans of the 1930's as needing to be educated "out of the dangerous superstitions and delusions inherited from a past which few of them understood,"[1] is a distortion of the truth.

Americans of the 1930's and of every other period of American history have known as much about world affairs as the people of any country, and have had as few superstitions and delusions inherited from the past. American isolationism respecting Europe was born not of ignorance and provincialism, but of belief in the soundness of the policy of nonentanglement in the affairs of Europe. It was a policy that had really

[1] F. L. Schuman, *International Politics* (3rd ed., 1941), p. 623.

worked—if results were any proof—and the results of our adventure in internationalism in 1917–1918 tended to confirm the conviction that it would work as well in the future as in the past. The Senate of the United States refused to ratify the Treaty of Versailles and the Covenant of the League of Nations in 1920. The issue was taken to the people in the election of that year, and the Democratic candidate, who stood for unconditional acceptance of both instruments, was overwhelmingly defeated. The American people emphatically did not want to be involved in European affairs under the conditions required by the Versailles Treaty and the Covenant of the League. The writer of these lines happened to be engaged that year in duties which took him twice across the continent. He had unusual opportunities to hear numerous public and private discussions of the League of Nations issue in all sections of the country. It was his impression then, and it is still his belief, that the American people were not unwilling to have our government assume large responsibilities in European affairs, provided it could be done without taking a hand in the European game of power politics. This attitude was much less the result of ancient American superstitions and delusions than of knowledge (fully available in the columns of every first-class American newspaper) that the Paris Peace Conference had made a jest of Woodrow Wilson's Fourteen Points and that one of the functions of the League of Nations was to execute the work of the Peace Conference. The great failure of the pro-League campaign was the inability of its leaders to show the American people clearly and convincingly how we could take part in the League without also taking part in the kind of international politics which had characterized the Peace Conference.

From 1920 to 1940 the United States avoided direct political participation in European affairs. Our government summoned the Washington Conference of 1921–1922, which brought about a reduction of naval armaments and secured the adoption of treaties recognizing the principle of the "open door" in China. It took part in the rather fruitless naval-disarmament conferences at Geneva in 1927 and at London in 1930. It was represented in the General Disarmament Conference at Geneva in 1932. It was largely responsible for the almost universal adoption of the Pact of Paris for the outlawry of war in 1928. It entered into extensive negotiations and arrangements for the settlement of war debts, and took part in various economic conferences. Movements for peace, disarmament, and international coöperation had our moral support and sometimes a good deal more; but the only instance of political involvement was our coöperation with the Council of the League of Nations in an endeavor to solve the Manchurian problem in 1931.

Neutrality legislation. Troubled conditions throughout the world in 1935 and subsequent years raised a fear in this country that another general war was impending. Sentiment against American involvement was so strong that Congress enacted a series of neutrality measures designed to keep us from being drawn into any foreign war as the result of commercial activities in which our people might engage. These laws made it unlawful for Americans to travel on the vessels of a belligerent country except in conformity with rules and regulations prescribed by the President, and required the President, in the event of war between two or more countries, to forbid the shipment of arms, ammunition, and implements of war to such countries. They also prohibited making loans or extending credits to belligerents by financial operations in this country. Another law, known as the Johnson Act, forbade the making of loans to any foreign government or government subdivision which had defaulted its debts to the United States.

The outbreak of general war in Europe in September, 1939, quickly brought this country to the parting of the ways. American sentiment generally favored the Allied cause, and many believed that the defeat of the Axis Powers was essential to the safety of the United States. The Allies were greatly in need of supplies and armaments, but under our neutrality legislation none could be shipped from the United States. President Roosevelt asked Congress to revise the neutrality legislation, removing the embargo on the shipment of arms to belligerent countries and adopting other provisions safeguarding American interests. Congress enacted a measure, which the President signed on November 4, 1939, that lifted the embargo to the extent that war materials might be shipped on foreign vessels after the ownership in them had been completely transferred to a foreign government, agency, corporation, or national. This was known as the "cash and carry" policy.

The end of neutrality. After the fall of France in May, 1940, events moved more rapidly to modify the neutrality of the United States. Immediate and total repeal of the neutrality laws was urged, but it was an election year and Congress was reluctant to act. The President undertook, however, to use his executive discretion to give all possible aid to Great Britain. On September 3 he announced an agreement between the British Ambassador and the Secretary of State whereby in return for the privilege of acquiring air and naval bases in certain British possessions in this hemisphere the United States had transferred to Great Britain fifty destroyers. Meanwhile Congress had authorized the building of a two-ocean navy, had enacted the compulsory military service law, and had provided for a great expansion of the army. It was de-

clared to be the policy of the United States not only to prepare for its own defense but to give all possible aid to the Allies. Early in 1941, Congress, on recommendation of the President, passed the Lease-Lend Act, which gave the President authority to "sell, transfer, exchange, lease, lend, or otherwise dispose of" defense materials to the government of any country the defense of which the President might deem vital to the defense of the United States. This was the end of neutrality. Without declaring war, the United States made itself an active partner of Great Britain and all other countries at war against Germany, Italy, and Japan.

The Japanese attack on Pearl Harbor, December 7, 1941, not only put the United States into the war as a belligerent, but led immediately to the formation of closer ties with the other anti-Axis nations. At Washington, D.C., on January 1, 1942, a document called the Declaration of the United Nations was signed by the United States and twenty-five other nations. Each pledged itself to employ its full resources against the Axis, to coöperate with the other signatory nations, and not to make a separate peace or armistice with enemy countries. Being essentially a military alliance, this organization was not suitable for international cooperation in peace. To convert it into a broader and more permanent organization, a great international conference was held at San Francisco in the spring of 1945. This conference drew up the Charter of the United Nations, to which the United States in common with some fifty other nations has adhered. The United Nations is now a going concern, with a permanent secretariat, a permanent site (New York City), and regularly appointed meetings. Being a world organization, it does not confine itself to the affairs of a single continent. It is clearly apparent, however, that its success as a world organization will depend on the political alignment which develops between the United States and the major powers of Europe. The final settlement with Germany, in which the United States is deeply involved, will be a major factor in shaping this alignment. How far the United States will throw its weight into the European situation still remains one of the great uncertainties of international politics. Thus far our statesmen have disclosed no comprehensive and consistent European policy.

Relations in the Near East. In the past the United States has had no important interests in the Near East, and has never evolved a policy of any sort respecting that section of the world. Whether the fact that Great Britain and Russia, our principal copartners in the United Nations, have vital and extensive interests in the Near East which will involve us in that region cannot now be foreseen. The Near East has vital bear-

ings on the general European situation which we cannot ignore. Also, certain American commercial enterprises have acquired large interests there.

Relations in the Far East. The United States has come to have a huge stake in the region of the Pacific and the Far East. Before World War II our possessions in the Pacific stretched from the Aleutian Islands at the north to American Samoa in the South Pacific. The Philippine Islands, then an American possession, fringed the Asiatic mainland and thereby made us close neighbors of China and Japan. We have given the Philippines their independence, but have been obliged to retain certain bases there for strategic reasons. We are also under an obligation to help the Philippine republic maintain its independence. In addition we have the problem of what to do with the island possessions wrested from Japan. We cannot finally determine our policy in such matters until the future of China is more clear, the occupation of Japan is concluded, and until the rôle of Russia in the Far East is more fully developed.

Respecting China, our best known policy in the past has been that of the "open door," meaning that we were opposed to the partition of Chinese territory or the domination of China's government, territory, or economic processes by outside powers. We asserted that policy more or less vigorously and consistently for forty years prior to World War II. Indeed, it was our insistence that Japan recognize and abide by the open-door policy that caused the rupture of relations which culminated in the attack on Pearl Harbor in 1941. The defeat of Japan removed one threat to China's integrity, but gave rise to others. China came out of the war bankrupt, weak, and torn with civil dissension. She was incapable of defending herself; scarcely capable, in truth, of governing herself. If China fell to pieces, there was a clear possibility of danger to the United States. Even though other countries should keep hands off, a divided China would profoundly weaken our defensive position in the whole Pacific region.

Therefore the United States endeavored to avert civil war in China and to foster the upbuilding of a united government strong enough to maintain the independence and integrity of the nation. To protect American interests, assist in preserving order, and help in the demobilization of Japanese forces, we kept troops in China for a considerable period after the war. We gave financial aid to the central government and provided various supplies and equipment. We also sent special diplomatic missions to China in the hope that they might conciliate the rival factions and find a basis for the formation of a united government. Our efforts did not meet with success. We have, therefore, withdrawn most of our troops from China, discontinued our conciliatory measures, and are now await-

ing the next turn of events. We apparently have no other policy.

Victory over Japan brought us the responsibility of occupying Japanese territory and determining the future of that country. Our announced policy is to convert the economy of Japan from one of war to peace, to dislodge the military class from power, to convert the political system of Japan into a democracy, and then to restore the independence of the Japanese nation. The initial success of this policy has been gratifying, but no one can foresee its ultimate consequences or say when the occupation can be safely brought to a close. Although the occupation is primarily an American task, the British and Russian governments have a voice in it. The interests of those governments as well as the United States are involved in the outcome. For us, it is obvious that our Japanese policy cannot be divorced from our Chinese policy, nor from our relations with Great Britain and Russia in the Pacific area. For these reasons it is likely that our Japanese policy for some years to come will consist of going forward with the occupation program and awaiting international developments.

We have little reason to anticipate difficulty with Great Britain in Far Eastern matters. British interests in that region are great, but the government of Great Britain is no longer able to maintain its position in the Orient or in the Pacific Ocean over the opposition of the United States. British naval and airpower are no longer equal to such a task. The Pacific has become an American lake.

