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A PREFACE

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POLITICAL INSTITUTIONS

A PREFACE

BY

EDWARD McCHESNEY SAIT

PROFESSOR OF POLITICAL SCIENCE, POMONA COLLEGE



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PREFACE

The two volumes of Buckle's *History of Civilisation in England* have been called a gigantic fragment of his general introduction. Without pretending to resemble that illustrious author in other ways, I too have written a fragmentary work. It bears, no doubt, the appearance of completion. As a survey of the broader aspects of the State, it can stand alone. But in the light of my original design it is fragmentary. I had expected to concentrate upon the organs of government and fundamental problems connected with their functioning.

Such a project required an immense amount of work in collecting materials. Illness interposed delay. I began to be bothered by thoughts of Mr. Dick and his perpetual, but unavailing toil over the Memorandum that the Lord Chancellor never received. Fortunately Professor Frederic A. Ogg, editor of the series to which I am contributing, and Mr. Dana H. Ferrin, vice-president of the D. Appleton-Century Company, came to my relief. They agreed to publish at once a first volume, dealing generally with the State, and to wait for a second volume, dealing specifically with the problems of government.

If knowledge does not always ripen into wisdom, it should at least inculcate modesty. In forty years or so of study I have learned a certain amount of history and politics and yet seldom expressed in print my own point of view. By itself, of course, prolonged study does not make a point of view worth expressing. Nevertheless, it must be admitted that modesty, like anything else, may be carried to excess. If one gradually and honestly forms opinions, believes in them, and stands ready to justify them, one may feel impelled to speak out, almost as a matter of moral obligation. There is no virtue in hiding the truth—or what one accepts as the truth. I have reached certain conclusions, for example, about the nature of international law and about the origin of the representative system; and, they being my version of the truth, I have given a place to them in this book, alongside of the commonly received doctrine.

Aside from such particular considerations, my outlook upon politics is colored by a deliberate rejection of theory in favor of realism. Philosophy has had little or nothing to do with the development of political

institutions. It takes hold of them, after they have been formed, and ascribes their rise to some conscious and rational human purpose. I have sought to show that the great monuments of human activity—such as the State itself or the Common Law—have taken shape like the coral islands, planlessly, by a series of minor adjustments that result from the more or less mechanical reaction of man to his environment. This hypothesis I am prepared to defend at any time. It was forced upon me by concrete historical facts and in spite of an earlier, inherited belief that men, as distinguished from the anthozoa, know what they are doing and where they are going.

The literature that I have drawn upon is very extensive. In the hope of getting students to become acquainted with some of it, I have quoted numerous passages from authors of disinction, like Maine and Seeley, Barker and Bryce, Boutmy and Faguet. Quotatons reveal more of an author's quality and arouse more interest in him than would any abstract or paraphrase. They must, occasionally, have the intended effect of encouraging alert and curious minds to apprentice themselves to some master of our craft. It may occasion surprise that my citations so rarely refer to foreign-language books. Experience has persuaded me to follow that course. The ordinary undergraduate, lacking the equipment or inclination to read French or German books, will pay little attention to footnotes that cite them frequently. As a consequence, the footnotes lose much of their potential value and, contrary to the object of an elementary treatise, become a mere technical apparatus. Moreover, the literature in English will satisfy the needs of all but advanced and specialized students; for nowadays, if any important foreign work has not yet been translated, English and American scholars have discussed its outstanding contributions.

I wish to express my gratitude to those who have helped me in the preparation of this book; particularly to Professor Ogg, whose editorial advice and criticism deserve something better than this formal acknowledgment; to Mr. Murray Kirkwood, of the Department of Government at Harvard, who collected materials for me both at that university and at Oxford; and to Mrs. H. P. Goss, Miss Bessie Murray, and Dr. Helen R. Rosenberg, former students of mine at the University of California.

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PART I

METHODS OF APPROACH

CHAPTER I

THE THEORETICAL APPROACH

THE impression that we get in viewing the Dent du Midi or the cathedral of Cologne will depend not only upon our capacity for appreciation, but also upon circumstance. In different lights and from different aspects new qualities will be revealed. So it is with political institutions. Their character and their significance vary with the attitude of the observer. Bryce has one way of looking at them; T. H. Green has quite another.

Is there one right way, or one best way? Should we make a choice between alternatives—perhaps not because one is best, but because it is more suitable to our immediate purpose—or make some sort of combination? This question must be faced at the outset, before political institutions actually confront us. It is desirable, at least, to know that there is more than one guide and that all guides may not be equally competent. Therefore, introductory chapters will discuss the problem of approach or method, dealing successively with the viewpoints of theory, science, history, and economics.

IDEALISTIC THEORY

From the time of Plato, the theoretical approach to politics has attracted scholars of great intellectual eminence and has played a considerable part in education. Plato gave us the *Republic* and the *Laws*. In the first he let his philosophical imagination run free. He designed a Utopia, an ideal polity, which has little relation to actualities or even to possibilities and which must, in fact, remain somewhere in the clouds until the day when philosophers are kings or kings are philosophers. As literature it is immortal; in the study of politics its value is open to some doubt. The *Laws* is less fantastic. It has been described by one Platonist as an intensely practical work. Towards the close of his long life Plato was now remodeling his *Republic*, as Jowett puts it; making it workable, drafting a constitution and code that flesh-and-blood Greeks might profitably adopt in that very age. He still pictures the best State; but now the best, not in the abstract, but relatively to

circumstances. And yet, in spite of good intentions, he remains so much the ideologist that Locke's constitution for the Carolinas, itself "a farrago of impracticable nonsense," seems, by comparison, firmly rooted in realities.[1] Let one illustration suffice: The state must always consist of exactly 5040 households,[2] the more prolific citizens being "made to refrain" and the birth-controllers being converted by rewards and stigmas.

In some quarters, however, Plato is regarded highly as a medium of instruction in government, and even accorded a foremost place. It is so at Oxford. Indeed, the Oxford school of political science reveres as its founders three idealistic philosophers and disciples of Hegel—Green and Bradley and Bosanquet. Professor Ernest Barker has carried this gospel to Cambridge. There, in an inaugural address,[3] he speaks almost disdainfully of more practical ways of approach, and attributes to the theorist a dynamic rôle in the shaping of political institutions.[4] Though himself an accomplished historian, he believes that theory "loses its true nature, and puts its neck unnecessarily under the yoke of happening and the routine of historic sequence, if it occupies itself largely with problems of history. It is concerned with questions of being rather than with those of becoming: it has to discuss what the State is *semper et ubique,* rather than what it was at this time or in that place, or how it developed from one form to another." [5] The influence of the idealistic philosophers on generations of Oxford men has been profound, he declares; "some who have sat at the feet of this political wisdom have in after years been called to handle the political destinies of their country; and they have shown that they have not forgotten the lessons which they once learned." Apparently a Balliol man whose fluency in Greek permits him to lounge with his feet on the mantelpiece and read the *Republic* without a dictionary is equipped to advise the Minister of Health on the problem of slum clearance and to govern restive Sikhs in the Punjab. Or is it possible that the efficiency

[1] On two occasions Plato offered advice to the tyrants of Syracuse. Perhaps appreciation may be measured by the fact that, on the first occasion, he was sold into slavery.

[2] Numerical proportions and ratios are considered very important, and citizens are required to study arithmetic.

[3] *The Study of Political Science and Its Relation to Cognate Studies* (1928).

[4] Sociologists may be interested in Barker's statement (when he is dealing with legal ideas, *ibid.,* p. 28) that "the family is a legal rather than a natural institution—an institution which was brought into existence by the primitive lawyers...." He says that property also is a conception of the lawyers.

[5] *Ibid.,* p. 17.

of the civil servant owes no more to Plato and Bosanquet than to Brahms and Swinburne? [1]

There is no intention here, of course, to decry the study of Plato and of philosophy in general. Without it any pretension to a broad culture would be hard to justify. In particular the Englishman, still more the American or Australian, being averse to or incapable of sustained abstract thought, should do what he can to supply the deficiency. Plato is a good antidote to pedestrianism. Philosophic argument develops the intelligence; it imparts resourcefulness and elasticity of mind. But we shall see that its rôle in the process of institution-building and government may be dismissed as negligible.

Idealistic theory—excogitated theory, we may call it—is a product of the imagination or of deductive reasoning and has little concern with actualities. What goes by the name of political theory is largely composed of such vague, unsubstantiated doctrine.[2] It is not unlikely to do more harm than service. We must be constantly on our guard against deception. What purports to be a valid explanation of social behavior may be merely an excogitated idea, derived from abstract thought, not from observed conduct, with just enough fact lugged in to disguise its true character. The proud father of a so-called theory, professing to test it, may mobilize only the facts that support his position; and he may do so without consciousness of bad faith because fact seems of little importance in his dialectical game. Again, the theory may be invented—or taken over and distorted by overemphasis—for the purpose of defending a particular interest, as champions of the church or organized labor expound pluralism and deny the sovereignty of the State, furnishing themselves in this way

[1] Paul Cohen-Portheim, in his *England the Unknown Isle* (1930), p. 96, makes some penetrating observations on Oxford and Cambridge: "They are not so much places of instruction as training-grounds, their object being to mould the students' characters and form young men who shall continue the traditions of the ruling class as they have been formed in the course of centuries in correspondence with the ideals of the English race." Again: "The chief thing an Englishman demands of people in leading positions is that they should be gentlemen, not that they should have specialized knowledge. He has the greatest respect for the gentleman and very little for the specialist; but the gentleman is a specialist in the art of ruling." And so the right kind of curriculum is the one that turns out gentlemen; gentlemen are what Oxford and Cambridge turn out; therefore, these universities have the right kind of curriculum.

[2] Professor C. E. Merriam, who ranks among the chief authorities on American political theory, says that "the greater part of political theorizing on close analysis proves to be more or less thinly veiled propaganda of particular social interests. A theory may contain an element of truth or science in it, but the truth will be so colored by the interests of those who advance the particular theory that it has little genuine or permanent value." *New Aspects of Politics* (1925), pp. 53-54.

with a philosophical basis for arguing against State interference with religious orders or with trade unions. From this standpoint we may even suspect Bentham and his followers; wishing to make drastic legal reforms and sweep away anomalous customary survivals, they set up the idea of law as the command of a superior.

Most ideas or theories are neither excogitated in a vacuum nor derived from systematic observation. They take shape, subconsciously, through the influence of environment. Manchester preaches to the world the doctrine of internationalism and pacifism. Why does that community cling so stubbornly to the traditions of Richard Cobden? "The ideal is absolutely in accordance with their personal interests," says André Siegfried,[1] "but the people of Manchester preach it with such religious zeal that in the end they forget the excellent material reasons for which they adopted it, and they flatter themselves that they are inspired solely by the pure love of humanity. It is due to these profound and obscure psychological traits that there has sprung up to the mutual advantage of both parties that mysterious alliance that exists between the missionary and the cotton exporter." In a word, the idea of pacifism is, for Manchester, a valid idea, because it is derived immediately from her circumstances; but the people of Manchester dress it up as a universal idea, equally applicable to all communities.

But, however dubious their origin, may not ideas have a considerable effect on social behavior? What if the masses enroll for a time under a banner that has been raised by some Mazzini or Treitschke or Marx; what if they repeat in their creed some doctrine about the sovereignty of the people, or self-determination, or the rights of a resolute and self-conscious minority? Surely then the idea becomes effective! This much,

[1] *Post-War Britain* (1924), p. 110. "Those interested realize on what a narrow margin rests the success of this marvellous enterprise. Let there be any reduction in the world's supply of raw cotton, and let the cost of production of the finished article increase in consequence to a level where the world's consumption cannot follow it; let the customers of yesterday become the producers of to-day, and let them in their turn set up prohibitive tariff walls; let hard times, wars, revolutions or other natural calamities arrest or even reduce the purchasing power of certain countries—such are the ever-present dangers which would react immediately on the prosperity, the activity, and indeed the very life of this extraordinary region. Just as an atom reflects the universe, so Manchester reflects the economic condition of the world. Her general staff follows from hour to hour the reactions of events which occur in the four corners of the globe. Although even well-informed people in France know nothing of these things, the masses of Manchester's workers are sensitive to them. A population which thus depends, and moreover realizes that it depends, on the rising and falling tides of international prosperity, does not think or feel politically the way any one else does. The trained faculty for protecting their own interests has been handed down from one generation to another, until it has become almost instinctive." *Ibid.*, p. 104.

and no more, can be admitted: Ideology may tend to hurry men forward, if it happens to accord with the wind and tide of circumstance; otherwise, if effective at all, it may momentarily weaken the play of natural forces, deflect the course, retard progress. But the idea that hurries men forward did not set them upon the route; they invented the idea or adopted it because it expressed their existing purpose or activity. This relationship of theory and practice is often misunderstood. Professor Ramsay Muir seems to misunderstand it in explaining the rise of nationalism.[1] He distinguishes the nineteenth century from the earlier period when peoples achieved nationhood as M. Jourdain talked prose, "without realizing the significant thing they were doing." In the nineteenth century, says Muir, they were no longer guided merely by instinct and tradition; they theorized; they acted in accordance with elaborately discussed principles. Now, without any question, such principles did enjoy a considerable vogue in the nineteenth century. But there is no good evidence to show that they were responsible for the spread of nationalism or that they greatly accelerated the pace of the movement. Theory, as a matter of fact, is usually devised to explain activity. Professor Hayes comes to the conclusion that the philosophers of nationalism were "themselves the result of the phenomenon they discuss rather than its cause" and that they "did not make its vogue. The vogue was there when they appeared on the scene. They merely expressed and gave some emphasis and guidance to it.... Let us recognize fully the outstanding limitation to their usefulness. They do not furnish us with any answer to the basic question as to why the masses for a century and a half have acted as if they were influenced by nationalist philosophers more than by others."[2]

SCIENTIFIC THEORY

There is another kind of theory that is commonly employed in the natural, and sometimes in the social, sciences. Unlike the excogitated variety, it lives only in the closest contact with the facts. First, it emerges from observed facts as a generalization or hypothesis, and then its validity is tested by a further and elaborate reference to the facts. Thus, a casual reading of history suggests that revolution is a consequence of well-being rather than misery, that propaganda has only a short-time value, that there is a cycle of peace and war comparable to

[1] *Nationalism and Internationalism* (1917), p. 86.

[2] Carlton H. Hayes, *The Historical Evolution of Modern Nationalism* (1931), pp. 290-291. On the other hand, Hayes shows at times a singular belief in the efficacy of propaganda (*e. g.*, p. 294).

the business cycle, that all forms of government (including the most democratic) tend to become oligarchies. If such hypotheses are confirmed by further inquiry, they become exceedingly useful. They may clarify a baffling situation—enable us to understand better how things have come about and why they are moving in a particular direction or what that direction is. We find Marx utterly unhistorical when he bases the future proletarian revolution upon increasing subjection and misery. But this kind of theory, borrowed from the natural sciences, finds little place in the histories of political thought. It has been brought to the front of late as an essential part of the scientific method by those who are trying to escape from the deceptions of old-style theory and to create a science of politics. This scientific theory will be examined in the next chapter, when its limitations will be pointed out. It affords the only hope of developing anything that can properly be called a science of politics.

Political ideas, then, evolve in a number of different ways: sometimes consciously, through imagination or abstract reasoning or through analysis of concrete facts; but sometimes unconsciously, as the effect of environment. Some relation to the environment there will always be. Even Plato, in creating his ideal State, felt the influence, either by attraction or repulsion, of what he saw in Athens and Sparta. No matter how hard they may try, philosophers cannot quite free themselves from the limitations of the material world around them; and their thought is always colored by that material world. As to the great mass of men, it may be said that their thought is dictated by the environment. Their activities and their ideas are determined by their material surroundings, their heritage from the past, and their contacts with other peoples. They are not free agents. When they respond to the stimuli of the environment, they can determine the manner of response only within the narrow range that the environment allows.

In analyzing any social situation we observe the interplay of four factors. First of all, there is the *biological heritage* of the individuals forming the group under investigation—their germ plasms, their genes; the native qualities that have been inherited from parents and that will be transmitted to offspring. Taking the group as a whole, we are likely to find, in spite of individual differences, an amazing uniformity, an approximation to what may be called an average type. In the second place, there is the *social heritage*—the stored-up wisdom of the past, the lessons of experience, traditional habits and attitudes. Those who remember the mistakes of their predecessors are not condemned to re-

peat them. They have learned to be cautious when a particular signal of danger appears, to check certain natural impulses; their response to a given stimulus will be a conditioned response. The social heritage, imposing restraints upon natural behavior, is commonly derided by ideologists as the chief obstacle to human progress. Without it, as a matter of fact, progress would have been impossible. In the third place, there is the *social environment.* A group may be greatly influenced by neighboring groups. From them it may borrow language, tools, methods, institutions, although these must be adapted to their new surroundings. Finally, there is the *material environment*—soil and climate, plant life and animal life, mineral resources, frontiers, and much besides. Whatever happens in human society results from the interplay of these four factors. Man responds to the stimuli applied by his social and material environment. The nature of the response will depend upon his biological heritage as conditioned by his social heritage.

It is the response of the group or mass that counts. Individuals, it is true, may respond differently to the same stimulus. To the extent that circumstances permit a range of conscious choice, they make a selective response. But even exceptional individuals are prisoners of their past. They cannot break quite free from the social heritage. If they did, for the moment, select a novel path, they could not hold to it very long. They are subject to pressure by the group, which dislikes and fears novelty, and to the pressure of the environment, which does not allow wide deviations from the norm. If, discarding the lessons of the past, they choose a new path, they experience the pain of maladjustment; they bump into obstacles in the environment and get bruised all over. Nor will the mass of men, the group as a whole, imitate such erratic behavior. The mass react normally. Or if they do momentarily become erratic by imitation, the pain of maladjustment and the dread of the unfamiliar will soon correct the aberration. Still, the group's manner of life does change; we all know that. How does it change? It changes, not suddenly, but by slow degrees, by slight deviations, by tentative little forward-steps, by trial and error. It changes through selective responses which, though impressive in the aggregate, are of little consequence when taken separately. Men do change their material environment; in turn it changes them. But men do it bit by bit; here a little, there a little. Their nervous systems could not endure sudden and drastic modifications of the environment.

> Oh, the little more, and how much it is!
> And the little less, and what worlds away!

Ideas are not commonly, then, the result of conscious thought. They are imposed upon us by circumstance. They rise out of our environment as a consequence of our spontaneous reaction to it. Most thought is imposed thought; not primary, controlling environment, but derivative, itself the creature of environment. This view is generally regarded, in intellectual circles, as an abominable heresy. The orthodox view may be represented by Lord Acton, the historian. "It is our function," he said, "to keep in view and to command the movement of ideas, which are not the effect but the cause of public events." This is quite Hegelian: ideas are the motive force of the whole life-process. Why, then, should Morley conclude, from a thorough study of the French Revolution, that ideas "acquired a certain importance after other things had finally broken up the crumbling system" and that they merely "supplied the formula for the accomplished fact"? [1] According to a French writer of 1795, it was after the Revolution had fairly begun that they sought in Mably and Rousseau for arms to sustain the system. The philosophers and ideologists—the intelligentsia—did not bring about the French Revolution. Their desertion of the Old Régime, like rats that leave a sinking ship, is now understood to be no more than one of the symptoms of approaching revolution.[2] This is not a mere controversy between the shades of Acton and Morley. We must decide between them; for it is a matter of fundamental concern to determine (if we can) whether great social movements and their appropriate institutions are the outcome of human design or of forces that master intellectuals and morons alike.

EXCOGITATED IDEAS

In Williamson's fine novel, *The Pathway,* the mystic Maddison makes what he regards as a great discovery. He has passed through an emotional or spiritual crisis and has found salvation in a new faith. To him now the only reality is thought. Change thought and you change the world. There lies the way of escape from the sordidness and brutality of life. "The mind is its own place and of itself can make a heaven of hell, a hell of heaven." Maddison regards himself for some while as a redeemer. He believes that mankind is on the verge of an experience like his own—universal conversion. But, of course, aberrations of that kind do not occur; great masses of men cannot be supplied overnight with a new mind and a new heart. In this respect Maddison was what

[1] *Miscellanies,* vol. III (1886), p. 228.
[2] See L. P. Edwards, *The Natural History of Revolution* (1927); George Soule, *The Coming American Revolution* (1934).

Jean Ogilvie at first described him as being—"a wash-out." [1] His dreams far exceeded his capacity for performance.

Maddisons and Actons are encountered in large numbers and in many directions. They have attached themselves, for example, to the peace movement. They seize upon the idea, the very excellent idea, of brotherhood and peace; they conceive of it, in some singular fashion, as an original force, creating its own dynamic energy; and they believe that by emphasizing the idea they can secure the reality. Thus H. G. Wells, grand artificer of Utopias,—whose successive dogmatic pronouncements are, unfortunately, difficult to harmonize—speaks darkly of "a race between education and catastrophe"; and Alfred Zimmern tells us that "the real difficulty lies with the *thinking* on both sides of the Atlantic." The voice is the voice of Maddison: change thought and you change the world. One finds in John Dewey and John Herman Randall a more cautious temper and a disposition to subordinate somewhat the rôle of ideas. Dewey says that "the greatest need of the world to-day is not for new organizations or new institutions, but, rather, for an awareness of the new relations into which we have come on this planet"; [2] and Randall says that "we cannot expect to make much progress in the building of the world-community until there has taken place such a re-education of the thinking people in all countries as shall make it possible to visualize the new world that has been born." [3] Their position may be described in this way: In the first place, we have come into new relations on this planet; a new world has been born. But, secondly, the change has taken place without our realizing its extent and significance. Bound by tradition, bound by inertia, we still think in terms of a vanished situation. Therefore—and this is the third and final point—we must rely upon education or propaganda to make us aware of the existing environment and the consequences that it entails. We must remold our ideas and bring them into conformity with realities.

The intellectuals [4] have now propounded two doctrines: the Maddi-

[1] This paragraph and several that follow are taken from my address on "The Peace Movement: Ideals and Actualities," *Proceedings of the Institute of International Relations*, 1931, pp. 223-232.

[2] Quoted in Randall, *A World Community* (1930), p. 171.

[3] *Ibid.*, p. 175.

[4] It is not easy to define the term "intellectual." In his *Natural History of Revolution* (1927), L. P. Edwards includes in the class (p. 38) authors, editors, lecturers, artists [we must register an exception here], priests and preachers, "and all those whose function it is to form and guide public opinion." He speaks of the intellectuals as non-productive laborers—the intelligentsia, highbrows, publicists (p. 39). They are (p. 63) the professional custodians of education, morality, and religion. "It is their job to make and unmake right and wrong, good and bad, vice and virtue, morality and immorality, nobleness and depravity, orthodoxy

son doctrine (change thought and you change the world) and the Dewey-Randall doctrine (change thought because the world has changed). Alongside of these the realists will insist upon placing their own doctrine: if the world changes, thought also changes. If the world changes, then—without the energetic pushing and pulling that Randall recommends—men will accommodate themselves to the change. The accommodation is inevitable, though sometimes slow;[1] it is inevitable because of the necessary response of man to the stimuli of his total environment. When the soil has been fertilized and cultivated and irrigated, appropriate ideas will sprout; and the crop will be the same with or without the incantations of the philosophers. At times Professor Dewey himself seems to accept this position, which finds such strong historical support. He says, for example, that "we live in a moving world and change with our interactions in it" and that "the mental and moral structure of individuals, the pattern of their desires and purposes, change with every great change in social constitution."[2] But such passages do not fairly represent his point of view.

In any given situation the elements are man (with his biological and social heritage) and material environment. Their interaction may be termed a manifestation of nature. Suspicions are aroused when the Deweys and the Randalls will not let nature take her course; when, dis-

and heresy, sense and foolishness." This reads like a definition of "uplifter." George Soule (*The Coming American Revolution,* 1934) includes in one place only the preachers, the lawyers, and the press (p. 41), and in another place only the Encyclopaedists and the press (p. 51). But he does make it clear (p. 8) that the intellectuals have a disposition to substitute fancy for fact, what ought to be for what actually is. They do so, the present writer believes, because their essential weakness is to overemphasize the potentialities of the mind. As a rule they have only a literary acquaintance with life, only a spectator's knowledge of affairs. Lacking experience with concrete realities, they take refuge in abstractions. They have been characterized, imperishably, in Shaw's epigram: "Those who can, do; those who can't, teach." One of Alexander Pope's couplets may likewise be applied to them:

"Go, teach eternal wisdom how to rule;
Then drop into thyself, and be a fool."

[1] The slowness of adjustment often causes impatience and a disposition somehow to hurry the process. Leonard Woolf, in *After the Deluge* (1931), pp. 33-39, vigorously attacks "this psychological dead hand, the dead mind. At every particular moment it is the dead rather than the living who are making history, for politically individuals think dead men's thoughts and pursue dead men's ideals.... Indeed it seems sometimes as if it is only the dead mind which can stir deeply political passions, and that a political ideal must have lost much of its meaning and relevance for the living before they will pursue it passionately.... Practically every political principle and idea, every social principle or aim, if it is widely accepted will be found to be controlled to a considerable extent by the dead mind. This is the explanation of that strange fact that no people are more conservative than liberals in their liberalism and revolutionaries in their revolution."

[2] *Individualism Old and New* (1930), pp. 167 and 81.

trusting nature, they want to hurry the process of adjustment and apply artificial stimulants—doses of ideology, concocted in their own laboratories and according to their own peculiar formulae. In a recent volume Professor Dewey admits that the present is *"too diversely crowded and chaotic to afford a balance of direction to ideas and emotions."* [1] This is a most important admission. If the environment is so chaotic, the intellectual shows not a little self-complacency in offering himself as a guide. How can he discover, amid such diversity and incoherence, "the new relations to which we have come on this planet" and "the new world that has been born"? Professor Dewey admits that we are surrounded by chaos, that ideas can find there no balance of direction, yet insists on bringing ideas into harmony with a selected portion of chaos. He says: "If we could inhibit the principles and standards that are merely traditional, if we could slough off the opinions that have no living relationship to the relations in which we live, the unavowed forces that now work upon us unconsciously but unremittingly would have a chance to build minds after their own pattern, and individuals might, in consequence, find themselves in possession of objects to which imagination and emotion would stably attach themselves. I do not mean, however, that the process of rebuilding can go on automatically. Discrimination is required in order to detect the beliefs and institutions that dominate merely because of custom and inertia, and in order to discover the moving realities of the present. Intelligence must distinguish, for example, the tendencies of the technology which produce the new corporateness from those inheritances proceeding out of the individualism of an earlier epoch which arrest and divide the operation of the new dynamics." [2]

The question arises: Why cannot the process of adjustment be automatic? Why must intelligence intervene, remove the old encrustations, and permit the new dynamics to work? Professor Dewey is utterly unable "to understand those who object to an intelligently controlled approach—for that is what science is." [3] But science has not made much headway in the social studies, even according to this vague definition. It will make some difference whether John Dewey or James M. Beck, Norman Thomas or Silas H. Strawn is asked to make the necessary discriminations, to apply the intelligent control; for some fragment of the new dynamics may easily be mistaken for an en-

[1] *Individualism Old and New*, p. 53. My italics.
[2] *Ibid.*, pp. 70-71.
[3] *Ibid.*, p. 97.

crustation of inertia. Another consideration is still more important. What is this transformed world, what are these transformed relationships to which our thought must be made to conform? The Deweys and the Randalls get an impression of change, which, since it differs from yours and mine, may well seem to us distorted and exaggerated. What they actually picture is, perhaps, the world as they would like it to be, or the world as they think it is becoming. They ask everybody to share their vision and to shape conduct accordingly. In fact, the Dewey-Randall doctrine (change thought because the world has changed) may be repudiated on two counts: first, because, with such a complex world, we cannot picture it accurately and "discover the moving realities of the present"; and secondly, because, even if we could get the picture, there would be no need of forcing a mental adjustment to it, and indeed no means of pushing forward the great mass of humanity faster than it is disposed to go. The doctrine is a dangerous one; for the world with which its apostles will try to make our thinking accord will certainly be quite different from the actual world. The route which they chart will therefore be the wrong route; and by the time we have discovered the errors of their amateurish cartography and sighted the reefs and shoals, the deviation may have brought us near to shipwreck.

HOW INSTITUTIONS TAKE FORM

Before we take the advice of the intellectuals it might be well to ask what they have contributed towards human achievement and social progress. More specifically, what has been the relative importance of ideas in the shaping of institutions? Men are imprisoned by habit—"the mainspring of human action," as Dewey calls it.[1] They are manacled to the past, unable to move away from it beyond a short length of chain. At any given time they take only a tentative step forward, originating very little, however revolutionary their aims.[2] Each

[1] *The Public and Its Problems* (1927), p. 159.

[2] This is seen clearly in the field of mechanical inventions. Why should such rival claims be made as between Bell and Gray over the telephone, Marconi and De Forrest over wireless, Daimler and Selden over the gas engine, Wheatstone and Elliott over the typewriter; Daguerre, Niepce, and Talbot over photography? Why so many simultaneous inventions? Mark Twain, writing long ago in *Harper's Magazine*, concluded that mental telepathy alone could explain the simultaneous appearance of the Morse telegraphic code and two other codes at widely separated points. But in all these cases many little preliminary steps have been taken; scientific publications make them known to all experimenters; and at last the way is charted to the final step, which will give a practicable telephone or camera. One step leads to another. Watt and Fulton profited by the steps that others had taken.

little step is taken in response to environment, giving the individual, in accordance with his inherited qualities, a certain latitude in the character of his response. Thus he modifies the environment to which he must respond.[1] It is the accumulation of little steps, of minor adjustments, that brings about a noticeable change in environment. New practices and new institutions, with their corresponding ideas,[2] emerge in this gradual fashion. So, anthropologists tell us, great social transformations occurred as men stumbled upon the secret of domesticating animals (huntsmen becoming herdsmen and developing a nomadic patriarchal society) and of tilling the soil (which explains why the tie of kinship gave place to the tie of territorial abode). Private property, slavery, a stratified society—such institutions arose naturally out of altered circumstances and not through any "intelligently controlled approach." New social forms originate and old social forms die without any clear perception, by contemporaries, of what is happening. Their movement eludes human control. Republican legislation could not arrest the decline of the Roman middle class or evade its fatal consequences; [3] no more could an English parliament save the yeomanry from decay. The most fundamental change in modern society goes by the name of the Industrial Revolution. Who planned it? Who foresaw its coming? Who, when it was actually upon us, understood its significance or knew how to moderate its force or change its direction?