However, our position relative to the Asiatic continent is not so dominant. World War II brought Russia back to the Far East in great strength. She acquired the Kurile Islands and the island of Sakhalin, occupied the northern half of Korea, and obtained a commanding position as to Manchuria and the Liaotung peninsula. Thus Russia became the strongest land-based power in the Far East. The United States cannot be said to have a definite Far Eastern policy as respects Russia, unless it be that of the traditional open door in China. There have been frictions and differences between the United States and Russia in Far Eastern matters, but nothing has yet arisen to cause a showdown. The nature of Russian designs in the Far East, if any, have not been sufficiently disclosed to evoke a definite American policy. Should Russian designs emerge, and should they run contrary to American concepts regarding the future of China and Japan, the result, no doubt, would be an immediate clarification not only of our policy as to Russia, but as to China, Japan, and the whole Pacific area. We probably would oppose communistic imperialism in the Far East as stubbornly as we did the capitalistic imperialism of Japan and other countries.

Colonial Administration

The expansion of the United States. Though we have not regarded ourselves as an imperialistic people, we have a record of territorial expansion that would excite the envy of any empire in history. The tiny republic founded by the thirteen revolting colonies of England gave little promise at the outset of becoming a great world empire. Its prospects of expansion were not good. There was the Northwest Territory, embracing most of the present states of Ohio, Indiana, Michigan, Illinois, and Wisconsin; but, for the rest, it was pretty much hemmed in by the possessions of France, Spain, and Mother England. Foreseeing no other expansion, the authors of the Constitution made no provision for it. Congress was authorized in Article IV of the Constitution "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States"—meaning the domain ceded to the central government by the states at the time of the adoption of the Articles of Confederation—but as to the acquisition of new territory or the government of colonial dependencies nothing was said.

In less than fifteen years fortune dropped the vast Louisiana Territory into our lap, and President Jefferson was so disturbed by the irregularity of the procedure followed that he proposed that the Constitution be amended to supply the necessary authority. But this amendment was made unnecessary by the liberal construction of the war, treaty, and other national powers of the Constitution in the hands of the Supreme Court. Florida, Texas, California, Oregon, and other additions followed in rapid succession. In less than seventy years from the adoption of the Constitution, all of the territory now included in the forty-eight states had been acquired by the United States. No nation in history could boast of such rapid expansion. Shortly after the Civil War, Alaska was purchased from Russia. In 1898 the Hawaiian Islands were annexed, and soon thereafter, in consequence of our victory in the Spanish War, we acquired Guam, Puerto Rico, and the Philippines. American Samoa was acquired by treaty about the same time. The Canal Zone was acquired in 1903 and the Virgin Islands in 1917.

Problems in colonial administration. Prior to the acquisition of our insular and overseas possessions we really had no problem of colonial administration. All of our territorial additions were contiguous to the United States, and were destined for inclusion in the Union. Congress merely provided for their government until they were ready for statehood. No such policy could be adopted for these new possessions beyond the seas. They were remote from the United States, were largely in-

habited by peoples of alien race and culture, and some of them certainly could never be fully assimilated to the American nation. And though statehood might be the ultimate goal, the policies followed in preparation for statehood would have to be very different from those previously employed.

Vexing constitutional difficulties immediately presented themselves. Did the Constitution apply in full force to territories such as the Philippines and Puerto Rico? If so, Congress must extend to the people of these territories all the rights and privileges of American citizenship, and must follow all the requirements of the Constitution as to governmental processes. Differentiation according to circumstance and need was impossible. These difficulties were largely removed by a series of decisions of the Supreme Court known as the Insular Cases. The Court held that there must be a distinction between territorial possessions which Congress has marked for admission to statehood and those which it has not. The former were labeled "incorporated" territories, signifying the intention to make them a corporate part of the United States; the latter have been called "unincorporated," signifying of course the opposite intention. In the incorporated territories the Constitution was held to apply without exception, but in the unincorporated territories it was said that only the fundamental provisions of the Constitution were effective. Those which were formal in character, having to do with modes and processes of government rather than substantial rights, did not apply. The determination of which territories belonged in each class and when a territory should be advanced from one to the other was left to the discretion of Congress. The Court merely ruled that the Constitution and general laws of the United States do not extend to a territory until Congress by some definite and unequivocal act makes them apply.

With the leeway thus accorded, Congress has proceeded to provide for each of our territorial dependencies a system of local administration and central supervision deemed suited to its needs. Only Alaska and Hawaii are in the class of incorporated territories, though Puerto Rico clearly approaches it. These have governmental systems closely analogous to the states of the Union. The others scale all the way from Puerto Rico, a largely self-governing colony, down to insular governments like those of Guam and Samoa which are administered by the Navy Department.

Alaska and Hawaii. Alaska has almost complete home rule. The governor is appointed by the President and Senate and so are the judges. The Legislature, consisting of two houses, is elected by the citizens of the territory, and has authority to make all laws necessary for the in-

ternal government of the territory. The governor may veto acts of the legislature, but his veto may be overridden by a two-thirds vote as in most of the states of the Union. The voters elect a territorial delegate who enjoys the privileges of the floor in the House of Representatives at Washington but has no vote. The people of Alaska are given full American citizenship. The governmental system of Hawaii is very similar to that of Alaska. The governor, the secretary, and the judges are appointed by the President and Senate. A legislature of two houses is elected by the voters and has power to make all laws necessary for island affairs. The people enjoy full American citizenship, and, as in the case of Alaska, elect a delegate to the House of Representatives in Washington.

Puerto Rico. A large degree of home rule has been given Puerto Rico. Its people are American citizens. In 1947 they were authorized to elect their own governor, an unusual privilege for an American dependency. The people of Puerto Rico also elect a bicameral legislature and a resident commissioner to sit without vote in the House of Representatives at Washington. The governor has a veto on acts of the legislature. Should the legislature pass a measure over the governor's veto, it goes to the President, who has ninety days in which to decide whether he will sustain the governor or the legislature. The President's decision is final. Congress also reserves authority to annul acts of the Puerto Rican legislature. Provision is also made that if the legislature fails to make appropriations for the support of the government, the amounts standing in the current budget are renewed for the ensuing year.

The Philippines. In January, 1933, Congress passed over the veto of President Hoover an act to grant the independence of the Philippine Islands under a ten-year plan. This measure became inoperative by reason of the failure of the Philippine legislature to accept it within the time specified. In March, 1934, an amended measure along the same lines was passed by Congress and approved by President Roosevelt. This measure provided for the acceptance of the plan by the Philippine legislature within a stated time; the election of delegates to a convention to frame a constitution for the Philippines; the approval of the constitution by the President of the United States; the ratification of the constitution by a plebiscite of the Filipino people; the election of officers to administer the Philippine Commonwealth under the constitution thus adopted; the formal transfer of the functions of government to the Philippine Commonwealth; and final independence ten years from the inauguration of the Commonwealth, on condition of the fulfillment of certain terms and conditions. During the ten-year probationary period, acts of the Commonwealth touching external trade and immigration,

loans from foreign countries, and monetary matters had to be approved by the President of the United States. The President was also given the right to intervene to safeguard and preserve the Philippine Commonwealth. A United States High Commissioner was stationed at Manila to act in a supervisory capacity. Also, the Supreme Court of the United States was the final court of appeal for the Philippines during the ten-year period. The terms of the act were accepted and carried out by the Filipino people, and in November, 1935, the Philippine Commonwealth was duly established. On July 4, 1946, in pursuance of the foregoing measure, the Philippine Islands became an independent nation.

Other possessions. The Virgin Islands are governed by a governor and certain administrative officials, appointed by the President and Senate, in conjunction with two legislative councils, some of whose members are elected by the islanders and some appointed by the governor. The inhabitants are given American citizenship, but have no delegate in Congress and little home rule. The Panama Canal Zone is under a governor appointed by the President and Senate and an administrative authority at Washington similarly chosen. There is no legislative body in the Canal Zone. Laws for the government of the Zone are enacted by Congress and are supplemented by the decrees of the governor. Guam and American Samoa are under the Office of Island Governments in the Navy Department and are governed by naval officers.

Colonial policy. As for colonial policy, it cannot be said that we have one. We have endeavored to provide honest and efficient government for our colonial dependencies, and in some ways have done much for their material welfare. On the other hand we have not sought the development of our colonial possessions as an integral part of the American economic system. We have treated them more as stepchildren than as blood kin, and have frequently subordinated their interests to our immediate concerns. We have neither exploited them, as some countries are wont to do with dependencies, nor prospered them with special benefits, as other countries have done. We have protected them against foreign aggression, given them reasonably efficient though not always sympathetic government, and accorded them such access to American markets as did not seriously conflict with the interests of our own producers.

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CHAPTER 25

GOVERNMENT FINANCE

Nature of the Problem

It is hard for the ordinary citizen to take the same common-sense view of government finance that he does of the money matters of private persons. There seems to be some sort of magic about government financing which deceives him into believing that governments can spend without restraint and yet never want for income. He is opposed to heavy taxation and votes against it at every opportunity, but he wants public spending to go on just the same.

The difficulties of the average citizen in respect to government finance usually arise from a lack of understanding. He does not comprehend the mysteries of public finance because strange words are used to describe it, and he feels that in all probability the common rules of income and expenditure do not apply to it at all. It is true, of course, that governments can do things with money and credit that no private individual or corporation can do, but in the long run the iron laws of arithmetic will catch up with a government just as surely as with a private person. The only real difference is that a government can delay the final reckoning somewhat longer.

Governments cannot operate without income, and there are only two ways for them to obtain a substantial income. One is by earnings and the other is by taxation. They can obtain, for a limited time, the appearance of income by borrowing and by coining money or manipulating the currency, but real income cannot be produced by these methods. So long as a government can get the necessary income, it may spend without a care; but, when it spends in excess of its income, there are limits to its ability to go on spending.