In their origin and early development, great movements, which transform institutions and ways of thinking, commonly escape observation. They carry us far, and along a new route, before we become conscious of the direction and the distance traveled. We very seldom realize where our many little steps are taking us. By means of an elaborate historical analysis of American legislation Frederic Jesup Stimson has shown how, gradually and insensibly, the principle of control has superseded

[1] Professor Dewey says: "Whether we wish it or not, whether we are aware of it or not, every act effects a modification of attitude and set which affects future behavior" (*The Public and Its Problems*, p. 159); and "every act produces a new perspective that demands a new exercise of preference," that is, of the circumscribed selective choice and use of conditions (*Individualism Old and New*, p. 167). Compare the view of Ernest Barker (*National Character*, 1927, p. 4): "Men make these great and august things, and these great and august things in turn make men. We are made by what we have made. We project our ideas into the world of reality, and when they have taken shape and form, they shape and form us by their reaction upon us."

[2] In *National Character and the Factors in Its Formation* (1927), pp. 137-138 and 143-144, Ernest Barker takes an opposite view, new ideas producing corresponding institutions.

[3] See Léon Homo, *Roman Political Institutions* (1929), pp. 90-104.

the principle of liberty in the United States.[1] We experience something of a shock when confronted with the evidence of having traveled for so long a time and of having moved so far from our original position.

When we examine political institutions, one after the other, they seem to have been erected, almost like the coral reefs, without conscious design.[2] There has been no pre-arranged plan, no architect's drawings and blue-prints; man has carried out the purposes of nature, we might say, acting blindly in response to her obscure commands.[3] We approach with veneration the splendid edifice of the Roman law—now, after so many centuries, the law of Continental Europe and of Latin America. Remarking its symmetry, its satisfying proportions, and the harmony of its various parts, we ask for the name of the architect. There was no architect; nobody planned it. Year by year it grew, by slow accretions, as each successive praetor, beginning his short term of office, granted new remedies and modified the perpetual edict in the light of specific problems.[4] Case by case it grew—like that other wonderful system, the English Common Law—as the jurisconsults instructed praetor and judge alike on points of law. There was little room for theory. Speaking of the legal treatises of the second century A.D., long after Roman jurisprudence had been impressed with its distinctive character, Professor Max Radin says: [5] "The mass of doctrine which these books contain is in no sense an application of a general or philosophical or ethical or legal theory. It is, on the contrary, the rationalization of concrete applications. It is very decidedly case law in which the cases are related,

[1] *The Western Way* (1929).

[2] Gladstone spoke of the constitution of the United States as having been struck off at a given time by the brain and the purpose of man and as being a great original contribution. In fact, the document is peculiarly empirical. It embodies English experience and colonial experience, experience with inter-state coöperation under the Continental Congress and under the Articles of Confederation. The more perfect union which hard-headed men of affairs set up at Philadelphia was deeply rooted in the lessons of the past and in the necessities of the present. It was not theory which dictated national control over customs tariffs and commerce, or prohibited the states from emitting bills of credit or impairing the obligation of contract; or which gave the central government the direct power of enforcing its own laws. Neither judicial control nor the separation of powers can be attributed to theory rather than experience. The intensely practical character of the constitution, which is illustrated so well by the numerous compromises, ensured its longevity; and this is likewise true of the fragmentary French constitution of 1875. It is interesting to note, in the case of the first constitution of the Irish Free State, that novel features such as the initiative and referendum, which were intended to differentiate it from the familiar English and Dominion models, were soon swept away.

[3] The "blindness" is far from complete, of course; in meeting a new situation man draws upon the lessons of experience.

[4] See below Chapter X on the evolution of Roman Law.

[5] *Handbook of Roman Law* (1927), pp. 71-72.

classified, reconciled, and systematized.... That is *bonum et aequum* [equity] which, if generally and frequently applied, would produce a maximum advantage. In determining what would produce this result the praetor or *judex* was aided by the rapidly increasing mass of precedents, collected, discussed, and annotated in published books. To disregard them would have been a psychological impossibility, even for radical reformers, and radical reformers did not usually obtain *imperium* in the Roman Empire, and equally rarely obtained the *jus respondendi,* the privilege of answering [giving opinions on points of law] with imperial authority." [1]

England, like Rome, has been a builder of political institutions. She is not merely the "mother of Parliaments." She has given birth to many other definite additions to the art of government, such as the party system and ministerial responsibility, equality before the law and judicial independence. Why have English political institutions spread so widely over the world? Why has the originative genius of the English people been recognized universally by imitation, the sincerest form of flattery? Their genius must be connected, as in the case of the Romans, with their so-called stupidity, their distrust of general ideas and their imperviousness to abstract thought. Instead of thinking things out, we are sometimes told, they muddle through; but they muddle through triumphantly because of an awareness of realities and a traditionalism which is solidly based on experience. While such qualities are in some degree the common possession of humanity, they are intensified in the English and explain their relative success in institution-building, as well as their deficiency in other directions. The English react to situations somewhat differently from the French, a "brainier" people. In the revolution of 1688, with the king in flight and a foreign invasion imminent, their parliamentarians concerned themselves chiefly with the precedents afforded, centuries back, by the deposition of Edward II and Richard II.[2] In the revolution of 1789 French deputies let affairs get out

[1] James Hadley (*Introduction to Roman Law,* 1873, reprinted 1931, pp. v-vi) is still more emphatic. "The process consisted not in formulating a philosophy which particular cases must be made to fit but in finding answers to a succession of specific problems. The Romans' strong practical sense and comparative indifference to the abstract made it inevitable that their chief interest should be in the question of what to do in a given set of circumstances."

[2] The elderly Maynard complained: "A man in a revolution, resolving to do nothing which is not strictly according to established form, resembles a man who has lost himself in the wilderness, and who stands crying, 'Where is the king's highway? I will walk nowhere but in the king's highway.' " Yet all must agree that the revolution was well-managed, largely because of precedent-mongering. This fondness of precedents is sometimes carried to absurd extremes,

of hand while they discussed the rather vague and abstract rights of man. The Scotch and English mentalities have often been contrasted in a similar fashion. A young Presbyterian, studying the Westminster Confession of Faith, is confronted at the very outset with the tremendous question: "What is the whole duty of man?" The Anglican catechism begins in characteristic matter-of-fact fashion: "What is your name?" And the next two questions ask who gave you this name and what your godfathers and godmothers then did for you.

"Taken as a whole, the English are not brilliant, but they are clear-headed: they are not far-sighted, but they can see the facts before their eyes: they are ill equipped with theoretical knowledge, but they understand the working of institutions and have a good eye for judging character: they have little constructive imagination of the more grandiose sort, but they have an instinct for the 'next step' which has often set them on paths which have led them far further than they dreamed; above all, they have a relatively high standard of individual character and public duty, without which no organization involving the free co-operation of man can hope to be effective. It is this unique endowment of moral qualities and practical gifts, coupled with unrivaled opportunities, which has made the English the pioneers in modern times in the art of human association." [1]

So the English constitution has slowly broadened down from precedent to precedent, its various parts evolving, like the two-chambered legislature, through day-by-day adjustments and through the operation of factors whose presence could not have been predicted. Two houses—instead of three or four, or even one—came into being by what might seem a series of accidents if the normal play of stimulus and response, "the instinct for the next step," were overlooked. It is only philosophers, ignorant of history, who praise the system as a fine example of human contrivance. Again, the English dealt with the royal prerogative

as in the establishment of the Board of Education (1899), with a president and four other (silent) members. The Duke of Devonshire quieted the demand for a ministry by saying: "It [the board] has the advantage, at all events, of numerous precedents, and it is perfectly well understood that there will be no board at all."

[1] A. E. Zimmern, *Nationality and Government* (1919), p. 161. In the London *Observer* (Sept. 18, 1927) Mr. Wickham Steed explains the difficulty of foreigners who try in vain to find the guiding idea of British policy and the deep thought that lies beneath it. The fact is that "in Britons the field of cerebral consciousness, or of conscious thought, is usually more restricted, and plays a smaller part in life and action than among 'brainier' peoples who seek, above all else, clear or systematic expression of their mental processes; and that, on the other hand, the field of unconscious perception, of instinctive recognition of facts not susceptible of pellucid formulation, is apt to be wider and deeper in the 'British complex' than in those of most other peoples."

very much as the Romans dealt with the royal *imperium*. They did not destroy or dissipate it: they kept it intact, limited its arbitrary use, and eventually transferred it from the king to responsible ministers. In early days, when the king was strong enough to ignore the protests of parliament, statutes were passed permitting him to do what he had already done; and in this and other ways, without any grandiose plan of supplanting the royal authority, a long line of precedents in the end gave color to parliamentary pretensions of control. The precedents grew through the shrewd vindication of immediate interests and "the instinct for the next step." How parliament made sure its footing, as it climbed the ladder, rung by rung; how it started as a mere instrument of the king in raising taxes, and, after centuries of gradual evolution, became the government-making organ should be familiar to every one who wishes to understand the process of institution-building. It is a process of trial and error—here a little, there a little. The interests of the moment, not of posterity, dictate action. But posterity gains; for the institutions which persist longest and which best serve the needs of society are those which have grown without the help of the doctrinaire.

Occasionally there has been a plan. But always, while poring over the blue-prints, the workers have built something quite unlike what they professed to be building. In the eighteenth century Englishmen accepted, intellectually, the principle of the separation of powers; for they had succeeded, after a long struggle, in freeing parliament from royal domination and in setting up an arrangement of equipoise or balance in the terms of the inconclusive truce of 1688. With their minds they repeated the pious maxim over and over again, in the Coué manner; but with their hands they brought executive and legislature together in the closest integration. Montesquieu visited England in 1726. He heard all the Whig leaders repeat the maxim; he saw that they professed to believe in it as the key to good government; and so he put the formula down in his book, *The Spirit of Laws*.[1] He failed to see that at this very

[1] It is frequently said that the principle of the separation of powers was embodied in the constitution of the United States through the influence of Montesquieu, this being offered as a proof of the dynamic power of theory. There is no factual basis for the assertion. In Farrand's *Records of the Federal Convention* (3 vols., 1911) there are just seven references to Montesquieu; and only one of them has anything to do with the separation of powers. "The great," "the famous," "the celebrated," Montesquieu is lugged in, apparently, to embellish a speech and suggest an acquaintance with the literature of politics. In fact, the delegates were guided (as the records amply prove) by the experience of their own country and what they mistakenly thought to be the experience of England. See, for example, Madison's speech of June 6 (*Records*, vol. I, p.

time Sir Robert Walpole, the first prime minister in the modern sense, was busily fusing the two powers.

The conception of a Cabinet making and executing laws under the supervision of Parliament, a Cabinet remaining in office only as long as it enjoyed the support of the majority in the House of Commons, became familiar in the nineteenth century. All the writers extolled the virtues of a system which gave the House the power of life and death over the Cabinet. They continued to extol it even when there had been set up, by insensible degrees, a very different system, which now gives the Cabinet the power of life and death over the House. In like manner they still praise the historic bicameral system, which has long been disintegrating and which, since the Parliament Act of 1911, has existed chiefly as a memory. One startling shift, occurring right in the face of dominant theory, has been exposed only during the last few years.[1] In the original home of the rule of law, where the rights of all men under the law are supposed to be determined by the ordinary courts, there has developed what Lord Hewart denounces as "the new despotism," a branch of law made and enforced by administrators after the fashion of administrative law on the continent of Europe. Once again facts have proved too strong for theory. But now that the monstrous growth has been detected, what shall be done about it? One thing is certain: Englishmen will not back a mere theory, however well grounded on past behavior, against the decrees of present circumstance.

The discrepancy between professions and conduct, between ideas and activities, is a phenomenon that will often be encountered. It is possible for a devotee of *laissez-faire* to speak the language of Mill's *Essay on Liberty* and yet embark upon a series of social reforms that lead right to the frontiers of collectivism. It is possible for a convinced isolationist to speak the language of George Washington's *Farewell Address* and yet, as practical considerations move him, commit the United States to every sort of foreign entanglement. It is possible for Professor Harold Laski to expound, in the first part of *A Grammar of Politics*, his favorite theories of pluralism, pragmatism, and "authority as

139). He says nothing at all about Montesquieu, but justifies the association of judges with the executive for the revision of laws on the ground that in England ("where the maxim itself had been drawn") the king had an absolute negative over the laws and the House of Lords acted as the supreme tribunal of justice. One may ask the theorists why Montesquieu was ignored in 1777, when the Articles of Confederation were drafted, and (according to their version) worshiped at Philadelphia ten years later.

[1] See Lord Hewart, *The New Despotism* (1929), and C. K. Allen, *Bureaucracy Triumphant* (1931).

federal," and yet give the lie to every one of them when he comes to the point of furnishing the State with workable institutions.[1] Few theorists manage to escape such contradictions when they move into any area of practical affairs.[2] But theorists have, in the long run, little positive effect upon social behavior; for (happily) our minds are so compartmented that here we have a playroom for our toys, for excogitated ideas, which, in the face of discordant facts, cannot permanently shape our conduct; and there we have a workroom for operative ideas, imposed ideas, which we accumulate from successive collisions with our environment.

VALID AND INVALID IDEAS

We may conceive of man as groping blindly along his path. He stubs his toe; and an idea is born. Shall he climb over the obstacle or make his way round it or, for the sake of future convenience, remove it from his path? The idea that is born is likely to be a valid idea, because it is imposed by circumstances (with the possibility of a choice) and deep-rooted in realities. Given the problem, man thinks things out, the train of thought arising spontaneously from the facts and keeping in the closest contact with them. He makes a choice between alternatives (a selective response), the range of valid choice being strictly limited by the factors in the situation. But suppose that the traveler, being an intellectual, does not fancy that kind of groping and believes that destiny can always be controlled. Suppose that he sets down upon his chart some ideal destination (a Utopia) and, with the help of sextant and theodolite, works out his route along a geometrical line. Having bumped into a boulder, he will refuse to abandon the ordained straight path and go around the obstacle; and, since he can by no means move it, he tries dynamite. Then, in place of the boulder, he discovers a yawning chasm. His ideology has got him into trouble. Where will

[1] See the penetrating criticism of Laski in W. Y. Elliott's *The Pragmatic Revolt in Politics* (1928), especially pp. 166-176.

[2] Writers who adopt the doctrine of Lord Acton, that ideas are the cause, and not the effect, of events, invariably get enmeshed in contradictions. Thus Ramsay Muir admits that in Germany "cosmopolitan ideas still obtained general acceptance, but this was due to the hopeless political disintegration of the country" (*Nationalism and Internationalism,* 1917, p. 131). J. Holland Rose says that, when he died, Mazzini's ideals "lay shattered by collision with coarse reality" (*Nationality in Modern History,* 1916, p. 85). R. H. Tawney says that "the justification of private property ... has undergone the fate of most political theories. It has been refuted not by the doctrines of rival philosophies, but by the prosaic course of economic development" (*The Acquisitive Society,* 1921, p. 82). These examples are taken from a great number of similar instances, compiled from a systematic examination of such writers.

he obtain the materials for a suspension bridge, and when can he expect to resume his somewhat dubious journey? No formula can tell us at what distance from the actual situation ideas lose their validity.[1] As in most of the important things of life, we are confronted with a question of degree; and our best guide is the maxim that the ancient Greeks so fondly cherished and so seldom respected: "Nothing in excess." If there is a dividing line between the false and true, the intellectuals, by natural disposition, commonly get on the wrong side of it. Generating ideas in a vacuum, they glut the market with the cheapest and, in some ways, the most deleterious of commodities. They think too much.

According to Shakespeare, Julius Caesar let fall some interesting observations about Gaius Cassius. Cassius was the intellectual, who thought that the Republic could be revived, that ideas could prevail over circumstance. Caesar was the man of action, the practical man. In what a characteristic fashion he begins his narrative of the Gallic war! No rhapsody there; just a description of the terrain: "All Gaul is divided into three parts, the Belgians inhabiting one, the Aquitanians another." He might have been the author of the Anglican catechism. In true Roman fashion he is setting the facts before us. Caesar felt the urge of a great ambition, and he realized it, bit by bit, because he went with the current of the age; and so, when the Cassiuses killed him, his work went on; his place was taken by another Caesar. What was it that Caesar said about Cassius?

> Let me have men about me that are fat,
> Sleek-headed men and such as sleep o' nights.
> Yond Cassius has a lean and hungry look,
> He thinks too much; such men are dangerous.

[1] A somewhat similar problem is discussed by Henshaw Ward in *Thobbing: a Seat at the Circus of the Intellect* (1926), pp. 44-45. He contrasts two ways of getting ideas. The first is used by the biologist when he investigates the elements of a germ-cell, or by the chemist when he investigates the structure of molecules. "The ideal scientist would want to make his brain conform to what exists *out there* in the world; he would want to have his brain build up the stuff that comes from *out there*. The driving power of his sort of imagining is curiosity about the reports made by the senses. Curiosity always desires to check up its findings with the findings of other inquirers. It doubts any explanation that does not appear the same to all normal observers." The other sort of imagining *constructs fancies out of brain-stuff*, after the manner of my "excogitated ideas." How distinguish between the two sorts? In the first case curiosity is the motive in making the pictures. "The ideal scientist would never have any affection for his images; he would be eager only to change them if somebody showed him a more probable picture. But the makers of what we call 'myths' or 'fancies' have no curiosity; they are in love with their imaginings and will on no account alter them until obliged to."

Yes: our Cassiuses think too much. Gifted with a fatal facility in generating ideas, they lose themselves in a cloud of words or, in the phrase of Kuno Renatus,[1] "a stratosphere of ideologies" and insist that everybody else get lost there likewise. Why do we burn incense at the shrine of Plato and forget the very names of the Roman engineers who civilized Europe with magnificent concrete highways? Why do we attach such spurious value to the contributions of the ideologists? Perhaps because they write history for us and appraise the efficacy of their own ideas, singling out the few that have proved valid and forgetting the multitude that have proved worthless. They have been remarkably fecund in offering dubious political advice; and the fact that the world, while frequently applauding it (in the playroom), has so seldom acted upon that advice does not seem to discourage them. So says Professor Rexford G. Tugwell, himself one of the ideologists: [2] "This is a time in which there ought to be a great demand for social inventors. It is a curious commentary on the psychology of creation that inventions are being produced even though the conventional elements of demand are lacking. There is, for instance, no market. On the contrary, the inventor in this field is regarded as a menace. His products are certainly not bought up eagerly and exploited as new machines are; strangely enough, he is not at all deterred. His ingenious devices are put forward in as great numbers and with as great persistence as though there were fame and fortune in each of them." At first sight, but quite erroneously, this may be taken for irony. Professor Tugwell really does admire the ideologists who (unable to make anything else) keep on propagating ideas; and he really does get saddened over a quite evident lack of appreciation. He might be reminded of the researches of Dr. Free. When measured by the ability to reason from cause to effect, Dr. Free found,

[1] *The Twelfth Hour of Capitalism* (1932), p. 28. "To reply to the question what has brought about the world crisis by peppering the whole economic system with negative signs and proclaiming the 'end of capitalism' seems to us too simple. It is just as unhelpful as if a man were to go to the dentist and ask what is the matter with his aching tooth, and the dentist, without even looking inside the man's mouth, were to reply: 'What do you expect, my dear sir? Don't you know that among all the members of civilized humanity to-day the jaws have degenerated? You must give up your tooth as a bad job. You must entirely change the whole system, you must go over to the rational jaw of artificial teeth.' Prophets of that sort abound to-day. And the comparison is much too kind to them, for the dentists have behind them a generation of experience with sets of teeth: while the economic systems urged upon us as alternatives to the capitalist system, whether they go by the name of Economic Planning or Self-sufficiency, are as yet no more than fictions of the intelligence, or have been tried only under conditions which are not compatible with that of German trade and industry."

[2] *The Industrial Discipline and the Governmental Arts* (1933), pp. 224-225.

automobile mechanics take the first place; college professors rank just below the ministers of religion and just above the morons.

It is not alone the unappreciative masses who reject the "ingenious devices" of the ideologist. Nature shows a similar skepticism. In measuring the value of excogitated ideas, which give us a planned destination and a geometrically charted route, this skepticism must be accorded a capital importance. Where do we discover this interesting attitude on the part of nature? Relying upon abundant and apparently conclusive data, most prominent biologists agree that the intellectuals are dying out.[1] They put the situation in this way: Intelligence is hereditary.[2] In our fluid society it rises to the top,[3] and there becomes sterilized, being skimmed off like cream—or scum. This is the effect of assortive mating (the marriage of like with like) and of the differential birth-rate.[4] The intellectuals lose the power of reproduction, or the will to exercise it; and, because of the voluntary or involuntary restriction upon the number of offspring, the line dies out. Professor Holmes presents the general verdict when he says that "the more intelligent are being outbred by those on a lower mental level.... It is quite evident that we are losing the stocks represented by our college-bred population. There is good evidence that we are losing the stocks that have achieved success in most kinds of intellectual pursuits.... This is one of the great tragedies of our time."[5]

The biologists may be quite right in describing the situation, and yet be quite wrong in putting on a tragic demeanor over it. They seem to

[1] See Edward M. East, *Mankind at the Crossroads* (1923) and *Heredity and Human Affairs* (1929), especially pp. 250-264 of the latter, where a good deal of evidence is cited; and S. J. Holmes, *The Trend of the Race* (1921) and *The Eugenic Predicament* (1933).

[2] "It comes by the grace of God," says Professor Holmes (*The Eugenic Predicament*, p. 77), "or, if one prefers, from the collocation of genes. If it is not inherited, the endeavor to supply it has little chance of conspicuous success."

[3] See Alleyne Ireland, *Democracy and the Human Equation* (1921); and N. J. Lennes, *Whither Democracy?* (1927).

[4] "There is a high differential birth-rate in favor of the least intelligent classes of the population sufficient to make a pessimist of any one conversant with the facts." East, *Heredity and Human Affairs*, p. 252.

[5] *Ibid.*, pp. 100-101. Professor East says (*op. cit.*, pp. 262-264): "The general conclusion of most studies of vital statistics is that those elements of the population exhibiting subnormal mentality show the highest gross fertility, while those elements having the greatest intellectual capacity court extinction by their relative sterility. With the existent hereditary mechanism the undesirability of this condition would seem obvious, since a good germ-plasm once extinguished cannot be recovered by any known process of alchemy.... The trend is obvious.... A continuous process of subtraction has never been discovered which leaves the subtrahend as large as before." For recent data on the birth-rate at different levels of cultural-intellectual development see Frank Lorimer and Frederick Osborn, *Dynamics of Population* (1935).

have forgotten about the survival of the fittest; or rather they assume that the brainiest are the fittest, and that, in killing them off, nature has made an unaccountable mistake. But nature does not make mistakes. She rebukes pride of intellect, the self-complacent illusion that mankind can take the wheel and settle the course. She bestows her favors upon the stupid mass, the animal mass, which responds readily to environment, erecting no ideological barriers and contenting itself with the narrow range of choice permitted by the next step. After all, perhaps, the meek shall inherit the earth. If nature abhors a vacuum, she has no use for ideas that are generated in one.

CONCLUSION

It has been the purpose here to contrast, particularly, two very different kinds of ideas: imposed ideas arising spontaneously from contact with the environment; and excogitated ideas, which purport to have an independent intellectual origin. The latter are attractive, fatally attractive. Among the classics of political literature they hold a preëminent place. They minister to the egotism of man, his will to believe in indefinite progress, in the ultimate conquest of the material universe, and in his mission to be the arbiter of destiny. They provide the myth of victory, without which man might be indisposed to continue the dreary struggle.[1] But the political achievements of man, which may safely be measured by his institutions,—the monuments of his activity, —have not been attended by much conscious thought. "The active voluntary part of man is very small," Walter Bagehot has said,[2] "and if it were not economized by a sleepy kind of habit, its results would be null.... It is the dull traditional habit of mankind that guides most

[1] "You will hear them talk in precise terms about themselves and their surroundings, which would seem to point to their having ideas on the matter," says José Ortega y Gasset (*The Revolt of the Masses*, 1932, pp. 169-170). "But start to analyse those ideas and you will find that they hardly reflect in any way the reality to which they appear to refer, and if you go deeper you will discover that there is not even an attempt to adjust the ideas to the reality. Quite the contrary: through these notions the individual is trying to cut off any personal vision of reality, of his own very life. For life is at the start a chaos in which one is lost. The individual suspects this, but he is frightened at finding himself face to face with this terrible reality, and tries to cover it over with a curtain of fantasy, where everything is clear. It does not worry him that his 'ideas' are not true, he uses them as trenches for the defence of his existence, as scarecrows to frighten away reality. The man with the clear head is the man who frees himself from those fantastic 'ideas' and looks life in the face, realises that everything in it is problematic, and feels himself lost.... These are the only genuine ideas; the ideas of the shipwrecked. All the rest are rhetoric, posturing, farce."

[2] *Physics and Politics* (2nd ed., 1900), p. 77.

men's actions, and is the steady frame in which each new artist must set the picture that he paints." This traditionalism, summing up the lessons of experience, usually determines each successive minor adjustment, each successive little step. It has been said, but said wrongly, that there is no pain like the pain of a new idea. What chiefly causes pain is a sudden and considerable change in the customary environment. The "social lag" is protective and due to the anxiety to avoid such pain. So, the more things change (on paper), the more they remain the same. The more grandiose the ideas that are offered to man, the more stubbornly he refuses to act in conformity with them. He does want to know where he is going, and he does not want to go far. Political theory —most of all abstract political theory—he regards with explicable suspicion.

CHAPTER II

THE SCIENTIFIC APPROACH

IT may be well to repeat, for the sake of emphasis, one of the main arguments of the first chapter. Enduring institutions have not been built according to conscious design and preconceived plan. They have grown piecemeal, by minor adjustments and innumerable small accretions, as the outcome of successive collisions between man and his environment. The environment to which man responds is the so-called total environment. It includes not only the material world, but the people themselves and their social heritage. The behavior of man varies with such geographical factors as soil and climate. It also depends on his social inheritance and his biological inheritance. The former consists of the knowledge and expedients and habits which have been transmitted from generation to generation, formerly by the wise men of the tribe, latterly by our colleges [1]—the lessons of the past, which are as invaluable to-day as a thousand or a million years ago and which theorists and ideologists are apt to deride as mere traditionalism. It determines, in considerable degree, the response that will be made to the material environment.[2] So does heredity. The response will be a "selective" response. "The world of experience is selectively determined," Professor MacIver tells us,[3] "by the mentality of the individual in accordance with his temperament, his degree of intelligence, his range of contacts, and his past experience." But as a matter of fact the area of valid choice is narrowly limited by the facts of any given situation. Man evolves, by trial and error, some sort of habitation; but the Eastern woodland Indian does not live in an igloo, or the Eskimo in a birchbark tipi.[4]

[1] Graham Wallas, *Our Social Heritage* (1921).

[2] In *The Social Life of Monkeys and Apes* (1932), Solly Zuckerman says that "man amasses experience through speech, and the effective stimuli underlying human behavior are largely the products of the lives of pre-existing peoples."

[3] R. M. MacIver, *Society: Its Structure and Changes* (1931), p. 527. He continues: "It is the whole situation subjectively realized, not as it stands either in external reality or in the eyes of any other individual. It is the outer world transmuted in the forces of a personality. For every individual the behavior of his fellows, as perceived and understood by him, is part of his total environment. For the group as a whole there is, however, a common environment of a more limited character, the common conditions under which it lives."

[4] Clark Wissler, *Man and Culture* (1923), p. 319.

It may be that action of *any* kind must be preceded by thought of *some* kind. On the other hand, thought does not necessarily take effect in action. Excogitated ideas, parasitic thought-forms, may be entertained without influencing conduct in the slightest degree. They are commonly mere playthings. The influence of theorists like Locke and Montesquieu as guides to actual behavior has been asserted without proof and in specific instances grotesquely exaggerated. Ideas that may be highly regarded from a literary or speculative standpoint arouse suspicion and dislike when put forward as programs of action. The theorist then encounters hostility; he becomes a public menace. The tyrant of Syracuse dampened the reforming ardor of Plato by selling him into slavery. This unsympathetic attitude Professor Arnold Bennett Hall attributes, quite justly, to the unscientific character of the theories.[1] There is a great deal of difference between theory in the physical sciences and theory in politics. When the chemist formulates a theory, he brings forward in its support conclusive evidence; its validity is a question of fact. In politics a casual generalization or an excogitated idea may be dignified as a theory. Perhaps no factual evidence is offered—sometimes, as in the case of the social contract, because none exists; or the alleged evidence is so meager or untrustworthy as to have no value whatever. It is not surprising, therefore, that new political theories, which may run counter to existing prejudices and convictions, are often received either with indifference or with hostility. Professor Hall proposes the remedy: to place political research "upon a scientific basis of objective fact," to create a science of politics that may properly rank with such sciences as physics and chemistry.

Has this science, then, still to be created? What of the assumption, in terms that have been employed for generations, that it already does exist? A century and a half ago Madison spoke, in *The Federalist*, of the "science of politics." [2] A century ago Sir George Cornewall Lewis referred to "political science" without any disposition to denounce it as an impostor term.[3] The general acceptance of that term may be illustrated by the appearance in America of Theodore D. Woolsey's *Political Science* (1877) and in England of Sir John R. Seeley's *Introduction to Political Science* (1896).[4] Seeley maintained

[1] *American Political Science Review*, vol. XIX (1925), pp. 104-105.
[2] No. XLVII.
[3] *Remarks on the Use and Abuse of Some Political Terms* (1832, 1898), p. 1.
[4] This remarkable book was based on Seeley's lectures at Cambridge University in the academic year 1885-1886 and, after his death, prepared for publication by Henry Sidgwick, whose *Elements of Politics* is likewise a classic.

that, since the distinctive characteristic of the State is the use of the contrivance called government, "we may say that this science deals with government as political economy deals with wealth; as biology deals with life, as algebra deals with numbers, as geometry deals with space and magnitude." [1] He did not actually claim the existence of a perfected science: it was in process of being formed. "If history itself be a growth so modern," he says,[2] "it is not surprising that the elaboration of a science out of history should still be in great degree reserved for the future. What was called history in the middle of the eighteenth century was too unsound to form the basis of anything. The case is different now. The present generation has a vast treasure of historical knowledge which is trustworthy and available for the purposes of science."