Government earnings. A government can obtain income by selling goods or services to others just as a private enterprise would do. It can sell to other governments or it can sell to private individuals. All governments do a certain amount of this and some do a great deal. This practice is called state enterprise. When a government owns and operates a postal system, a water-supply system, or an electric light and power system it is engaged in state enterprise. If state enterprise is carried to the point where all means of production and distribution are carried on

by the government, we have what is called state socialism. Under state socialism, since the government controls the whole process of production and distribution and fixes both prices and wages, it should be able to derive all of its necessary income from earnings, though as a matter of fact no socialist state has ever been able to do so.

State enterprise, however, cannot be expected to provide more than a part, and usually but a minor part, of the necessary government income. The government seldom gets into enterprises that will stand a high rate of profit, and as a matter of fact many government enterprises are actually run at a loss. It is also true that the total number of government enterprises and the volume of business done by them are not usually great enough to produce the necessary income even though fat profits were always forthcoming.

It seems clear, therefore, that government earnings constitute a rather short sock from which to draw needed income.

Taxation. The only other source of real income is taxation. By taxation the government compels its subjects to share their wealth and income with it. It may do this in many ways, but there are limits to what any government may take from its subjects. It can get nothing if there is no wealth or income to be taxed. Taxes which hinder business and discourage the acquisition of wealth cannot be expected to produce revenue. Such taxes are often levied, but their purpose is usually regulation and not revenue.

Nor can very much income be produced by taxes that are so burdensome as to cause general resistance or evasion. Up to a certain point the taxpaying public will suffer itself to be milked without rebellion. Just where that point is, nobody knows. Sometimes, as was the case in the American Revolution, it is far lower than the ruling authorities suspect. Tax rebellion usually starts with evasion. There are very few taxes that cannot be evaded to some extent, and when public sympathy is with the evaders it is very difficult for the government to plug all the holes. General evasion may be met by rigorous enforcement; but in such cases the cost of collection usually rises so high that there is little profit in trying to collect. Futhermore, rigorous enforcement may stir up so much resistance that collection is hopeless. When the British authorities undertook to arrest and prosecute tax-evading American colonists, they could not get American juries to convict the defendants; and when they tried to do away with jury trial, they found themselves with a revolution on their hands. Forcing a revolution is, of course, the poorest possible way to get revenue.

The taxing power leads to no inexhaustible pot of gold. A government wishing to obtain a substantial income from taxation never makes

the mistake of killing the goose that lays the golden eggs or of angering her to the point where she refuses to lay.

Borrowing. When governments find themselves unable to gain enough income from earnings and taxation, they may resort to borrowing. But they cannot borrow unless their credit is good, and in order to keep their credit good they must pay interest fully and promptly and repay or soundly refinance the principal as it falls due. If they fail in these requisites, they will have to pay such high rates of interest and accept such heavy discounts that borrowing will become unduly expensive. Borrowing produces no real income; it merely anticipates future income from earnings or taxation.

Money and credit. Governments unable to earn, tax, or borrow have often sought to keep themselves afloat by debasing the coinage, issuing worthless paper money, or juggling bank credit. Such devices may be successful within moderate limits, but when carried too far they always lead to disaster.

Governments have the sole power to coin metallic money; but, unless they themselves own gold and silver mines, they have to purchase these necessary metals in the open market or else act merely as an agency to convert metal into coin for the benefit of private owners. In the latter case the government gains nothing but the small fees charged for coining the metal. In the former case it has to give something in exchange for the metal bought. What can it give? It can give property, if it has exchangeable property to give; which usually it has not. It can give its own bills or notes, which is usually what it does give. People will exchange gold and silver for government paper, if they have confidence in the government; not otherwise. Of course a government can attempt to force people to surrender gold and silver, but that is likely to be a very unprofitable transaction if the people do not have confidence in the government's intention and ability to pay its debts. The United States government expropriated all of the monetary gold in the country in 1933 and 1934, but this measure was effective only because the great majority of Americans had faith enough in their government to turn in their gold voluntarily. If they had refused to do so, the government would have had a hard time finding enough gold to do it any good and there would not have been jails enough to hold all of the gold hoarders.

Governments have the authority to coin money, and they have the ability, if they have the confidence of the people, to get possession of all monetary gold and silver. But they do not have the ability to impart purchasing power to money. That power results from its exchange value in relation to other commodities. All the government can do is to determine the units of coin and fix the number of grains of metal in the

basic unit. If the people are willing to exchange other commodities for gold or silver, those metals have purchasing power and can be used as money. When the government declares that a certain number of grains of gold make a dollar and that the dollar is the basic unit of coin, it sets up a yardstick for the measurement of values in exchange. People become accustomed to the use of this yardstick and think of a dollar as being a dollar without regard to its actual gold content. They will take a coin or a bill marked as a dollar because they have faith that they can always exchange it for something else that they regard as worth a dollar. In short, they come to have a feeling that a dollar is an unvarying standard or measure of value as well as a thing of value in itself. If they did not have this feeling; if, on the contrary, they felt that the value of the dollar was constantly fluctuating like other values, they would never take a dollar without being sure of its actual value in exchange.

This public confidence in the established monetary standard makes it possible for a government to profit by debasing or devaluating money. Debased coin is coin supposedly containing the standard number of grains of metal but actually short of that amount. Devaluation is a reduction of the number of grains making up the standard without changing the name or other characteristics of the unit. Both are a species of sharp practice, but debasing is worse than devaluation. In debasing the government actually steals so many grains from each coin, but allows it to circulate as though it contained the full number. In devaluation the government openly shortens the yardstick by cutting down the number of grains required for the standard, assuming that the people will still accept it as the old yardstick. If they do, whatever is saved is profit to the government. One should not get the impression, however, that governments can play fast and loose with debasement and devaluation without running into trouble. Within moderate limits they can play this game; but, if they go too far, they destroy the confidence in the monetary system, and the whole thing tumbles like a house of cards. No government has ever been able to finance itself to any large extent by this sort of trickery.

Governments also have the power to issue paper money, which is usually known as currency. If there is general confidence in the integrity of a government and in its ability to pay its debts, its promises to pay will be readily accepted by everyone. Such a promise in written form and stamped as a dollar will be regarded as just as good as a dollar in coin, and will readily circulate as currency. This situation offers a possibility of government financing by what is known as fiat money, that is, money having nothing behind it save the unsupported promise of the government to pay, and made legal tender for the payment of debts not

by reason of its intrinsic value but because the government commands that it shall be so regarded. The possibility of financing by printing-press money is limited. When such money is issued in large quantities, it depreciates in purchasing power. The people lose faith in it and will not take it at par. The government is thus in worse shape than before, because its money will buy less. To meet its needs, it issues more printing-press money, and more depreciation occurs. If the process continues, paper money will become valueless; and the government will be forced to turn to other sources of income. Meanwhile commerce and industry will have been ruined by the wild orgy of inflation that has occurred.

Governments also have the power to charter banks and thus to control the credit operations of such institutions. Using this power, they can force banks to use government notes and bonds as the principal investment for their reserves. In so doing the government may be able to expand its borrowing power very considerably, and also to bring about an inflation of the currency without issuing its own fiat money. But these possibilities are limited. Should the government press so far with such a policy as to arouse suspicion that bank reserves are composed of promises which the government cannot or will not redeem, people will cease to entrust their money to banks and that source of government income will vanish into thin air.

Summary. The conclusion to which we are necessarily brought by the foregoing review of the income possibilities of government is that no government can spend in excess of its ultimate ability to meet its bills by earning or by taxation without becoming insolvent. When a private individual or corporation becomes financially insolvent, the law provides a way out by means of bankruptcy. The insolvent debtor is declared bankrupt and a court takes over his assets and distributes them proportionately among his creditors. But insolvent governments cannot be put through bankruptcy. The only way out for them is repudiation. And when a government repudiates its debts, it risks downfall for itself and disaster for its people.

The central problem of government finance, therefore, is to keep expenditures within the bounds set by the factors controlling real income. These factors are variable and are not always easy to gauge. Public opinion seldom falls squarely in line with them, and the most courageous and intelligent statesmanship is necessary if sound financial policy is to be achieved.

Government Revenues in the United States

Sources of government income. Government revenues in the United States are mainly derived from taxation. Although there has been a

great development of government enterprise, both locally and nationally, the net revenues of these undertakings are of no great consequence. Many do not pay their own operating costs, and very few are capable of producing profits enough to contribute materially to the general income of the government.

There are two general forms of taxation—direct and indirect. Direct taxes are assessments levied flatly upon persons, property, income, or specific wealth in some form, and are collected outright from the very person on whom it is intended that the burden shall fall. Indirect taxes are charges made for various privileges or rights, and are collected from one person with the expectation that he will pass them on to others who do not pay the tax directly to the government. Both direct and indirect taxes are widely used in the United States.

In most countries the tax situation is much simpler than in the United States because the full power to tax is vested in the central government with authority to exercise the entire quantum of power itself or delegate such powers as it may choose to local subdivisions. In this country the entire quantum of taxing power is vested nowhere. Our Constitution undertakes to limit the taxing powers of both the central government and the states, and nearly all of our state constitutions endeavor in some degree to limit the taxing power of the state and its local subdivisions. The result is a situation so complex as to cause tax experts oftentimes to throw up their hands in despair over its intricacies.

Limitations on the taxing power. Broadly speaking, the following are the generally recognized limitations on the taxing power of the central government:

1. It may not levy a tax on articles exported from any state.

2. It may not levy taxes for private purposes or in any other way contrary to due process of law.

3. Its revenue laws must not discriminate in favor of the ports of one state over those of another or require vessels plying between different states to pay duties on such commerce.

4. All duties, imposts, and excises levied by it must be uniform throughout the United States.

5. All direct taxes levied by it, save the income tax, must be apportioned among the states according to population.

The following are the general limitations on the taxing power of the states:

1. They may not levy taxes upon imports or exports.

2. They may not levy taxes on interstate commerce.

3. They may not levy tonnage taxes on ships entering their ports, or charge inspection fees in excess of the amounts necessary to defray the costs of examination.

4. They may not levy taxes for a private purpose or otherwise contrary to due process of law.

The United States Supreme Court has held that neither the federal government nor the states may tax the necessary agencies and instrumentalities of the other. The Court's opinion of what constitute such nontaxable agencies and instrumentalities has varied a great deal from time to time.

The usual limitations on the power to tax found in state constitutions are:

1. That taxes shall be levied and collected for public purposes only.

2. That taxes shall be equal and uniform throughout the state.

3. That the power of taxation shall never be surrendered, suspended, or contracted away.

4. That all property shall be taxed in proportion to its value.

5. That the tax levy in any year shall not exceed a stated number of mills or cents per given unit of valuation.

6. That counties, cities, and other local subdivisions shall have only such powers of taxation as may be prescribed by law.

7. That local units of government shall not be permitted to levy taxes in excess of certain prescribed rates or amounts.

8. That the assessment of property for taxation shall be at its full value or a definite proportion thereof.

9. That private, local, or special legislation exempting property from taxation shall not be enacted.

The problem of multiple taxation. The questions involved in the actual application of the foregoing restrictions on the power to tax are too numerous and complex for discussion here. They raise some of the most bewildering difficulties of American government. It would only add to the reader's confusion to try to explain in a few paragraphs what tax experts have not been able to unravel in many volumes. One thing is plain, however, and that is that few restrictions are imposed as to the selection of the objects or subjects of taxation. There is no rule against double taxation, and triple and even quadruple taxation are sometimes encountered. Lucrative and easy sources of revenue are apt to be pounced upon by every tax authority which stands a chance to extract a penny from them. Alcoholic beverages at the present time pay taxes to

both national and state governments, and in some parts of the Union they also pay to county, town, and city governments. Other examples of multiple taxation are to be observed in the instances of inheritance taxes, income taxes, real estate taxes, tobacco taxes, and many others. Multiple taxation is not only grossly unjust in some cases but causes endless confusion and complication. No scientific and equitable plan of taxation can be worked out while such a condition obtains. Tax reformers have often proposed a complete segregation of revenue sources, allocating certain taxes entirely to the national government, others to the states, and still others to local units of government. But nothing much has been accomplished in this direction. In a few of the states a partial segregation of revenue sources as between the state and local units of government has been established, and some of the states levy and collect the whole of certain taxes, as for example gasoline taxes and income taxes, and remit a certain portion thereof to counties, cities, and other local units. Some tax reformers have urged a plan whereby all taxes would be levied and collected by the federal government. The national treasury would then make remittances to the states on a proportionate principle. Local sentiment has always been too strong for such a plan to win general favor.

Direct taxes in the United States. Direct taxes in some form are levied by practically all units of government in this country. These include income taxes, property taxes, corporation taxes, inheritance taxes, poll taxes, and some others. The types named will now be briefly discussed.

Income taxes. Taxes upon incomes are levied by the national government and about half of the states. This is a relatively new form of taxation in the United States. Congress levied an income tax during the Civil War but later abandoned it. In 1894 another federal income-tax law was enacted. The Supreme Court ruled that this was a direct tax and hence must be apportioned among the states according to population, which rendered it practically worthless. To escape this difficulty Congress proposed and in 1913 the states ratified the Sixteenth Amendment, which gives Congress power to levy and collect income taxes without apportionment among the states. Upon the adoption of this amendment Congress immediately enacted an income-tax law. Since then it has been the policy of the federal government to derive the principal part of its revenues from income taxes. The first state income-tax law was enacted in Wisconsin in 1911. Other states gradually followed suit. In recent years, as other sources of revenue have diminished, the states have been turning to the income tax in large numbers.

Federal income taxes are of two general types—taxes on personal incomes and taxes on the incomes of corporations. Personal income taxes are levied on the incomes of individuals. All persons with gross incomes

above a fixed amount are obliged to make returns, but only net income is taxable. Deductions from the gross income are allowed for the payment of other taxes, for the support of dependents, and for various other reasons. The net income is taxed at a stated rate, and this is called the normal tax. Then, if the net income exceeds a stated amount, progressive surtax rates are applied. Each revenue law for several years has changed the terms of the personal income tax. The enormous need of the federal government for additional income has led to the constant lowering of the amount of exempt income, the elimination of many deductions from gross income, and the raising of both normal and surtax rates. Some students of taxation believe that the personal income tax has been pushed almost to the limit of productivity.

Federal corporation income taxes are also levied on net incomes. Various deductions from gross income are allowed for operating costs, and all net incomes in excess of a stated figure are subject to taxation. Normal rates are levied up to a fixed point and the surtax rates are applied. The terms of the corporation income-tax laws have been subject to extensive change in the direction of lowered exemptions and increased rates.

Most of the state income taxes are similar to the federal income taxes. On personal incomes the state exemptions are usually lower than the federal and the rates levied on net incomes seldom go so high. Not all of the states levy corporation taxes, but there is a strong trend in this direction. Some of the states also tax capital gains.

As a source of revenue the income tax has great advantages and also great shortcomings. In times of prosperity it is highly productive, but in times of business depression when the government has the most need of a large and reliable income it fails. Federal revenues from the income tax totaled $3,040,000,000 in 1930, $1,557,000,000 in 1932, and $5,658,000,000 in 1938. Such fluctuations cannot be avoided by raising the rates and lowering the exemptions as national income falls. That would produce much opposition and evasion, but not much revenue. Income tax collection costs are always high, but in flush times they are relatively small compared to the revenues realized, whereas in hard times they are unduly large. The adverse reaction upon business is also more severe in difficult times, just when it should be least so. Another serious problem is the plugging of loopholes which enable many taxpayers to escape their just share of the burden. Experience in the United States has revealed that wealthy persons who can afford to employ experts to make out their tax returns have often avoided the full burden of the tax. In spite of its defects, however, the income tax is regarded as one of the best of all taxes. Not many forms of taxation are less open to evasion, and none is

fairer either in principle or practice. More closely than any other tax does it approach the ideal that tax burdens should be distributed among the people on the basis of ability to pay. And if governments could acquire enough financial sense not to waste the proceeds of the income tax in the fat years, it would provide ample reserves for the lean ones.

The payroll taxes levied by the federal government to support the social security program probably should be classified as income taxes. These are collected from the employer, but are levied on the employer and employee. The employer deducts the required percentage of the salary or wages of the employee and pays it over to the government, and also pays as his portion of the tax a certain percentage of his total wage or salary outlay.

Property taxes. Taxes on property are of two kinds—real-property taxes and personal-property taxes. Taken together these constitute the general property tax. This is a tax laid upon property in proportion to its value. Though in times past the federal government has occasionally resorted to property taxes, it has not found them practicable to any great extent. The constitutional requirement that direct taxes must be apportioned among the states according to population has rendered the general property tax undesirable from the federal standpoint, and it has therefore been resigned to the states. A few of the states have in turn resigned it to local government units, deriving their revenues from other sources; but in most of the states both the state and its local units of government derive a large part of their income from the general property tax.

It is widely agreed that as to personal property the general property tax has been a failure. There are two kinds of personal property—tangible and intangible. Both are exceedingly difficult to assess for taxation. Some of the most valuable forms of tangible personal property—for example, jewels and art objects—are so easy to conceal that they largely escape taxation. The same may be said of stocks, bonds, mortgages, and other types of intangible personal property. Household furnishings, livestock, merchandise, and other forms of tangible personal property, though not readily concealable, are seldom a reliable measure of taxpaying ability and are of such varied character that the average assessor cannot be expected to appraise them correctly and fairly. For these reasons some of the states have abandoned the personal-property tax altogether. They have found that the revenues are small compared to the trouble and cost of collection, and that with the most vigorous administration they are successful in taxing but a small part of the personal property legally subject to taxation. This looseness, of course, is grossly unfair to property that cannot slip past the assessor. Some of the states retain the personal-property tax, but allow the taxpayer to

make a voluntary return in which he lists his own property and makes his own valuations. This honor system brings in quite a little revenue without much cost, but manifestly penalizes the honest taxpayer. Most of the states retaining the personal property tax go through the motions of mandatory assessment and collection, but in actual administration of the law they are so lax that the taxpayer practically calls the turn. Through the registration of motor vehicles and chattel mortgages the assessor catches his automobile and possibly his radio or electric refrigerator, but for the rest he virtually takes the taxpayer's word.

Up to 1920 or thereabouts the tax on real property was regarded as one of the most satisfactory of all taxes. Land and buildings can never escape the assessor. Moreover, their values are more stable than are those of other forms of property, and are fairly well standardized and thus not too difficult to appraise accurately and fairly. Furthermore, until lately, the ownership of real property was a fairly trustworthy index of capacity to pay. Because of these facts real property was made to bear the major part of the load. Between 1920 and 1940 there was a great shrinkage of real estate values and earnings. Real property could not carry its former tax load. Accordingly, state and local governments sought other sources of revenue to supplement the general property tax. Land valuations were revised downward on the tax rolls, and in many states the tax rates were limited by constitutional enactments. The war boom of the 1940's restored real estate earnings but did not correspondingly restore the general property tax.

In the actual administration of the general property tax a number of serious difficulties arise. Not the least of these is the problem of valuation. Since property pays according to value, the tax cannot be levied and collected until a definitive official valuation has been made. This valuation is called assessment. The county or town assessor and his deputies list all parcels of property in their jurisdiction and place a value upon them. Assuming the work to be done conscientiously and honestly, which is not always the case, it is impossible for it to be done accurately and equitably, as no two assessors have the same standards or judgments of value. Provision is therefore made in every tax jurisdiction —county, town, or city—for the review and equalization of assessments. Sometimes a special board of equalization is set up and sometimes the board of county commissioners acts in this capacity. Taxpayers may appear before this body and ask to have their assessments adjusted according to their representations of the value of their property. The board has authority to make such adjustments as seem proper. Because there are also wide divergences in valuation as between counties, the state tax commission in many states is empowered to equalize county assessments.