This optimism has scarcely been justified. Fifty years have passed; the literature of politics has expanded enormously. Yet competent authorities, whose judgment is entitled to respect, deny that a science has come into being. According to James Bryce, for example, it is "impossible that politics should ever become a science in the sense in which mechanics or chemistry or botany is a science." [3] According to Charles A. Beard, "the prospects for a political science are not very hopeful." [4] Although the idea is fascinating, "when we survey the state of the materials and take stock of our minds as instruments for the task, the business becomes appalling. . . . No science of politics is possible; or if possible, desirable." [5] George Catlin maintains that "there is as yet no such thing as a political science in any admissible sense. . . . The great objection to a political science in the mind of the ordinary man is that the subject pompously so named has hitherto conspicuously failed to 'make good'; it has made a great display of packing for the journey, but has never as yet been known to arrive at a destination beyond the everyday knowledge of any layman." [6] At Cambridge University, where Seeley taught and where the use of the term "political science" has official sanction, Ernest Barker said recently: [7] "I am not altogether happy about the term 'science.' It has been indicated so largely, and almost

[1] *Introduction to Political Science*, ed. of 1902, pp. 17-18.
[2] *Ibid.*, p. 29.
[3] *Modern Democracies* (2 vols., 1921), vol. I, p. 14.
[4] *Research in the Social Sciences* (W. Gee ed., 1929), p. 271.
[5] *Ibid.*, pp. 270 and 286.
[6] *The Science and Method of Politics* (1927), pp. 142 and 147. See also Catlin's *A Study of the Principles of Politics* (1930).
[7] *The Study of Political Science and Its Relation to Cognate Studies* (1928), p. 3.

exclusively, for the exact and experimental study of natural phenomena, that its application to politics may convey suggestions, and excite anticipations, which cannot be justified."

Here Professor Barker is thinking of science in the restricted and exact usage of the natural sciences, in which laws are formulated and, in conformity with them, future occurrences predicted. Politics, he believes, is still incapable of any such precision. But what of the future? Does not chemistry trace its dubious origin to alchemy; and astronomy, to astrology? Is not the medical doctor of to-day the offspring of a long line of charlatans and quacks? [1] As to whether a science of politics may likewise emerge reputable opinion differs. Some writers deny the possibility. Others agree, more or less, with Professor Catlin that "to set out in pursuit of a political science is not an enterprise in its very nature futile" and that politics may be "capable of becoming a science or a part of a social science." [2] Others, again, entertain no doubts about the fulfilment of their sanguine expectations. Whether we agree with them or not, all of these opinions are entitled to respect. On the other hand, what can justify the view of some young and ardent spirits that the science already exists? It exists, of course, if only the term science is loosely enough employed. They make no such qualification. Their solemn and pretentious aping of the physical sciences not only arouses suspicion, but invites ridicule. This is especially true in America, where we hear a great deal about "experiments" and "measurements" and where a pseudo-scientific patter or jargon—"specious scientific terminology and mysterious thaumaturgic ideas," to use the phrase of J. A. Hobson [3]—tends to disguise utterly unwarranted assumptions.[4] Such

[1] H. W. Haggard, *Devils, Drugs, and Doctors* (1929).

[2] *Op. cit.*, pp. 120 and 144.

[3] *Free-thought in the Social Sciences* (1926), p. 57.

[4] Hobson says (*ibid.*, p. 38) that in England and still more in America "the too rapid blossoming of erudite and esoteric terminology arouses some not unnatural suspicion, as if designed to bluff the intellectual public into acceptance of the social sciences upon their own valuation." MacIver, as a sociologist, is equally severe (*op. cit.*, p. ix): "Those sociologists who are content to point to the guide-posts, who never feel happy when they pass beyond their figures to the social truths they can yield, who delight in the 'natural science approach,' who think their work is done when they have counted something and measured something else, are ignorant of the art of interpretation which is the soul of the sciences of man.... Sometimes one feels that sociology would prosper more, especially in America, if its practitioners forgot to think of it as a science." The language might have been a little stronger; it scarcely indicates the odd practices that are indulged in. Emory S. Bogardus, recently president of the American Sociological Society, has a chapter on "Democratic Leadership" in his *Fundamentals of Social Psychology* (1924). Without defining democracy or leadership he formulates eight criteria of democratic leadership solely on the

abuses are common to all the social sciences. Admitting that "the applied psychologist, though he need not be a charlatan, sometimes closely approximates that status," Professor Bernard C. Ewer has condemned overconfidence and splurge.[1] The same scholarly caution is much needed in the field of politics.[2]

DEFINITION OF TERMS

In order to clarify the situation, some of its aspects must be discussed at length. Simply to know that different views are entertained about the possible development of a science of politics does not carry us far enough. Why should there be this divergence? What considerations determine these contrary opinions? If we ask, and answer in some fashion, two preliminary questions, we shall be in a better position to approach our problem. These two questions are: What is politics? What is science?

The word "politics" carries a variety of meanings. In particular, it is commonly used in two senses: a narrow one, concerning the affairs of parties (nominations, campaigns, parliamentary tactics); and a wider one, concerning the affairs of the State.[3] The wider meaning is original and primary; for the English word politics is derived from the Greek word *πόλις*, which may be translated as city-state or State.[4] Politics, therefore, covers a wider area than government, the latter being only a characteristic mechanism or instrument of the State. When Professor

basis of 158 replies to a questionnaire. Bogardus is worried about the Tammany bosses, but decides that they only simulate "at-oneness" with the humbler members of the group. He accepts the aristocrat Washington. One of his great conclusions is that "democratic leadership is possible of attainment by normal persons," by all above the moron level. "At moments of greatest discouragement and severest defeat a person may remember that his democratic leadership possibilities cannot be stolen from him"; but "persons may falsely delude themselves into thinking that they are democratic leaders." "What a stimulating concept," he exclaims, "the democracy of leadership universally available!"

[1] *Applied Psychology* (1923), pp. 15-16.

[2] We need, if not a science, a scientific attitude of mind. This is what Sir F. Pollock means when he observes (*An Introduction to the History of the Science of Politics*, 1902 ed., p. 4) that "political science must and does exist, if it were only for the refutation of absurd political theories and projects."

[3] Book titles will serve for purposes of illustration. The narrower meaning of the term is conveyed in Beard's *American Government and Politics;* the wider meaning in Sidgwick's *Elements of Politics*, which treats not only of the organs of government and political parties, but of individualism, property, morality, and much besides. Yet the term "government" is frequently used as covering politics in the limited sense. The scope of Lowell's *Government of England* and of Ogg's *English Government and Politics* is the same. Goodnow's *Politics and Administration* introduces a third meaning of the term. There Goodnow contrasts two functions of government, that of policy-determining and that of policy-enforcing.

[4] See Chapter V, which deals with the State.

Catlin insists that the study of politics must not be limited to the State,[1] that it should extend to such matters as the activity of parties, the influence of the press, and the relations between employers and employees, he is apparently confused. Nowadays at least, the State is regarded as something more than government; it includes the territory and its inhabitants; and the purview of politics extends to the limits of the State. Properly speaking, politics reaches into every sort of social cranny and recess. It is practical motives, motives of expediency, that keep the investigator pretty close to the immediate concerns of government. Even when, thus limited, he is dealing with government in the main (and government tends to spread over a rapidly-increasing area of activities), he cannot ignore the play of ulterior social forces on the ground that economics or sociology will look after them.

As to science the *New English Dictionary* gives numerous definitions, illuminating them by means of a mass of dated citations. Two of these definitions are apposite to our inquiry. In the broad and original sense, science means knowledge. Politics also is knowledge. Therefore politics is science. But to say this is to say very little. It will certainly not satisfy those who claim that politics is already a science or on the way to becoming one; for they have in mind the standard that is set by the physical sciences. It is interesting to find the late J. Arthur Thomson contrasting science and ordinary knowledge without any suggestion whatever that the latter has any possible claim to the title of science.[2] Science, he says, is "criticised, systematized, and generalized knowledge. That is to say, the student of science takes more pains than the man in the street does to get at the facts; he is not content with sporadic knowledge, but will have as large a body of facts as he can get; he systematizes these data and his inferences from them, and sums up in a generalization or formula. In all this he observes certain logical processes, certain orders of inference, and we call this scientific method."

We turn, then, to the second definition: "a branch of knowledge which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truths within its own domain." Of course, dictionaries, even the best of them, are fallible.

[1] *American Political Science Review*, vol. XXI (1927), pp. 257-258. See also Catlin's *The Science and Method of Politics* (1927), pp. 139-140 and 177-180.

[2] *Introduction to Science* (1911), p. 58.

The lexicographer is not himself an authority; he gets his information from what he regards as authoritative sources. If we do the same, if we consult (say) half a dozen representative writers in the physical sciences and half a dozen in the social sciences, we shall find that they agree substantially with the foregoing definition. For example, Professor W. J. Shepard (politics) tells us that scientific method can be resolved into three processes.[1] These are: accumulating the facts, linking them together in causal sequences, and, by generalization, deriving from such sequences fundamental principles and laws. Professor Ewer (psychology) puts the characteristics of science in this way: [2] "first and foremost the careful, comprehensive *observation of facts,* employing methods of accurate measurement as far as possible, and resulting in *exact description,* and *systematic classification.*[3] Secondly, science is the *explanation of facts* as the effects of definite causes, to which they are related *according to laws of nature.* Explanation accordingly takes the preliminary form of hypothesis, which is a construction of the scientific imagination, to be verified or disproved through comparison with the facts.[4] Third, in so far as the laws of cause and effect are known it is possible to *predict occurrences,* and in a practical way to *arrange conditions so as to produce calculated results.* In all these processes *experiment* often helps to determine with precision both the character of the facts and the relationships of cause and effect. These are the essential characteristics of science in general."

We are now in a position to inquire whether politics can be developed into a science, or at least to appreciate the obstacles that stand in the way. Certain rules of procedure must be followed. First comes the laborious collection of facts, a task in which no one can succeed without detachment, discrimination, and accuracy; [5] and then the

[1] *The History and Prospects of the Social Sciences* (H. E. Barnes ed., 1925), p. 427.

[2] *Op. cit.,* pp. 22-23.

[3] Cf. Thompson, *op. cit.,* p. 64: "In collecting data for scientific thinking the fundamental virtue is accuracy, and it is impossible to exaggerate its importance. Science begins with measurement, with which we include, of course, every method of precise registration."

[4] Thomison, *op. cit.,* p. 69: "The scientific imagination devises a possible solution—an hypothesis—and the investigator proceeds to test it. He makes intellectual keys and then tries whether they fit the lock. If the hypothesis does not fit it is rejected and another is made. The scientific workshop is full of discarded keys.... [The hypothesis] has to be tried and tested until it rises to the rank of a theory."

[5] "In the scientific mood we wish to know what the nature of things is. There are men who seem to have a boundless, insatiable curiousity, who have a life-long passion for acquiring facts and understanding the relation between them." Irwin Edman, *Human Traits and Their Social Significance* (1920), p. 369.

analysis and classification of the facts.[1] At first sight, these preliminary stages seem to involve a mere clerical job, which can be accomplished with the expenditure of a certain amount of time and patience. The supposed simplicity is altogether an illusion.[2] It is not easy for the investigator to separate facts from the mass of vague rumor and intentional perversion which masquerades under their name, or to divest himself of preconceived notions which would lead him, consciously or unconsciously, to bolster up his position with selected facts. (The consideration of this highly important aspect of our problem will be deferred for a moment.) The facts, having been collected and classified, must finally be explained. Now comes the search for causal relationships, sequences, and the laws which will make prediction possible. In this search science makes use of the hypothesis—a provisional or possible solution, which does not rise to the rank of theory until it has been verified by test after test. It is because of the thoroughly rigid application of tests that the scientific theory differs from the political theory, the latter being in most cases no more than an excogitated idea.

EXPERIMENT IN POLITICS

For the purpose of testing his hypothesis, the chemist or physicist makes use of the controlled experiment. He creates artificially the facts he wishes to observe; he arranges artificially for certain things to occur, as when the chemist combines substances in a test-tube to determine the affinity between different kinds of matter; and he does so over and over again until he has reached conclusive results. But in politics experiment of any similar kind is impossible. Such at least was the opinion of Seeley in 1885,[3] and of Bryce more than a generation

[1] See E. B. Tichener, "Psychology: Science or Technology?" *Popular Science Monthly,* vol. LXXXIV (1914), p. 43.

[2] Seeley (*op. cit.,* pp. 23-24) warns us that "the authentication of the facts with which political science deals is far more laborious than in other sciences. Many other causes [besides secrecy and false accounts] concur to produce this result. Especially this, that we have before us a vast mass of observations, recorded by various observers at various periods, which are only partially trustworthy. Sometimes because the observers were not scientific, or because they were prejudiced, or because they made their observations rather for amusement than with any serious object, or because they lived when the art of writing was unknown or little used. We cannot afford to put all this mass of observations aside, yet we cannot use it without subjecting it to tests which in other sciences are not needed, and which have to be invented for the occasion."

[3] "If we want to discover, for example, what would be the effect of suddenly introducing democratic institutions into a country, we cannot take a state, pass the necessary Reform Bill in it, and then stand by watching the result." *Op. cit.,* pp. 22-23.

later.[1] Professor Merriam withholds his agreement. He admits that experiment has "seemed to lie beyond the reach of the student of political and social science" and that "it has not yet been shown that politics may be studied experimentally."[2] But to deny the possibility, he maintains, is not warranted. "Certainly the state has more material available for such observation than any other institution. The army, the schools, the public personnel, and an array of public institutions are directly under its management, and may be utilized for purposes of experiment if so desired."[3] Professor Catlin, too, is hopeful. "If I observe," he says, "the amount of intoxication in ten overcrowded areas and in ten adequately housed areas of the same general type, observe the change in the statistics of intoxication after clearing a congested area (perhaps cleared at my suggestion), and the change when an area, put under observation at my suggestion, becomes more crowded, I have conditions which are experimental in the same sense that a piece of chemical research may be called experimental."[4] He admits one difficulty (really insuperable), that the experiment must be repeated many times. But he overlooks complicating factors which are likely to invalidate his conclusions. May it not be that drunkards migrate to the slums, where rents are low, rather than that the slums make drunkards; and that, when the slums are cleared, better houses built, and rents raised, a more sober and affluent class enters the area, the drunkards finding low rents wherever they can? How will it be possible for Professor Catlin to eliminate the many unknown factors, to simplify conditions and establish the kind of "control" that the chemist possesses?

Professor Harold F. Gosnell has actually conducted "An Experiment in the Stimulation of Voting."[5] He made a thorough canvass of 6,000 adult citizens in the city of Chicago and divided them into two groups, taking care that both groups should be similarly constituted from the standpoint of age, sex, color, country of birth, length of residence in the district, rent paid, knowledge of government, and schooling. One group was stimulated by appeals sent through the mails; the other was not. Seventy-five per cent of the stimulated citizens registered;

[1] "That which we call an experiment in politics can never be repeated because the conditions can never be exactly reproduced, as Heraclitus says that one cannot step twice into the same river." *Modern Democracies* (2 vols., 1921), vol. I, p. 14.

[2] C. E. Merriam, *New Aspects of Politics* (1925), pp. 55 and 227.

[3] *Ibid.*, p. 225.

[4] *Op. cit.*, pp. 113-114.