But despite all these precautions complaints are universally, and perhaps justly, heard that assessments are unfair and inequitable, and that some classes of property owners and some localities thus shift the burden of taxation to others.

Another serious difficulty is the rule in many states that the rate of taxation must be uniform on all kinds of property. It has been demonstrated that some types of property will not stand as high rates of taxation as others. Particularly is this true of intangibles. When it is sought to tax them at the same rate as real property, they commonly take flight to other jurisdictions where the rate is lower, thus leaving the whole burden on real estate. To meet this difficulty a number of states have adopted constitutional amendments or enacted laws permitting the classification of property for taxation and requiring uniformity of rates only within classes. This does not wholly solve the problem, however, for just classification is exceedingly difficult and any classification which decidedly favors one class of property tends to induce wealth to seek investment in the classes bearing the lighter rates and thus overburdens those carrying the heavier rates.

Corporation taxes. Corporation taxes have come into wide favor in the United States during the past quarter century. These are levies made upon the income, profits, receipts, or stock of business corporations. Both the federal government and the states employ the corporation tax. The national government taxes the income of corporations. All of the states levy corporation taxes in some form. These are applied mainly to public utilities, industrial corporations, banks, and insurance companies, but some of the states levy upon the capital stock, income, or gross receipts of all corporations. In all states corporations must pay a charter tax or a tax for the privilege of doing business in the state. Public-utility corporations in many states are subject to special franchise taxes. Corporations, of course, pay taxes on their real estate and other tangible property the same as natural persons. In a number of the states the bulk of the revenues of the state government is derived from corporation taxes.

Inheritance taxes. The inheritance tax is another form of direct taxation that has become well nigh universal in the United States of late years. We must classify this as a direct tax despite the decision of the Supreme Court that it is a tax not on the ownership but on a special use of property, and therefore an excise tax. This decision averted the necessity of apportioning the federal inheritance tax among the states according to population, but it did not alter the fact that inheritance taxes are directly levied upon and collected from those intended to pay and cannot be shifted. From the economic standpoint, therefore, they are direct taxes if any taxes at all are direct. The first state inheritance-tax law was

adopted by New York in 1885. At present forty-five states have such laws. The federal inheritance-tax law was enacted in 1916.

Inheritance taxes are graduated or progressive taxes. A certain rate is levied upon inheritances above a given amount, and higher rates on larger inheritances until the maximum is reached. Higher rates are usually levied upon the inheritances of collateral heirs than upon those of direct heirs. The problem of multiple taxation has caused endless trouble in connection with inheritance taxes. A deceased person might leave property in more than one state. The state in which he resided at the time of death would attempt to tax the whole estate, and each state in which he had property would insist upon its right to tax that portion of the estate in its jurisdiction. To mitigate duplication between federal and state inheritance taxes the federal law provides that inheritance taxes paid by heirs in any state shall be credited up to 80% in payment of federal inheritance taxes. A number of the states now have reciprocal laws exempting the estates of nonresident decedents if the decedent's own state likewise exempts the estates of nonresidents. There is now a strong movement to lower the exemptions and increase the rates of inheritance taxes. Proposals have been advanced in Congress to amend the federal inheritance-tax law so as to increase the rate to 100% on all above $1,000,000.

Poll taxes. The capitation or poll tax is an ancient form of direct tax that is falling into disuse. It is a flat annual levy on all citizens or all male citizens within certain age limits, usually 21 to 45 or 50. The federal government levies no poll taxes. Once poll taxes were levied in almost every state; at the present time they are used by the state or certain local units of government in about one-half of the states, but the rates are low and the revenues small. In several states the payment of poll taxes is necessary to vote, and the tax is a means of circumventing the Fifteenth Amendment. In the remainder of the states it is retained largely because of the feeling that every citizen ought to be made conscious of pecuniary obligations to his government. Some states permit citizens to work out their poll taxes on the roads.

Indirect taxes. Indirect taxes are classified in the Constitution as duties, imposts, and excises. Broadly interpreted, these terms are sufficient to cover practically all important forms of indirect taxation save license taxes. A duty is usually defined as a toll or charge on importation, exportation, or consumption. An impost, strictly speaking, is a tax on imports. Excises are internal taxes levied on specified articles, commodities, occupations, trades, dealers, producers, manufacturers, operations, or uses of things. A license is an authority given to do certain things or engage in certain occupations or businesses which would other-

wise be illegal. Though charges are levied for the privilege, the primary purpose is not revenue but regulation.

Import taxes. Duties and imposts in this country are levied only by the federal government, the states being forbidden to tax either exports or imports. Customs receipts from duties on imports once constituted the principal source of revenue for our national government, and at times rolled up surpluses that the government knew not how to use. Those good old days are apparently gone forever. With the constant raising of our tariff walls and the consequent decline of our import trade, revenues from customs duties have shrunk to a relatively small item in the annual budget. The principal purpose of customs duties now is regulatory, the duties being fixed not so much with a view to the production of revenue as to the protection of American industry from foreign competition. At this point, normally, we should introduce a little essay on the tariff policy of the United States, but at the present writing the United States has no tariff policy. For many years there was a sharp controversy between the advocates of a high protective tariff and those who favored a low tariff or a tariff for revenue only. The high-tariff crowd nearly always won out, but there was so much petty politics in the making of tariff schedules that Congress finally was induced to establish the United States Tariff Commission to function in an advisory capacity in studying tariff problems and recommending changes in the tariff laws. The first Tariff Commission, established in 1909, was soon discontinued. It was reëstablished, however, in 1916, and was completely reorganized in 1930. The 1930 law gave the Commission power to conduct investigations and supply tariff information both to Congress and the President, and to make recommendations for changes in rates. Authority was also given the President, on the finding of the Tariff Commission that existing rates were too high or too low to equalize costs between American and foreign producers, to raise or lower specific rates by 50%. The Tariff Act of 1934 empowered the President during the succeeding years to make reciprocal agreements with foreign nations for tariff reductions without consulting the Tariff Commission. Such reductions may not exceed 50% of the previous rate. About twenty agreements of this sort have been concluded.

Excise taxes. Both the federal government and the states in the last few years have turned to excise taxes as a ready means of increasing public revenues. These are really taxes on consumption, but unless they go very high the consumer is but faintly aware of the fact that he is being taxed. If levied on things widely consumed, they are prolific yielders of revenue. Federal excise taxes are now levied upon alcoholic beverages, tobacco, gasoline, automobiles, automobile accessories, electri-

cal energy, real-estate conveyances, safe-deposit boxes, toilet preparations, jewelry, radio receiving sets, sporting goods, mechanical refrigerators, cameras, matches, firearms, soft drinks, candy, chewing gum, playing cards, the issue and transfer of stocks and bonds, the transportation of oil by pipe lines, and the sending of messages by telegraph, telephone, radio, or cable. State excise taxes are at present levied upon gasoline, alcoholic beverages, tobacco and tobacco products, butter substitutes, amusements, cosmetics, soft drinks, confections, firearms, malt, sporting goods, electric energy, retail sales, gross receipts, and a whole host of other things.

Excise taxes, though relatively painless and fairly easy and economical to collect, have very decided drawbacks. If levied only on luxuries, they rarely produce sufficient revenue. If levied upon necessities, they bear more heavily on the poor than on the rich. If the levy results in material price increases, consumption declines or shifts to untaxed commodities with a consequent loss of revenues. And if not safeguarded by stringent and effective controls, there is great danger of "pyramiding," that is, adding part or all of the tax to each successive turnover of the commodity, with the result that the consumer pays double or treble the actual tax, the difference between the actual tax and the tax as charged to the consumer being pocketed by manufacturers, middle men, and retailers as extra profit on their share in the transaction.

A form of excise taxation which has been increasingly favored in recent years is the general sales tax. This may take the form of a levy on the sales of manufacturers or on the sales of retailers. The retail sales tax may be levied on the retailer himself or on the purchaser. If the latter, the merchant merely acts as the collector of the tax. It is expected that the manufacturer and retailer, if the tax is levied on them, will pass it on. Hence, the sales tax in this form is open to the objection that it may be pyramided at the expense of the consumer. This pyramiding is not possible when the tax is levied directly on the retail purchaser. Many states have adopted this type of retail sales tax. It has proved to be an excellent producer of revenue, but if the rates are high it operates as a brake on spending. A federal retail sales tax has been strongly urged, as a means both of supplementing the income tax and of curbing inflation. State governments as well as private interests have strongly opposed federal entry into this area of taxation.

License taxes. License taxes are levied by all branches of government in the United States, but only in state and local government are they considerable producers of revenue. Federal licenses are required for the manufacture of alcoholic beverages, for the manufacture and sale of narcotic drugs, to operate aircraft in interstate commerce, and for

various other purposes; but the main object is regulation, not revenue. Scarcely 10% of the revenues of the federal government are derived from license taxes. Businesses and occupations now licensed by state or local governments include theaters, hotels, restaurants, beer parlors, soft-drink establishments, pool rooms, dance pavilions, warehouses, rooming houses, amusement parks, motor-transport companies, chain stores, motor-vehicle operators, and numerous professions and skilled trades. Theoretically the purpose of licensing is to facilitate the regulation of the licensed occupation, and the license fee is merely to cover the cost of regulation. Regulation is undoubtedly a factor in every case, but of recent years there has been a tendency to boost license charges above any conceivable cost of regulation. The chain-store tax, now being widely adopted by the states, affords a good illustration of this. In imposing this levy upon chain stores there is a clear purpose to regulate chain merchandising and eliminate abuses detrimental to the independent competitor, but most of the states graduate the fees so that the tax burden increases with the number of stores. This may or may not discourage the growth of chains, but it invariably puts money in the public treasury. State and local governments now obtain over a billion dollars annually from license charges.