[5] *American Political Science Review*, vol. XX (1926), pp. 869-874. See also his book, *Getting Out the Vote* (1927).

sixty-five per cent of the non-stimulated. Of those who registered, fifty-seven per cent in the first (stimulated) group and forty-seven per cent in the second group voted. Other conclusions had to do with the effect of stimulation upon native-born and foreign-born, literate and illiterate, etc. Has Professor Gosnell demonstrated, then, that experiment (as the chemist would define it) is possible in politics? By no means. Even if we assume, on the part of the investigators, a scientific attitude,—a detachment and accuracy which can often be maintained when the issue is not a controversial or fateful one,—the conclusions apply only to a particular place (Chicago), to a particular time (1924-25), and to particular forms of stimulation. Even under such limitations, the results would not be valid unless the experiment had been repeated a considerable number of times. We are as far as ever from envisaging any law of politics, or any basis of prediction.

OBSERVATION OF RECURRENCES

But, if experiment cannot be used in politics as in chemistry and physics, the same holds true in some of the physical sciences. In them observation must take the place of experiment. When observation reveals the repetition or recurrence of the same phenomena, laws can be formulated: geologists are able to predict the appearance of certain minerals in certain formations. Experiment is impossible in astronomy also. The sun and the moon, as Seeley says, are not at our beck and call; we must wait on them, since they will not wait on us. Nevertheless, astronomy is an exact science. Observation has verified such uniformities as that the earth revolves on its axis and round the sun in fixed periods of time. The routine of sequences can be summed up in rigid mechanical formulæ. If the astronomer has been able to make three good observations of a passing comet, he can, by deduction, predict its return to a night.

A science of politics can be developed only through observation, which is much more laborious and much more open to error than experiment.[1] There must be a search for recurrences, and a study of them when found.[2] The search is likely to be a protracted one; for science, not being contented with vague surmise, will demand proof that the very same things do repeatedly happen. It is not enough to be impressed with the orderliness of history and to believe, like Sisley

[1] "The best the social scientist can do is the worst the natural scientist has to do—to wait on nature and history to perform quasi-experiments for him." A. G. Keller, *Societal Evolution* (1915), p. 128.

[2] G. E. G. Catlin, *Amer. Pol. Sci. Rev.*, vol. XXI (1927), p. 256.

Huddleston, that, if one were wise enough and could comprehend all the facts, one could foresee everything that happens; [1] or to suggest, like Professor Munro, that "many political developments which people believe to be the outcome of accident or human perversity are in reality the workings-out of laws which have thus far eluded detection because they have not been sought with adequate diligence." [2] There must be conclusive evidence. Professor Merriam offers no evidence at all when he asserts that political processes are being "reproduced countless times" and are "recurring over and over again in much the same form, and apparently in sequences that may be ferreted out, given sufficient acuteness and persistence." [3] On the basis of alleged recurrence, many generalizations have made their appearance; for example: war is unprofitable to victor and vanquished alike; a population that rebels is a population that is looking up; there is no seed like marytrs' blood (this implying the inefficacy of force); bosses are the normal outcome of the constitutional fragmentation of power and responsibility. When Robert Michels pretends to have set up an "iron law of oligarchy," to have demonstrated that, under democratic forms, control always falls into the hands of a little inner circle,[4] we scrutinize his evidence. That evidence, based mainly upon a survey of certain Socialist parties in Europe, is altogether inadequate. The iron law is no more than an hypothesis. Similarly, in *The Decline of the West,* Spengler's magnificent conception of cultural cycles may or may not be true; the informed reader becomes skeptical as he detects, here and there, a twisting and distortion of historical data; and his confidence in the integrity of the author diminishes still more when he is confronted later with *The Hour of Decision.*

In 1927 the use of scientific methods was illustrated by two books of unusual merit: *The Natural History of Revolution* by L. P. Edwards [5] and *Whither Democracy?* by N. J. Lennes. Professor Edwards

[1] *France* (1927), p. 257.
[2] W. B. Munro, *The Government of the United States* (3rd ed., 1931), pp. 3-4.
[3] *Op. cit.*, p. 55.
[4] *Political Parties* (1915).
[5] George Soule, in *The Coming American Revolution* (1934), traverses the same ground as Edwards. But it is obvious that he got up his material for the occasion and from elementary historical textbooks. His ignorance of history is betrayed by singular lapses, as when he mentions Jefferson and Adams as delegates at the Philadelphia convention. The book can have no "scientific" value. It does make an interesting contribution in Part II, where the author stresses certain changes which have been taking place in capitalism and indicates a growing incompetence on the part of the ruling classes. It is impossible to take seriously S. A. Reeve's *The Natural Law of Social Convulsion* (1933). Consider, for example, his forty-five cosmic laws of social evolution, pp. 434-588.

sought principally to establish the symptoms of revolution. He formulates these with admirable clarity—preliminary symptoms, such as popular restlessness, or the rise of the repressed class in wealth, intelligence, and power; and master-symptoms, such as the transfer of allegiance on the part of the intellectuals. In the light of these generalizations certain aspects of the past, and also of the scene around us to-day, take on a new significance. But here again conclusions rest upon insufficient data; hypotheses remain unproved. For scientific purposes the investigator should not have been satisfied with a somewhat cursory survey of four revolutions—the English (of the seventeenth century), the American, the French, and the Russian, particularly in view of the fact that the four are, in fundamental respects, so unlike each other. According to Professor Lennes, society is becoming stratified and taking new form in hereditary occupational groups.[1] As democratic ideals are achieved, society becomes fluid; so far as any classes exist, the obstacles to interclass migration are removed. In the social scale and in the corresponding occupational scale, intelligence rises, stupidity falls. Every one tends to find his appropriate level. He will stay there; for like breeds like (heredity of mental traits) and like marries like (assortive mating). After some generations, on account of the stabilizing biological factors, migration ceases. This thesis is perhaps the most important that has been offered in political literature as a scientific demonstration. The argument, which is persuasive, is supported, comparatively speaking, by a surprising richness of data. Why, then, has general acceptance been withheld? There has been reluctance to accept some of the data or to admit their sufficiency, even were all accepted.

Indeed, the observer of political and social phenomena is handicapped by the character of his materials. It is doubtless true, as Karl Pearson maintains, that science comes into being, not through the facts themselves, but through the method of dealing with them.[2] Without a

[1] Alleyne Ireland, in his *Democracy and the Human Equation* (1921), sought to show that, because of the freedom of inter-class migration, there is taking place a "constant upward and downward genetic pressure tending to produce an increasing difference between the two ends of the social spectrum" and that "the more intelligent and successful of the 'lower' classes have been constantly rising out of their class and into the one socially above it." Studies by Havelock Ellis and F. A. Woods are offered as evidence that the English lower classes are being divested of their talent and genius. The same biological factors which Lennes makes use of prevent any class from recreating these lost gifts within itself.

[2] "Now this is the peculiarity of the scientific method, that when once it has become a habit of mind, that mind converts *all* facts whatsoever into science. The field of science is unlimited; its material is endless, every group of natural phenomena, every phase of social life, every stage of past or present development

scientific attitude and procedure, no advance can be made. But must we follow Pearson when he maintains that the scientific mind "converts *all* facts whatsoever into science"? May not the materials be of such a kind as to render the application of scientific method very difficult and even defy it altogether? It is generally admitted that human phenomena, as compared with natural phenomena, are exceedingly complex.[1] The given situation is complex, and so is the human nature which must react to it. We are dealing with a multitude of refractory individuals, who are emotional rather than rational or logical and who, even when consciously seeking their own interest, do not always understand it very well.[2] To the observer their conduct may well seem erratic. Fastening upon the similarities and overlooking the differences, he may not see that the situation to which men react is never the same as any past situation; he may be misled by false analogies. Nor is he likely to make allowance for the varying biological inheritance of individuals and the varying "social heritage" of groups, although these will dictate the character of the response to the situation. He is baffled by the fluidity and changefulness of his material, by the variations that occur with every shift of time and place.[3] "The fundamental difference between the

is material for science. *The unity of all science consists alone in its method, not in its material.* The man who classifies facts of any kind whatever, who sees their mutual relation and describes their sequences, is applying the scientific method and is a man of science. The facts may belong to the past history of mankind, to the social statistics of our great cities, to the atmosphere of the most distant stars, to the digestive organs of a worm, or to the life of a scarcely visible bacillus. It is not facts themselves which make science, but the method by which they are dealt with."—*The Grammar of Science* (3rd ed., 1911), pp. 12-13.

[1] But consider the comment of Professor Catlin (*op. cit.*, p. 124): "The obvious consideration that if no two human beings are the same no more are any two leaves, that if history never repeats its events neither does or can water ever return to the same stream, does not seem to occur to these critics with sufficient force. The objection which they presume to be insuperable is indeed the elementary obstacle which every natural science, by the establishment of units of measurement and standards of reference, has to overcome. The vagaries of human conduct cannot exceed in multiformity the luxuriance of natural variety." Note also the view of Professor W. B. Munro (*The Government of the United States*, 3rd ed., 1931, p. 4): "The weather has strange vagaries, yet we have a science of meteorology. The eccentricities of public opinion are no greater."

[2] Note the reasons why Clarence Darrow (*The Story of My Life*, 1932, p. 54) denies that there is any science of government: "Each human unit is in some regard an independent entity with his own ideas, his hopes and fears, loves and hates. These attitudes are constantly changing from day to day, and year to year. They are played upon by shrewd men, by influential newspapers, by all sorts of schemes and devices which make human government only trial and success, and trial and failure. Human organizations are simply collections of individuals always in motion and always seeking an easier and more harmonious adjustment."

[3] Emphasizing this changefulness, Professor Tugwell says (*op. cit.*, p. 13): "For the stuff which is dealt with here is the fluid stuff of social life. It moves in every dimension, never resting. The influences which impinge upon it cannot be forecast, because they flow from an unguessed quantity of possible com-

investigation of external nature and that of human affairs," says Bryce,[1] "lies in the character of the facts to be observed. The phenomena with which the chemist and the physicist deal—and this is for most purposes true of biological phenomena also—are, and so far as our imperfect knowledge goes, always have been, now and at all times, everywhere identical. Oxygen and sulphur behave in the same way in Europe and in Australia and in Sirius. But the phenomena of an election are not the same in Bern and in Buenos Aires, though we may call the thing by the same name, nor were they the same in Bern two centuries ago, or in Buenos Aires twenty years ago, as they are now." This consideration must embarrass the search for recurrence in politics and for any routine of sequence that shows the operation of a general law. How can we discover them and prove their existence, if history never repeats, if situations which look alike actually differ according to time and place?

OTHER DIFFICULTIES

But the scientific treatment of human affairs not only involves difficulty, perhaps insurmountable difficulty. Outside narrow limits, we are sometimes told, the analyzing and adding methods of natural science are inappropriate.[2] Quantitative methods, which give only quantitative results, fail utterly when they are confronted by emotional and intellectual imponderables.[3] What fateful issue, like slavery or race equality, can be settled by logic and statistics? What Fascist or Nazi would abjure his faith because of figures and tables and classifications? Sir Norman Angell tells how a friend once wrote a history of the Dreyfus case, carefully and objectively setting down all the recurrences of those extraordinary ten years.[4] Sir Norman read the manuscript and then observed: "You have told of nearly every event that happened except the one event—the tone and color and intensity of the tumult which

binations. Results seem disproportionate to what we judge to be causes; influences suddenly loom large from nowhere, like thunderclouds in an August sky. Activity clusters about this, that, or the other function, creating for the time a more or less definite grouping which we think we can define, only to have it suddenly fade for unsuspected causes." See also Beard, *op. cit.*, p. 287.

[1] *Op. cit.*, vol. I, pp. 13-14.

[2] Beard, *op cit.*, pp. 281 *et seq.*

[3] Those who believe only in measured units and refuse to talk about things which cannot be defined in that way, says Professor Tugwell (*op. cit.*, pp. 11-12), are "apt to cling so desperately to the known and measurable that what is necessary to be done in a going world is not touched by [their] conclusions." So too MacIver (*op. cit.*, p. 520): "But these quantitative indices are merely evidences of an interaction which they do not explain; they are not the dynamic factors of which we are in quest."

[4] *The Public Mind* (1927), p. 25.

that case provoked in the minds and hearts of men; you have told the facts, but you have not written a history of the Dreyfus case." Social phenomena differ from physical phenomena. Professor MacIver contends that they are not isolable components of a situation, but "aspects of a total nonmechanical consciously upheld system of social relationships," in which the possible aspects are numerous and dissolve into one another; and that, since the investigator is dealing with the inner phenomena of experience and not the outer phenomena of nature, he must use the tools of the artist as well as the tools of the scientist. Social relationships are infinitely variable and subtle. They cannot be reduced to formulæ. A process of counting, measuring, and manipulating is no more likely to reveal their essential qualities than those of a picture or a poem.[1] We see now the meaning of Professor Beard's conclusion, that a science of politics is impossible, or, if possible, undesirable. It is impossible because the scientific method can be applied only to a small and relatively unimportant part of political phenomena; and undesirable because measurements and classifications are likely to obscure and falsify the dynamic realities.

There still remains something to be said about the refractoriness of the material of politics. That material, being charged with human interest, evokes feeling on the part of the investigator and subjects him to emotional influences such as do not affect the chemist when he deals with hydrocarbons or the physicist when he deals with atoms and electrons. Political problems are likely to involve interests and sentiments, prejudices and convictions, animosities and affections. It would not be easy to investigate prohibition, negro suffrage, birth-control, or even proportional representation, without losing the correct scientific attitude of detachment and neutrality. "The comic spirit has no finer field of frolic," says J. A. Hobson,[2] "than a science whose devotees, genuinely believing themselves to be dominated by a single-minded zeal for knowledge, are yet exposed at every turn to the secret manipulations of the interests and passions against which they believe themselves immune." The observer himself is a member of the society that he is studying.[3] He can by no means escape from the consequences. He is influenced by his own personal interests, and by the interests of the groups to which he belongs—business, social, political, religious groups. He believes what he wants to believe. He looks for

[1] R. M. MacIver, *Society: Its Structure and Changes* (1931), pp. 520 and vii-x.
[2] *Free-thought in the Social Sciences* (1926), p. 36.
[3] "This has been perhaps the chief stumbling-block in the evaluation of the political process." Merriam, *op. cit.*, p. 53.

the facts that he wants to find, and ignores or minimizes the facts that undermine his position.[1] "The facts are so abundant," says Bryce,[2] "that it is always possible to find the former, and so obscure that it is no less easy to undervalue the latter." Conscious or unconscious motives may lead to the falsification of weights and measures, the "faking" of evidence, the "cooking" of results. History becomes a quarry of missiles. The most common abuse is the mixing up of what ought to be (from the investigator's standpoint) with what actually is. As if the botanist should begin by asking the object for which a plant exists and next proceed to deduce the characteristics of a perfect plant!

A further obstacle to scientific treatment will become obvious as successive topics are discussed in this book. The terminology of politics is notoriously loose, notoriously wanting in scientific precision. It is a vague, popular terminology, which has grown up for immediate practical uses and which always must stand close to the path that mass-thinking takes.[3] In learned treatises as well as in casual conversation, terms are used over and over again with assurance, as if they had a settled and definite connotation ("state," "law," "liberty," "confederation"); yet any close scrutiny will reveal their haziness and ambiguity. Not long ago, for example, a group of scholars undertook the measurement of public opinion. But "before even a beginning could be made, it was necessary to come to some agreement concerning the meaning of terms. Some members of the round table believed that there is no such thing as public opinion; others believed in its existence but doubted their ability to define it with sufficient precision for scientific purposes. Others again, more sanguine or more credulous, believed that the term could be defined, but were of different minds concerning the kind of definition that should be adopted."[4] Again, authorities can by no means agree on the meaning of the word "nation": Professor Ernest Barker presents one point of view when he says that common language

[1] "It makes no earthly difference to the natural scientist how his position works out," says J. W. Swain (*The Journal of Philosophy*, vol. XXIII, p. 696), "but it may make all the difference in the world to the social scientist how his works out; even though he confines his studies to savages and criminals, his generalizations will ultimately embrace society as a whole, and therefore the only solutions of his problem which he will be willing to accept are ones that make adequate provision for himself, his friends, his social class, and the various groups to which he is loyal: it is in vain to expect him to commit *hari-kiri* if he finds that he or they are the cause of society's woes."

[2] *Op. cit.*, vol. I, p. 15.

[3] Hobson, *op. cit.*, pp. 15 and 20; Bryce, *op. cit.*, vol. I, p. 15.

[4] A. N. Holcombe in the *Amer. Pol. Sci. Rev.*, vol. XIX (1925), p. 123.

is not an essential characteristic, because the Swiss, with three or four languages, form a nation; [1] and Professor Carlton Hayes presents another when he says that the Swiss cannot be regarded as a nation, because they speak several different languages.[2] Alfred Zimmern complains that "so far as I am able to make out, the word 'international' has about seven different meanings." [3] It would be quite as hard to discover the correct scientific use of the word "democracy." [4]

Now, attempts have been made to remove this disability. By means of the arbitrary and capricious definition of terms which are widely used, but which are not used in such a specific way, writers have tried to create a scientific atmosphere. For a time the strained interpretations may be accepted as the esoteric fashion of some small group of disciples. But the fashion languishes and dies. It succumbs before persistent popular usage. As Sir George Cornewall Lewis observed, "The links which bind together the various shades of meaning are connected too closely with the general course of our thoughts to be broken at the command of any individual. It is impossible to legislate in matters of language." [5] If Lewis was right, the prospects for a science of politics are correspondingly dubious. Since he wrote a century has passed; and, in spite of efforts to create a scientific terminology, his contention has not been disproved. Or should we attach special significance to the French legal codes? Apparently they have fixed the meaning of certain terms, not only for the lawyers, but also for educated Frenchmen in general.

CONCLUSION

The chief difficulties that stand in the way of developing a science of politics have now been indicated. The difficulties are serious enough to persuade Bryce, and many other recognized authorities, that politics cannot become a science comparable to the exact natural sciences.[6]

[1] *National Character and the Factors in Its Formation* (1927), p. 13.
[2] *Essays on Nationalism* (1926), p. 8.
[3] *Nationality and Government* (1919), p. 33.
[4] E. M. Sait, *Democracy* (1929).
[5] *Remarks on the Use and Abuse of Some Political Terms* (1832; 1898, ed. by T. Raleigh), pp. 7-8. The mathematician or botanist proceeds differently. He invents new technical terms which embody scientific notions.
[6] On the other hand, Alleyne Ireland maintains (*Democracy and the Human Equation*, 1921, pp. 14-15): "The significance of this contrast between the methods employed in studying chemistry and those employed in studying government is not disposed of, as many people believe, by asserting that the reactions of inanimate substances, which form the principal material of the chemist's investigations, are amenable to a logic different from that which applies to the reactions of human beings; there is a difference of degree, but not of kind. It is idle and pernicious

But Bryce anticipates some progress in the future.[1] He is hopeful that more exact methods may be applied and more positive conclusions established than have been possible hitherto. There is one constant, he says, one factor that remains practically always the same; and that is human nature.[2] Reason has to such an extent come to shape the conduct of men that "sequences in their action can be established and their behaviour under given conditions can to some extent be foretold." It will be necessary, however, to deal with masses of men, "all subject to the same influences at the same time," so that the idiosyncrasies of individuals may be evened out. We shall find the roots of politics in psychology. Professor Munro's position is very much the same.[3] Because of the human equation the laws of political science can never be so definite as those of physics or chemistry; at best they will be "what the natural scientists call statistical laws, which he illustrates on a scatter-shot diagram rather than by plotting a graph.... Men and women, in the mass, respond to the same stimulus in much the same way everywhere. The political action and attitude of a single individual cannot easily be forecast, but the action and attitude of a million individuals on any question are not beyond reasonable accuracy of prediction when all the discoverable forces are assembled and impartially weighed."[4] Professor Catlin takes a different line. He looks

to pretend that because human reactions in the field of politics cannot be measured with the accuracy which the microscope, the thermometer and the balance insure in chemical investigation, they cannot be measured with an accuracy quite adequate to the purpose for which the measurement is undertaken." Ireland maintains that a scientific examination of half a dozen subjects, which he lists, would yield results that could be taken as "proved" and that could be used as the working hypotheses of a science of government.

[1] *Op. cit.*, vol. I, pp. 14-15.

[2] This view of human nature is by no means accepted universally. For example, R. M. MacIver says (*Society*, 1931, p. 501): "If the configurations of the earth are changeful, if the skies themselves are so changeful that we can discern their inconstancy through abysmal depths of space, if every living thing bears the signs of its own different past, if man's body has evolved from something anthropoid and beyond that from shapes of dim age-buried creatures—how can one share the assurance that his mind so restless and energetic, so uniquefully purposeful, remains miraculously the same, or is so lacking in character, in the quality of development, that it forever merely reflects a changing environment?"

[3] *Op. cit.*, p. 4.

[4] Many writers believe that an important advance may be made through the use of statistics; for example, N. J. Lennes, *Whither Democracy?* (1927), pp. 19-20. Professor Lennes admits that "we can never predict closely how an individual person will act under a certain set of circumstances, largely because we can never know the individual completely enough, and further because the problem of determining the resultant course of events would be far too complicated for solution, even if all the facts were known.... But certain types of very valuable prediction are possible. It is possible, for instance, to predict that of a million human beings, living under conditions that are fairly well known, approximately a certain proportion will undergo such and such experiences in a given time.

for progress through the use of abstract hypotheses and through the construction of an abstract "political man." [1] "It is not fruitless," he says, "to inquire how this laboratory creation will behave, and then to compare with this how men do in fact behave in political matters. The same expedient of an artificial single-motived man was utilized not unsuccessfully, *so long as its limitations were remembered,* by the economists in the pioneer days of Economics, when it was hard to see the wood for the trees of detail."

What future generations may accomplish remains hidden from us. This much must be admitted now: there is no science of politics, and no immediate prospect of one; and, notwithstanding the modest hopes of the writers just quoted, the obstacles are such as to discourage any prediction that more can be done than to clarify certain phases of political life by the use of the physical sciences and statistics (where the subject-matter lends itself to such treatment) and of psychology (whenever it emerges from the present state of chaos). At the same time, skepticism should not be carried too far. Obstacles that seemed no less discouraging have been surmounted in the past. Ludicrously small beginnings have led to great achievements. Who would have predicted three hundred years ago, when medicine had done little more than to revive the principles of Hippocrates, the marvels that were accomplished in the latter part of the nineteenth century? [2] Who can read the naïve proceedings of the Royal Society in the reign of Charles II without being amazed over the subsequent triumphs of the physical sciences? Is it possible that politics may follow a similar path? The correct attitude, no doubt, is one of reserve. Even so, we are not justified in a neutrality that suppresses ridicule of the pseudo-scientists, with their puerile antics and their belief that anything can be understood by applying a tape-measure to it and that anything becomes a science when it has been plastered with esoteric terms.

More than ten thousand and less than twenty thousand will die during the next year unless an unusual disease should appear. If the character of the population and of their environment is known more fully, it may be possible to predict that more than fifteen thousand and less than seventeen thousand will die in that time.... In none of these cases will the prediction be exact, but it will be of the greatest value."

[1] *Op. cit.*, pp. 129 *et seq.*

[2] H. W. Haggard, *Devils, Drugs, and Doctors* (1929), pp. 392, 395.

CHAPTER III

THE HISTORICAL APPROACH

THERE are reasons—and these have been indicated—why a science of politics is unlikely to develop beyond a rudimentary stage. The materials are refractory. They stubbornly resist efforts to achieve the precision of the natural sciences. Indeed, the movement has suffered already from exaggerations which tend to discredit it; in their enthusiasm pioneers have lost sight of obvious limitations, much as the behaviorists have done in psychology. Nevertheless, by confining their inquiries to what actually is and by excluding ethical judgments, they have accomplished something of great moment.

They pay little attention to political theory, to such (so-called) "fundamental problems" as the purposes for which the State exists and the best means of realizing those purposes. They do not follow Professor Barker when he says that the State is "concerned less with historic processes . . . than with the fundamental realities—essence, purpose, and value—which transcend the category of time." [1] What strange "realities" these are! The alleged purposes or ends of the State, when subjected to scrutiny, turn out to be figments of philosophical imagination; they take different form according to the caprice of different philosophers; although represented as the premises upon which some conclusion rests, they are commonly invented as a means of establishing the conclusion.[2] The theorist's superiority to facts, like the Emperor Sigismund's superiority to grammar, is a curious rather than a commendable trait. The antidote that the scientific method offers goes far in justifying the effort to create a political science.

Zoölogy and botany have not achieved success by starting with a classification of good and bad animals, good and bad plants; and the study of politics cannot proceed very far as a branch of ethics. Theories about the purposes of a political institution and the best way

[1] *The Study of Political Science* (1928), p. 18.

[2] J. W. Garner, *Political Science and Government* (1928), pp. 69-73; R. N. Gilchrist, *Principles of Political Science* (1927), pp. 396-434. Gilchrist says (p. 424): "Why does the State exist? This is one of the fundamental questions of Ethics and Political Science. The answers given to the question are manifold: each writer on the subject has his own solution."

of realizing them are entitled to respect only when they survive confrontation with the facts. When we are told that the underlying purpose of the State is to secure social control by the exercise of force or to facilitate the living of the good life, we quite properly ask for proof. If there is any proof, it can be found only in the historical record. The record furnishes none whatever. When Professor Finer tells us that motive produces intention, that intention is formulated in "reasoned theory," and that institutions are created to give effect to the theory,[1] he can scarcely have subjected his assumptions to any historical test. History gives him no support. It can be shown, in case after case (with respect to the bicameral legislature, for example), that the reasoned theory takes shape after the institution has been set up. It can be shown further that a theory, even while openly professed, will not govern the conduct of men and prevent a normal reaction to circumstance.[2] In Soviet Russia practical considerations forced the abandonment of workers' control in the factories and of pupils' control in the schools. The correction of manifest abuses led to the mutilation, by its own votaries, of the principle of *laissez-faire*. The principle of states' rights has suffered most at the hands of the American party which traditionally has defended it. So, in Great Britain, life-long disciples of Cobden, suddenly converted by exigent facts, gave their votes for a high protective tariff.

We appeal to history against philosophical theories and excogitated ideas. What are they based upon? Whether they are based upon logic or imagination, the propriety of testing them and finding out whether they are consonant with the facts can scarcely be denied. As the record of human experience, history is the essential corrective. Those who are familiar with the contemporary scene and ignorant of the past fall into singular misconceptions. This is the theme of the German poet Rückert. He imagined a celestial visitor descending, at long intervals, upon a certain portion of the earth's surface and finding now a dreary expanse of ice and snow, now a primeval forest, a smiling valley covered with cattle and crops, or a city lost in the smoke of its throbbing factories; and to the question of how these things originated the invariable answer was: "So it always has been and always will be." Such myopia is not uncommon. We are sometimes told that democracy is a final and enduring form of government; [3] and yet, according to the

[1] Herman Finer, *The Theory and Practice of Modern Government* (2 vols., 1932), vol. I, p. 3.
[2] See Chapter I.
[3] E. M. Sait, *Democracy* (1929), p. 17.

record, this is a world of ceaseless change, in which human society and human institutions are constantly assuming a new shape. We are sometimes told that the old men make war and convert the young men into cannon fodder; and yet the recurrence of large-scale war in modern times shows a certain periodicity, peace lasting till a new post-war generation takes control of affairs, a generation whose youthful ardor has not been cooled by experience of war.[1] There is a marked disposition to mistake transitory situations for final accomplishments. In Russia changes are taking place—inscrutable changes; they defy any reliable analysis while they are still in process. The great mass of 170 millions is moving. No one can yet tell where it is going; superficial appearances are apt to be as deceptive in the Russia of Stalin as in the England of Cromwell or the France of Robespierre. One thing should be clear from past revolutions: Russian society will stray far from the charted route of Bolshevism. Yet we are constantly asked to believe that a paper scheme or a theory (well authenticated by citations from Lenin) represents a final solution.

In the life of the race, as in the life of the individual, it is the accumulation of experience that gives some security against repeating the blunders of the past. Once bitten, we say, twice shy. The individual, making mistakes, learns lessons from them and becomes cautious. The race draws upon the experience of past generations, the social heritage, which is another name for history. History is the great teacher of wisdom. It supplies the chief materials for all the social sciences, politics included. Formerly the teachers and writers in the field of politics, like Seeley and Bryce in Great Britain or Burgess and Beard in the United States, were trained primarily as historians, even in the graduate school. Nowadays history is neglected, the undergraduate often deeming it of less importance to his equipment in politics than psychology or geography or statistics. All that he gets, perhaps, is a segregated historical review of political thought or diplomacy, arbitrarily divorced from the general context and therefore not altogether coherent.[2] He is embarrassed by the formidable growth of politics, as it reaches greater maturity; by the necessity of exploring its numerous branches (such as theory, international rela-

[1] What has become of the thesis of French Jacobins and of Mazzini that nationalism would sterilize rivalries and make wars of aggrandizement impossible? J. H. Rose, *Nationality as a Factor in Modern History* (1916), pp. 88-89; C. H. Hayes, *The Historical Evolution of Modern Nationalism* (1932), p. 304.

[2] He seldom studies constitutional history; and yet a thorough knowledge of the development of political institutions in his own country and in England would seem to be invaluable.

tions, administration, political institutions) and afterwards specializing in one or more of them. Nor can he dismiss lightly the claims of cognate social studies, which have developed alongside of politics and which may seem more immediately serviceable than history. This is unfortunate, and even disastrous, if one may judge from the aberrations of some contemporary books. History, as a record of past experience, is indispensable, and can be mastered only by rigorous application. It is a delusion to suppose that without such previous study the facts can be sought and found for the occasion. Improvisation is impossible.

The study of history does more than furnish the facts and enable us to make or test generalizations. It enlarges the horizon, improves the perspective; and it builds up an attitude towards events that may be termed the historical sense. We become aware of a relationship between apparently isolated events. We appreciate the truth of Stubbs' aphorism, that the roots of the present lie buried deep in the past, and of Freeman's, that history is past politics and politics is present history. There is a continuity which makes to-day one with yesterday and with to-morrow. Violent revolution may, for the moment, interrupt this continuity. But, in spite of noisy demonstrations and drastic reforms on paper, the fundamental institutions of a country survive, as they did in the England of Charles II and in the France of Louis XVIII. Although experience leaves its mark upon them, they remain afterwards, like the characters in the fifth act of a drama, consistent with what they were before. There are reasons why this should be so. Men cling to the known, to the ways that have become easy through habituation. They do change the environment, little by little, with each selective response to it. But the environment is modified so gradually that adaptation to it occasions no strain. If they become impatient with existing circumstances, entertain visions of happiness in the unknown, and attempt some sudden and considerable change, they lose touch with the comforting social heritage, the familiar guide-posts and directions; and, experiencing the pain that always accompanies imperfect adjustment, they hurry back to more congenial surroundings.