A program of tax reform. An integrated, balanced, and sound revenue program for the nation as a whole—what should it embrace and how may it be achieved? Professor Edwin R. A. Seligman, one of the leading tax authorities of the United States, has stated [1] that all reforms must converge around three points: (1) complete coördination of national, state, and local revenue systems, eliminating duplications, introducing order and correlation, and giving attention both to the total burden on the taxpayer and the proper claims of central and local finance; (2) discontinuance of the policy of tax exemptions which has brought into existence over thirty billions of tax-exempt securities and twenty billions of tax-exempt tangibles; (3) more rational and scientific use of indirect taxes to supplement direct levies, seeking the fullest possible return from excises least objectionable from the standpoint of social and economic policy. How to attain these objectives with taxing power divided between the federal government, forty-eight states, and uncounted thousands of local units is a problem for which no ready solution can be offered. Honest and able statesmanship can do much, but the complete solution involves such drastic changes in the political habits and ideas of the American people that a long process of education will be necessary to break down the resistance to far-reaching reforms. Sweeping changes in the taxing system are equally feared by the taxpaying and the tax spending publics.

[1] *Nation*, April 27, 1932.

Government Borrowing and Lending

The public debt. When, on June 30, 1938, the debt of our federal government mounted to $37,000,000,000, newspaper accounts referred to that figure as an "all-time high." In two years it had gone to $45,000,000,000 and in the next four years to $219,000,000,000. And this was by no means all of the American public debt, for the indebtedness of state and local governments would add another $28,000,000,000 at least. Reducing the aggregate public indebtedness to a per capita basis, every American in the year 1944 was carrying at least $1700 of indebtedness for the government in addition to his own private financial burdens. But he was much less aware of the former than the latter.

Why this staggering load of public debt? Why do governments have to borrow? And why in such tremendous amounts? What are the consequences of government borrowing, and what policies should control the contracting and retirement of public debts? Some of these questions are fairly easy to answer; others furrow the brows of all the experts in public finance.

Governments borrow for much the same reasons as private individuals. They have expenses in excess of current income, they need or wish to make outlays that would unduly burden the budget of a single year, they have emergencies to meet and cannot finance them out of current revenues, or they are improvident and extravagant and borrow because borrowing is the easiest makeshift available. It has been vigorously contended by exponents of the pay-as-you-go principle that governments should never borrow or should do so only to meet great emergencies which cannot be financed in any other way. It is possible to demonstrate by faultless mathematics that such a policy would reduce the costs of government many millions of dollars, and would forestall much of the prodigal spending induced by the easy deferment of obligations through the floating loans. It is conservatively estimated that if all public debts could be wiped out the annual cost of government in the United States would be $4,000,000,000 less than it is. In view of this fact is there any justification at all for government borrowing?

Reasons for government borrowing. It is rarely possible for a government to operate on a strictly cash basis. There are always unforeseen and unforeseeable emergencies. To provide against the extraordinary needs occasioned by such emergencies, if borrowing were to be renounced, it would be necessary either to accumulate resources in advance or make supplementary tax levies as need should rise. Both of these alternatives are objectionable. It is difficult to estimate in advance what reserves to maintain, and a surplus in the public treasury is not usually a good

thing anyhow. It offers too much temptation to rash and improvident spending. Supplementary tax levies, on the other hand, are almost out of the question. They demoralize business and are cruelly unfair to the taxpayers of the particular period in which the emergency occurs. There are also circumstances other than emergencies which justify borrowing. Very often it is desirable from the standpoint of public welfare to construct improvements or embark on enterprises which will return benefits to the public over a long period of years. To saddle the entire cost upon the taxpayers of a single year or brief series of years is not fair, and is exceedingly burdensome as well as disturbing to business. Moreover, such a policy would usually result in extreme fluctuations of the tax burden. One year it would be oppressively heavy, and the next year perhaps it would be absurdly light. Not being able to calculate taxation as a relatively constant factor in their costs, property owners and business men would be unable to make plans or enter into contracts extending over long periods of time. From the business standpoint a fairly stable tax rate, even though it be a very high one, is to be preferred to one that rises and falls like the thermometer on a spring day. By borrowing, and spreading costs evenly over long periods, fairly stable tax rates can be attained.

Wisdom dictates, then, not that governments shall abstain from borrowing, but that they shall pursue such policies as will avoid excessive and uneconomic borrowing. The man who borrows to pay his house rent or grocery bills is headed for trouble if he continues the practice long, because he is going into debt for things adding nothing to his permanent capital. In the end he has a debt and nothing to show for it. The same is true of the man who incurs a debt to purchase an automobile that will be worn out before he gets it paid for. Likewise, governments that borrow to pay current operating costs or to acquire facilities or make improvements that will not outlast the debt are headed for serious financial trouble. A prominent western municipality, facing a crisis in its finances in the terrible year 1933 when tax revenues were drying up like mud puddles on a hot day, had to find money to pay off bonds issued for ferries which had not been in operation for 30 years. That sort of public indebtedness is as indefensible as the career of the Prodigal Son of the Bible parable, who wasted his substance in riotous living. Another type of borrower who is surely destined for grief is the one who allows his debts to climb to the point where his credit is destroyed. Then he must face the music, and if he cannot pay, his creditors will close down on him and take everything he has. Almost as foolish is the borrower who lets his debts grow so huge that the carrying charges eat up so much of his current income that he is sorely impoverished. There are

governments like that. The carrying charges on the public debt take so much of their annual revenues that, in order to maintain their credit, they are forced to cut their operating costs to the point where they cannot render decent service to the public. There are also governments which exhaust their credit and default their debts. Creditors cannot close down on a government as on a private individual, but a repudiation of public debts is one of the worst things that can happen in the economic life of a people and in the long run one of the worst things a government can do if it values its own permanence and security.

The follies of government borrowing are in large part attributable to the follies of the people themselves. In autocratic governments that relation may not be true, but in democratic governments such as our own it is overwhelmingly true. Public debts in this country can be contracted only by authorization of the elected representatives of the people, and in many instances must be submitted to the people themselves for final approval. The records show that in the great majority of cases where bond issues are submitted to popular vote the people give their sanction, and further that when they turn thumbs down they are just as apt to reject a good bond issue as a bad one. The average voter reacts according to the desirability of the proposition from his personal point of view, not according to its soundness or unsoundness from a financial point of view. And on the whole this is just as true of the taxpaying as of the nontaxpaying voter. The farmer groaning under a crushing burden of taxation will vote bonds for road building or state grain elevators as readily as his city cousin gives his approval to bonds for a municipal stadium or public auditorium. Politicians in and out of legislative bodies curry favor with the public by conceiving and advocating new and more attractive ways of spending money. Of course they do not go before the people and say, "We now propose to take another million dollars out of your pockets." They merely champion causes which greatly appeal to the people—and incidentally involve large public outlays. That these outlays boost the public debt makes no difference. No politician ever lost face with the voters for adding to the public debt—critics have to show that he or his gang are lining their own pockets before you can get the public stirred. But many a public man has been made to feel the wrath of the voters for trying to cut down the indebtedness of the government. Like the craving of the drunkard for his grog, the craving of the average citizen for dispensations from the public treasury knows no satisfaction short of complete inebriation. Those who supply the debauching potion are the people's friends even to the gutter of repudiation, but those who withhold it are never popular.

The relation of government indebtedness to the economic life of the

people is not well understood. Public indebtedness constitutes a first mortgage on national wealth and a first claim on national income. When the ratio between public debt and the wealth and income reaches a point where substantial portions of the capital and earnings of the population are absorbed in the retirement of the public debt or in carrying the interest charges thereon, everybody suffers. Capital will not be sufficiently available for private enterprise; property and investments decline in value; opportunities for employment are reduced and net incomes fall. These results can be averted only by a more rapid growth of general wealth and income than the rate of debt accumulation. Hence it is imperative that large increase of public indebtedness be accompanied by correspondingly large increases of national wealth and income. The fact that the reserves of banks, insurance companies, and other fiduciary institutions are largely invested in government securities means that the savings of the people are extensively invested in the public debt. The note circulation of banks is also based very largely on government securities. Imprudent management of the public debt not only jeopardizes the financial resources of multitudes of persons, but may also bring about dangerous conditions of inflation or deflation.

Types of government indebtedness. There are two broad classes of government indebtedness—long-term debts and short-term debts. The former are often referred to as the funded debt, because definitely accruing funds are set up to retire them at maturity. The latter are commonly referred to as the floating debt, because of the absence of any such definite plans for amortization. The funded debt is usually represented by long-term bonds, the floating debt by short-term notes, tax-anticipation warrants, or certificates of indebtedness. In principle, short-term debts should be merely temporary expedients and should never be converted into long-term debts, but one of the appalling features of government finance in this country is the extent to which such debts, incurred to meet temporary revenue deficiencies, have been allowed to accumulate and finally have been converted into long-term debts. That practice is one reason why the American taxpayer is paying for so many dead horses.

Long-term bonds comprise about 70% of the federal debt, and this proportion doubtless will be increased by the large sale of war savings bonds. Short-term obligations of the federal government usually have taken the form of treasury notes, treasury bills, and certificates of indebtedness. These usually run from thirty or sixty days to one or two years. They are used mainly for temporary financing. If not retired at maturity, they are converted into long-term securities.

State and local debts are much less easy to describe. Florida, Nebraska,

and Ohio reported in 1940 that they had no funded debt at all. The largest state debt was New York's $525,784,000 and the smallest was Arizona's $250,000. There were heavy county, town, and city debts in all states. There are no constitutional restrictions on federal indebtedness, either as to amount or purpose. Not so in state and local governments. Half or more of the states have provisions in their constitutions forbidding the state government to incur any debt at all except for certain specified purposes. Others forbid the state government to incur any debt without popular referendum except for certain stated objects. In neither case are the exceptions broad or numerous. Practically all make an exception of debts incurred to repel invasion, suppress insurrection, or defend the state in war. A number permit exceptions to refund existing debts, to pay interest on existing debts, or to provide for unforeseen emergencies. Several, though not restricting the purposes, limit the amount of debt which may be incurred for all purposes save the exceptions mentioned above. A majority of the state constitutions prohibit the contracting of any debt without a tax levy sufficient to pay the interest and discharge the principal at maturity. Counties, cities, and other local units labor under similar disabilities, imposed either by the state constitution, by acts of the legislature, or by local charters. The long-term debts of state and local governments invariably consist of bond issues. Generally these are marketed through regular financial institutions, but sometimes they are sold directly to the public. The short-term debts of state and local governments are made up of unpaid bills (which are sometimes allowed to accumulate for months and even years), warrants issued in anticipation of tax receipts, notes to banks, and similar obligations.

Less understood by the laymen than any other phase of the government debt problem is the process of funding and amortization. Short-term debts are supposed to be paid out of current income—though this wise rule is often ignored—but for long-term debts amortization out of the income of any year or brief term of years is impracticable. The two methods usually followed in paying off long-term debts are the sinking-fund method and the serial-bond method. The sinking-fund method operates as follows: Bonds to the amount of, let us say, $100,000, are issued to run for 15 years and bear interest at 4%. Calculations are made of the amount needed to pay interest during the 15-year period and discharge the principal at maturity. This is divided into 15 parts. Then a sinking fund is established. Each year a sum is appropriated to pay the interest on these bonds and contribute the necessary installment to the sinking fund. The money paid into the sinking fund is invested in approved securities and all the earnings of these securities are turned back

into the sinking fund. At the end of 15 years, if the original calculations were correct and no mishaps have occurred, there will be $100,000 in the sinking fund, and the government will have saved the difference between its interest payments and the earnings of the sinking fund. The serial-bond method operates without sinking funds. Instead of an issue of $100,000 all to run for 15 years, the bonds will be divided into series to mature at different periods throughout the 15 years. Every year, every 3 years, or every 5 years, according to the arrangement of the series, part of the bonds become due. Calculations are then made of the amount needed to pay interest and retire each series as it falls due, and this amount is regularly appropriated in the budget as required. Both methods have their advantages and faults. The serial-bond method is generally considered the more economical on account of the great savings realized on interest charges.

Government lending. Government is not only the largest of all borrowers in this country but also the largest of all lenders. A considerable part of the borrowings, in fact, is for the purpose of lending. Because governmental agencies can usually borrow on more favorable terms than private persons, and can borrow at times when capital will not take the risk of private credit, it has always been the policy of government in this country to lend its credit to private enterprise. A goodly part of the cost of railway building, ship construction, irrigation development, and public-utility development has been financed directly or indirectly through government loans. So recklessly indeed did state and local governments in the eras of canal and railroad building lavish their credit upon wildcat enterprises that billions of dollars were lost not only to those governmental agencies but also to private investors who risked their capital on the belief that anything backed by government credit must be safe. Two of our severest economic setbacks, that of 1837 and that of 1873, are largely attributed to the indiscriminate extension of government credit to unsound private enterprises. As a result we find in the majority of state constitutions today provisions forbidding the state to lend its credit or give financial aid to private individuals or corporations save for the relief of the poor or something of that sort. Similar restrictions are applied to local units of government, and in many states the legislature is forbidden to authorize local units to extend their credit to private enterprise.

No such restrictions are found in the national Constitution, and therefore the federal government has become the nation's chief purveyor of government loans. For many years the federal government has supplied credit to shipping lines, land banks, irrigation projects, and certain other private enterprises. Since 1932, however, it has become the nation's

principal source of credit for private enterprise of various kinds. In order to create a great central reservoir of credit which might be used to counteract economic depression the federal government established in February, 1932, the Reconstruction Finance Corporation. This is a government-controlled corporation authorized to secure funds by selling its securities to the general public and to use the proceeds to make advances to needy business institutions. Other agencies authorized to make loans directly from the federal treasury or from funds supplied in part by the federal government and in part by private capital include the Farm Credit Administration, the Farm Security Administration, the Federal Farm Mortgage Corporation, the Federal Land Banks, the Home Owners' Loan Corporation, the Federal Home Loan Banks, the Commodity Credit Corporation, the Production Credit Corporations, the Intermediate Credit Banks, the Export-Import Bank, the Federal Savings and Loan Associations, the Banks for Coöperatives, the Disaster Loan Corporation, the United States Maritime Commission, and the Public Works Administration. Enormous sums have been advanced to state and local governments and to private individuals and corporations by these and other federal agencies. Loans are being constantly repaid and new loans made. It is universally conceded, however, that the government can never expect to recover all of its loans. How large a sum will have to be written off as a total loss remains to be seen.

Government Expenditures

It is easy to gain the impression that money flows from government treasuries like water through a sieve. At times conditions almost justify that simile, and such conditions would prevail at all times were it not for certain safeguarding forms and procedures. It is an immutable rule in the United States, generally embedded in fundamental law, that no money or funds of any kind may be expended from the treasuries of national, state, or local governments without authorization by law. And it is further the rule that when such authorization is given there must be certain processes of checking and controlling spending to insure compliance with the terms of the legal authorization to spend. From these requirements it results that government expenditures involve two basic operations: (1) the legislative steps necessary to authorize disbursements from the treasury, and (2) the administrative steps necessary to carry out the legislative authorization and secure compliance therewith.

Appropriations. The treasury is a huge reservoir which receives public revenues from all conceivable sources and holds them intact. From that great pool they cannot be moved until a legislative enactment definitely

sets apart a specified sum for a specified purpose and authorizes it to be drawn out. Such legislative enactments are called appropriations. They appropriate—that is, single out and assign—certain treasury funds to certain stated uses. Legislative practice in making appropriations may be careful, intelligent, and businesslike or just the opposite. "Just the opposite" was the rule in this country before the introduction of scientific budget procedure, and is still the rule in a good many of our political subdivisions. Legislatures are highly decentralized bodies. Ordinarily no individual member, committee, or other official group is singly responsible for their transactions as a whole. Any individual member and likewise any committee may introduce and wangle through measures calling for appropriations for many different purposes. Similarly any member or committee may present and work for the passage of revenue measures. For seeing, however, that appropriations in total do not exceed probable and available revenues, or that expenditures are not extravagant and unnecessary, no one in particular is definitely and exclusively responsible. Hence gross abuses developed in the financial procedure of American legislatures. Appropriations would be made in blind disregard of the condition of the treasury or the possibility of revenues adequate to meet them. Standing or continuing appropriations would be made to run from year to year with no reconsideration of their wisdom or necessity. By log-rolling and pork-barrel tactics appropriations would be made for multitudes of purposes not warranted by considerations of public policy. Heads of executive departments and agencies would be given appropriations on padded estimates of needs without regard to the requirements of the public service as a whole.

The budget system. As a means of correcting the faults of their appropriation procedures, the national government, many of the states, and a large number of local government entities have adopted the executive-budget plan. Borrowed from English financial practice, this plan works on the principles of centralization and coördination. The chief executive is made responsible for presenting to the legislature a complete program of revenues and expenditures, known as the budget; and is given power to make all inquiries and investigations necessary to develop such a program. The legislature foregoes or is deprived of its power to pass revenue and appropriation bills indiscriminately and in disregard of the executive budget. In England, and in some cases in the United States, the legislature may decrease but not increase items in the executive budget. The federal budget law of 1921 places budgetary authority in the President and creates the Bureau of the Budget to assist him in the discharge of his budgetary functions. Each year the President is required to submit to Congress the following budgetary data: (1) estimates of all

expenditures for the ensuing year; (2) estimates of revenues and all other probable receipts for the ensuing year; (3) a statement of income and expenditure for the last completed fiscal year; (4) estimates of expected income and expenditures for the fiscal year then in progress; (5) estimated balances of unused appropriations; (6) a complete analysis of the treasury as of the date of the budget; and (7) a complete analysis of the debt of the United States. These data are presented both in summary and in minute detail, so that Congress may have before it two pictures—one a panorama of the whole financial problem and the other a detailed portrayal of the underlying facts. Along with the budget the President sends a message in which he explains the budget and sets forth his proposals for balancing revenues and expenditures if possible and for financing deficiencies if a balanced budget is impossible. On receipt of the President's budget in Congress the various proposals are referred to appropriate committees in the House of Representatives, where all finance bills must originate, and work begins on the drafting of legislation to carry out the budget plan. Revenue measures usually go to the Committee on Ways and Means and appropriation bills to the Committee of Appropriations. From that point budget legislation follows the usual course, passing the House and the Senate, and then going to the President for approval or veto. Congress may alter the President's proposals as it sees fit, but ordinarily does not make material changes in the aggregate expenditures proposed. In 1934 President Roosevelt adopted the unusual plan of presenting Congress with two budgets—one for the ordinary operation of government and another for emergency operations.

State and local budget plans proceed in much the same way as the federal plan. The governor, mayor, city manager, or other chief executive is made responsible for preparing and submitting the budget to the legislative body. The practice varies, however, as to the extent of the authority given the chief executive to prepare a comprehensive and truly authentic budget. In some cases the budget estimates for certain favored branches or departments of the government are not required to be incorporated in the executive budget, or if included, are not subject to review and revision by the executive to the same extent as other estimates. Such halfway plans really do not deserve to be called budget systems. Nor do those in which a so-called budget is prepared on the authority of a department head, administrative board, or legislative committee. There is no genuine budget system unless there is absolute concentration of responsibility for making estimates of *all* revenues and *all* expenditures plus power to investigate, review, and revise *all* estimates so as to produce a balanced and articulated financial plan. And there is but

one place where the necessary responsibility and power can be located with anything like satisfactory results, and that is in the chief executive. A true budget is a *plan*, not a mere arithmetical summation of estimates originating in scores of detached and uncoördinated government agencies. Many minds may contribute to the making of a plan, but responsibility divided among many is no responsibility at all. Hence there must be one and only one official responsible for whipping the plan into final form and presenting it to the legislative body. The chief executive is the official to whom this responsibility naturally belongs, because he is the one above all others to whom the people look for results in the development and execution of public policies. When the executive budget goes to the legislative body, responsibility shifts to the latter. The legislature must accept and approve the budget proposals of the executive or assume the responsibility of making changes. In state and local budget practice the legislative body as a rule is free to modify the executive budget as it deems necessary and prudent, but the responsibility involved in making substantial changes is so clear and direct that radical changes are not common. Furthermore, governors and mayors are often able to thwart such changes by vetoing finance bills passed by the legislature.

Control of disbursements. When finally the appropriations have been made and the budget plan, if there be one, enacted into law, then comes the second phase of financial procedure—that of administrative control of the execution of legislative authorization to spend. Hundreds and perhaps thousands of government officials have been authorized to draw money from the treasury in stated amounts for purposes specified in the law. Are treasury officials to pay out these sums on demand of spending officers with no check whatsoever? To permit that would invite carelessness and irregularity, not to mention actual corruption. Before money is irrevocably disbursed from the treasury certain facts should be conclusively ascertained and certified by someone having no interest in the handling or spending of funds. These are: (1) that every spending officer seeking to draw on the treasury actually is the legal incumbent of the office for which the expenditure in question was granted; (2) that an appropriation was made for this office and for the purpose named in the request for disbursement; (3) that the request for disbursement is in conformity with the terms of the appropriation both as to purpose and amount; and (4) that there is an unexpended balance of the particular appropriation sufficient to pay the sum requested. In state and local governments these functions are performed by an officer known as the auditor or comptroller and in the federal government by the Comptroller General of the United States. This functionary occupies an in-

dependent position, is usually elected by the people or chosen by the legislature, and is not obliged to take orders from anybody. The treasurer is forbidden to honor any voucher or warrant presented by any spending officer until it has been examined, approved, and countersigned by the auditor or comptroller. And from his decision there is no appeal either to the courts or to higher administrative officials. The only recourse, in case the auditor or comptroller refuses to approve a claim on the treasury, is to go to the legislature and ask for a special appropriation to cover the item or appeal to a special court of claims which has been authorized to pass upon claims not payable through the regular channels. In the case of counties, cities, and other local government units it is usually possible to bring suit in the regular county court.

Almost as important as the approval of claims in advance of expenditure is the checking of records and accounts afterwards in order to ascertain whether spending officers actually have followed the law in every transaction and whether their books are complete and accurate. This operation is known as auditing, and is required to be performed once a year or oftener. Sometimes this function is performed by a committee of the legislature, but generally it is assigned to the auditor or comptroller. In the federal government it is one of the duties of the Comptroller General. In addition it is necessary to have uniform and standard methods of keeping accounts in all branches and departments of government, and to have the accounting procedure of these different agencies under constant supervision. The General Accounting Office in the federal government, headed by the Comptroller General, has authority to prescribe forms, systems, and procedure of keeping account for all federal offices and departments and is empowered to examine the accounts of all fiscal officers. State auditors or comptrollers commonly have the same power in state government. The accounting methods of counties, cities, school districts, and various other local units are usually subject to state control. The state department of accounts or the state auditor prescribes the methods and procedures to be followed and makes periodical examinations to check on the actual execution of the instructions given. To complete the control of expenditures, frequent financial reporting is also essential. Such reports are regularly issued once a year, but that is not often enough to guide executive heads in carrying out a budget plan. Once a month at least they should have reports from every spending agency, showing whether they are running ahead or behind, what has been expended to date, what balances remain, and what may be anticipated for the rest of the year. With this information at hand it is usually possible to make adjustments which will prevent the breakdown of the budget plan. In every soundly conceived budget system

such reports are required, and authority is usually given to the chief executive to make transfers of appropriations from one department or agency to another according to his judgment of the needs of the situation.

Deficit Financing

A major financial question of the present day is that of deficit financing. This method of financing has been employed since 1933 to finance the New Deal program of relief and recovery, and is being used to supplement taxation in financing our war effort.

The theory of deficit financing is very simple. In periods of economic depression private enterprise is unable to spend sufficiently to provide employment and keep the national income from falling too low. In such times, however, the government, not being obliged to operate on a profit basis and having unimpaired credit, can spend more freely. Therefore it is argued that the government should "take up the slack." It should do enough spending to provide widespread reëmployment and stimulate general business activity, but should not during the depression period, so the theory goes, attempt to levy taxes sufficient to meet its increased outlays. That levy would block recovery by placing too great a burden upon private income. However, when private enterprise finally gets back on its feet and is able to provide employment which will keep the national income at a high level, the government is expected to increase its tax levies and gradually pay off the debt which it has accumulated during the period of deficit financing.

This theory is bitterly attacked by persons who believe that deficit financing is dangerous and unsound. It is claimed that deficit financing cannot succeed for several reasons. In the first place, it is said that deficit financing is deceptive. Instead of levying taxes to meet its outlays, the government borrows money. But in order to borrow money it has to pay interest and make provision for the systematic retirement of the principal. These debt charges grow to enormous proportions, and can be met only by increased taxation or by further borrowing, which means greatly increased taxation in the end. This, it is said, constitutes a greater deterrent to permanent business recovery than would taxation to keep the budget currently in balance. It is also contended that deficit financing results in such uncertainty as to future tax burdens and as to the security of private capital that investors hesitate to put their money into business ventures. Thus private capital is so largely diverted from normal business channels to investment in government securities that business cannot secure the capital necessary to expand its operations. It is further alleged that deficit financing builds up numerous political inter-

ests for whom lavish government spending means votes on election day, and that such interests will combine to prevent the reduction of government spending when the need no longer exists and also to prevent the levy of increased taxes to retire the debts incurred through deficit financing. Hence, it is said that deficit financing leads to continually more and more deficit financing. If this goes on long enough, the credit of the government will be wrecked, the value of its securities destroyed, and the economic institutions of the nation completely demoralized.

Advocates of deficit financing reply to these arguments by denying that the predicted results have followed or will follow. They claim that debt charges have not increased so as to place any burden upon business —in fact they say that interest rates and premium costs are lower than ever. They deny that credit has been diverted from private industry and point to banks glutted with deposit money which cannot find investment. The truth, they say, is that deficit financing has put to work billions of dollars of capital that would otherwise have lain idle in the banks. They claim that it will be easy for the government to reduce spending and increase taxation when permanent recovery comes, because private enterprise will then offer investment opportunities so much more attractive than government securities that government borrowing will quickly shrink to normal proportions. It will then be necessary for the government to resort to increased taxation in order to finance itself, and this will occasion no great difficulty because the national income will readily stand such increased rates of taxation.

We seem destined to prove or disprove the theory of deficit financing by actual experience.

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APPENDIX

CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. (1). The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

(2). No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

(3). Representatives and direct taxes [1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4). When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

(5). The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. (1). The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[3]

(2). Immediately after they shall be assembled in consequence of the first

[1] Modified as to income taxes by the 16th Amendment.
[2] Replaced by the 14th Amendment.
[3] Modified by the 17th Amendment.

election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

(3). No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

(4). The Vice President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

(5). The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

(6). The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

(7). Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. (1). The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

(2). The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. (1). Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day; and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

(2). Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

(3). Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

(4). Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. (1). The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the

[3] Modified by the 17th Amendment.

peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

(2). No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

SECTION 7. (1). All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

(2). Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

(3). Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. (1). The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

(2). To borrow money on the credit of the United States;

(3). To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

(4). To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

(5). To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

(6). To provide for the punishment of counterfeiting the securities and current coin of the United States;

(7). To establish post offices and post roads;

(8). To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

(9). To constitute tribunals inferior to the Supreme Court;

(10). To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

(11). To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

(12). To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

(13). To provide and maintain a navy;

(14). To make rules for the government and regulation of the land and naval forces;

(15). To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

(16). To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

(17). To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

(18). To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. (1). The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

(2). The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

(3). No bill of attainder or ex post facto law shall be passed.

(4). No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.[4]

(5). No tax or duty shall be laid on articles exported from any State.

(6). No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

(7). No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

(8). No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. (1). No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of

[4] Modified by the 16th Amendment.

attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

(2). No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

(3). No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. (1). The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

(2). Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors [5] shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

(3). The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

(4). No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have

[5] This paragraph was replaced in 1804 by the 12th Amendment.

attained to the age of thirty five years, and been fourteen years a resident within the United States.

(5). In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

(6). The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

(7). Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. (1). The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(2). He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

(3). The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to

time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. (1). The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State; [6]—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

(2). In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

(3). The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. (1). Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(2). The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. (1). The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

(2). A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

(3). No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. (1). New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of

[6] Restricted by the 11th Amendment.

States, without the consent of the legislatures of the States concerned as well as of the Congress.

(2). The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

SECTION 1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

SECTION 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

SECTION 3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GO WASHINGTON—
Presidt. and Deputy from Virginia

Articles in addition to and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States, pursuant to the fifth article of the original Constitution.

ARTICLE I [7]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[7] The first ten Amendments were adopted in 1791.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [8]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII [9]

The electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice.

[8] Adopted in 1798.
[9] Adopted in 1804.

And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [10]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [11]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial offices of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by

[10] Adopted in 1865.
[11] Adopted in 1868.

law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV [12]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI [13]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII [13]

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [14]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as

[12] Adopted in 1870.
[13] Adopted in 1913.
[14] Adopted in 1919.

provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX [15]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX [16]

SECTION 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI [17]

SECTION 1. The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of submission hereof to the States by the Congress.

[15] Adopted in 1920.
[16] Adopted in 1933.
[17] Adopted in 1933.

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