Aristotle says somewhere that, in order to understand anything, we must observe its beginning and development.[1] This genetic method is

[1] H. D. Hall has pointed out how statesmen of Great Britain and the Dominions, in discussing the future government of the Empire, "make constant reference to history, and continually emphasise the fact that the present organisation of the Empire, and the problems of government presented by it, cannot be understood unless they are studied in the light of their historical development. Not

essential to the understanding of political institutions. They are not struck off at a given time by the brain and purpose of man, by the philosophers and planners.[1] Instead of making their appearance in a mature (excogitated) form, they evolve gradually, from the amœba stage, as a consequence of successive small adjustments and adaptations; [2] or else they are borrowed from the place of origin and adapted to the needs of another community. The normal manner of growth was described in the first chapter of this book. From infinitely small beginnings the embryo takes on the recognizable form of an institution and acquires vigor as it draws sustenance from the environment. To isolate the institution from its genetic background leads to fatal misapprehensions. Planners assume that they can not only skip the tedious period of growth, but—with a corps of engineers and an up-to-date plant—produce a robot that will be superior to any contrivance of nature. Fortunately the plans are almost as numerous as the planners, and mutually inconsistent. Since every one sticks to his own plan, the sole way of getting one of them adopted is the short-lived way of compulsion—the Communist or Fascist way. The New Deal is not an exception. It embodies, not a coherent plan, but rather a tentative approach to a number of different and perhaps incompatible plans.

Reference has just been made to the fact that institutions are some-

only is the constitution of the British Empire the result of a long historical growth, but it depends, even more than the British constitution, on unwritten conventions, delicate adjustments, and verbal understandings which are practically unintelligible to any one who has not studied their development. Hence if we are to understand this constitution, we must look, not so much in the stony face of the law, but in the minds of the people who make the constitution work. But historical study is just as necessary for an understanding of the real meaning underlying the outward form of institutions" The British peoples, Hall says, have a strong sense of continuity. "The reason for approaching the Imperial problem by the avenue of history is that the common man thinks of this problem to a large extent in terms of history." *The British Commonwealth of Nations* (1920), p. 5.

[1] See note, p. 16, regarding Gladstone's observation on the constitution of the United States.

[2] "All social change, in so far as social history can trace it, has proceeded through very gradual modifications of existing institutions," says Professor W. C. MacLeod (*The Origin and History of Politics*, 1931, pp. 57-58). It is impossible for "social history to perceive any sudden generation of anything really 'new,' any really startling innovation; all 'new' ideas of social history are merely slight variations on some old theme, or old in some neighboring culture from which the 'new' idea has been borrowed. Parliamentary representative government evolved in England over long centuries, through a long process of gradual, slow changes almost imperceptible in any one decade or century. Invariably the builders worked without any plan, never realizing the full significance for the future pattern of each new structural element they added. Patterns took shape 'accidentally,' as it were."

times borrowed. The closer the contact between peoples, the more extensively do they borrow from one another. In the nineteenth century, when the middle classes of continental Europe sought to organize their newly-won political power, they found appropriate models in England. They borrowed the representative system, the bicameral system, the cabinet system, and much besides. A few of these culture-elements the English themselves had borrowed, centuries before, from the Continent (for example, the jury system, in its primitive Frankish form); but most of them had originated and developed on English soil by means of what we call *independent invention*. By a process of *diffusion* they spread over Europe, and ultimately over most of the civilized world. Diffusion explains, likewise, the Romanized law of continental Europe and Latin America; or similarity in the methods of fighting disease and crime, of educating the young, of electing representatives, of recruiting civil servants, and of raising national revenues.

The institutions of a country may be either indigenous (independent invention) or exotic (diffusion). It is not always possible, even by consulting the record,—and for early times there is no record,—to decide to which category the institutions belong. Do not peoples so closely resemble each other in mentality that, confronted with similar problems, they may evolve similar cultures, like stimuli producing like responses? When this happens, and undoubtedly it does happen to some extent, we have the phenomena of *convergence* or *parallel development*. But does it happen frequently?[1] Did most similarly-situated peoples pass through the stages of huntsmen, herdsmen, and husbandmen, each discovering for itself the secret of domesticating animals and tilling the soil? Was the State originated over and over again by different peoples, or only once, in one place, and then universalized by diffusion? Was the practice of representation originated over and over again in the countries of medieval Europe, or was it borrowed from Spain? Where the record is clear—as in the case of the titular executive or the Australian ballot or competitive examinations for the civil service—the evidence shows that diffusion is far more common than convergence. But, even when people borrow foreign tools rather than waste time and effort over experiment, they might them-

[1] For a brief discussion of the conflicting claims of diffusionists and convergencists see W. C. MacLeod, *The Origin and History of Politics* (1931), pp. 65-74. As to the rules that anthropologists apply in the absence of written records see J. H. Steward, "Diffusion and Independent Invention: a Critique of Logic," *American Anthropologist*, vol. XXXI (1929), pp. 491-495.

selves have devised tools of a similar kind. Perhaps independent invention in the early days, among comparatively isolated peoples, was more common than it is now.

What a people borrows, it proceeds to modify. Modification must take place in the new environment, as with the flower or vegetable that has to adapt itself to a new soil and a new climate. The transplanted institution may continue to flourish: the English cabinet system, for example, has worked admirably in the Dominion of Canada.[1] Or, showing a liability to parasitic diseases, it may either persist in a state of chronic anemia, like the cabinet of France, or succumb before excessive demands on its vitality, like the cabinet of Italy. Few things are more interesting or more instructive than to observe, as the historical student does, the actual process of diffusion; to familiarize oneself with an institution in its original home and then to watch its behavior under new conditions. After becoming accustomed to the process, one sees the absurdity of calling an institution ideal or best, when it has been examined only theoretically and apart from any particular environment. There is no "timeless category" in politics. What suited one age and one place may fail miserably in the same place at a different time or in a different place at the same time.[2] Success will be measured by the capacity of an institution to adjust itself to its surroundings and to demonstrate its fitness to survive. Efficiency and robustness will be tested by experience. The indigenous culture-element has this advantage over the exotic: it has grown up naturally to meet the needs of the community, and persists because the environment suits it.

The value of the historical approach will become more obvious later

[1] "The study of popular government in Canada derives a peculiar interest from the fact that while the economic and social conditions of the country are generally similar to those of the United States, the political institutions have been framed on English models, and usages have retained an English character. Thus it is that in Canada, better perhaps than in any other country, the working of the English system can be judged in its application to the facts of a new and swiftly growing country, thoroughly democratic in its ideas and its institutions." Bryce, *Modern Democracies* (2 vols., 1921), vol. I, p. 455.

[2] Swiss institutions have been lavishly praised; and surprise has been expressed that other countries have not borrowed them. With his customary caution, Bryce feels doubtful whether the Federal Council (the executive) could be transplanted successfully in American or German soil. "The advantages which the Swiss scheme has displayed largely depend upon the habit of re-electing its members every three years, the legislature which elects being itself little changed from one election to another. The habit of re-election has in its turn depended upon the predominance of one party in both Houses of the National Assembly, on the small size of the constituencies, and on the comparatively low temperature at which partisanship stands in the country." Bryce is not even certain that these favorable conditions will endure in Switzerland. *Op. cit.*, vol. I, p. 448.

on, when specific problems are discussed. To salute history as the great teacher of wisdom is not merely a formal gesture. How could the study of politics advance unless we had before us the panorama of the past, the record of man's experience, his derelictions and failures, his high hopes and achievements? Much still remains hidden from the most penetrating eyes. Hegel and Nietzsche, Marx and Spengler tried in vain to discover the deeply-buried and gigantic pattern of human activities. Although Spengler professed to do so, the historical expert cannot envisage, interpret, and delineate the inevitable future.[1] He makes only a sagacious guess—sagacious because he has an awareness of the processes of history and of the compulsion exercised by environment.[2] But much also is revealed. The past is full of lessons for those willing to learn. As we contemplate former follies and achievements, for example, we learn to distrust grandiose schemes and to appreciate caution, realizing that even the next step may precipitate us upon a deceptive quicksand. "It is contact with the past," says Alfred Zimmern,[3] "which equips men and communities for the tasks of the present; and the more bewildering the present, the greater the accumulation of material goods and material cares, the greater the need for inspiration and refreshment from the past."

History is the record of what has happened. It should include every phase of human experience. Otherwise, the close dependence of one kind of activity upon another, the interaction between them, will be scarcely perceived or entirely overlooked; the unity of the human drama will be destroyed. With the systematic development of sciences and arts, however, the tendency has been to split history into fragments, to appropriate parts of the record and write specialized histories of philosophy, literature, economics, medicine, astronomy. What is left goes by the name of political history.[4] It is political in a narrow sense. As already observed, politics deals with the State, and properly therefore concerns itself not only with the government, but with the population and territory as well. Even if we confined our attention to government, we should soon find that its institutions are affected

[1] Oswald Spengler, *The Hour of Decision* (1934), p. x.

[2] "Nothing that has once become a fact can be withdrawn—we are all therefore obliged to walk in the particular direction, whether we will or not." *Ibid.*, p. xiv.

[3] *Nationality and Government* (1919), p. 100.

[4] "History, then, as the word is now used, is the name of a *residuum* which has been left when one group of facts after another has been taken possession of by some science." Seeley, *op. cit.*, p. 9.

by geography—by climate, soil, food, minerals, frontiers; [1] by group relationships and pressures, methods of production and exchange, sanitary engineering, biological inheritance, and a host of other factors. In the scale of values a preëminent place belongs to economics.

[1] Ernest Barker includes an admirable discussion of the geographical factor in his *National Character and the Factors in Its Formation* (1927), pp. 48-82.

CHAPTER IV

THE ECONOMIC APPROACH

No one can read history without detecting, from time to time, a causal relationship between economics and politics. There is some evidence for the contention that economics precedes politics, shapes it, controls it. The ruin of the Roman middle class—the small landowners who had been the mainstay of the constitution—led directly to the fall of the republic; and, as Léon Homo has shown,[1] that tragedy had an economic background. It was, at least in part, the impoverishment of the middle classes in Germany that deprived the Weimar constitution of stability and opened the way for the Nazi adventure. How do we explain the consolidation of England and France into a national State? A feudal overlord converted his suzerainty into sovereignty. As we watch the proceeding, we grasp the significance of the walled towns, centers of the new commercial and industrial wealth, and of the solid burghers who, in alliance with the king, were ready to fight for peace and for survival against the pillaging feudatories.[2] Feudalism and the revenues from it declined; royal activities and expenses increased. The English king reached out for the profits of justice and, incidentally, developed the Common Law. Mainly for purposes of taxation, he summoned representatives from the shires and boroughs, foreshadowing the appearance of the House of Commons. Such illustrations might be multiplied indefinitely. Let one more suffice. Why was there such general dissatisfaction with the first American constitution, the Articles of Confederation? What fundamental defects had been revealed? Those defects were mainly of an economic nature. They had to do with the utter inadequacy of the revenue, the depreciation of paper currency, the inability to regulate commerce or to

[1] *Roman Political Institutions* (1929), pp. 85-104.

[2] To-day the national States fight each other, engage in private warfare, as the barons did; but the factory system, means of rapid communication, and the constant exchange of raw materials and finished products are binding them together in a web of common interests. The need of preserving world-wide commerce suggests that some day men will be ready to fight for peace in alliance with some agency like the League of Nations. The economic basis of the peace movement will be examined in a later part of this book.

prevent the violation of business contracts. Such were the problems that led to the forming of a more perfect union.

If economic influences played such an effective political rôle two thousand or two hundred years ago, they are not less dynamic to-day. Everybody has become conscious of the shift from *laissez-faire*, the steadily growing assumption by government of activities that were formerly left to private enterprise. We have entered, it seems, a new era of mercantilism and, by accentuating present tendencies, are not unlikely to move farther in the direction of socialism. This economic transformation, even in the earlier stages, has left its mark upon government. Legislatures stagger under the burden of the new paternalism and exhibit their inadequacy. They have lost prestige. Instead of being glorified as the palladium of popular liberty, they are openly derided. It is even proposed to discard them in favor of vocational or functional assemblies. In countries like Russia, Italy, and Germany dictatorship has reduced them to a position of mere registering bodies; and dictatorship seems to spread like a malign disease. With or without the check of a dictator, power has been passing from the legislature to the civil service or bureaucracy, which alone feels competent to manage the complex and technical business of the State.[1] Anglo-Saxon countries are taking a place alongside of the countries of continental Europe with a body of administrative law and with administrative courts, at least in embryo. The popular conception of liberalism is undergoing a great change. Liberty lingers on as a name, but a name used to designate almost the opposite of nineteenth-century liberalism; for the new liberty consists mainly in legislative restrictions which will keep one free man from exploiting another while the State exploits both. Not the least evil is the loss of consensus. In a period of economic transition, when the route has become uncertain, the community falls apart into hostile divisions. The material environment is not the same for all men; it differs according to locality, according to occupation;

[1] "This is the greatest danger that to-day threatens civilisation: State intervention.... Society will have to live for the governmental machine. And as, after all, it is only a machine whose existence and maintenance depend upon the vital supports around it, the State, after sucking out the very marrow of society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organism.... The whole of life is bureaucratised. What results? The bureaucratisation of life brings about its absolute decay in all orders. Wealth diminishes, births are few. Then the State, in order to attend to its own needs, forces on still more the bureaucratisation of human existence [the militarisation of society]." J. Ortega y Gasset, *The Revolt of the Masses* (1932), pp. 132-133.

and, even when it is more or less the same, the selective responses differ according to the self-interest of individuals or groups, as they interpret it. Disagreement about the economic route goes far beyond possible compromise. At the extremes, perhaps, we have communists and fascists; and, in the violent struggle between them, support is withdrawn from existing institutions.

ECONOMIC DETERMINISM

Economic relationships, then, afford the chief clue to political relationships.[1] Aristotle was the first to formulate the principle of economic determinism.[2] But it was Harrington, in his *Oceana* (1656), who brought the principle into prominence, attempting to prove that power naturally and necessarily follows property and that the political constitution is the product of the economic constitution. In the latter part of the eighteenth century he had many illustrious disciples, such as Adam Smith and Arthur Young in England, and Alexander Hamilton, John Adams,[3] and James Madison in the United States. "The diversities in the faculties of men, from which the rights of property originate," says Madison in the tenth number of *The Federalist*, "is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views

[1] C. A. Beard, *The Economic Basis of Politics* (1922); Achille Loria, *The Economic Foundations of Society* (1907); E. R. A. Seligman, *Economic Interpretation of History* (2nd ed., 1907).

[2] R. G. Gettell, in his *History of Political Thought* (1924, p. 51), observes that "in spite of some confusion of thought, he [Aristotle] worked out the fundamental principle that the character and distribution of wealth is a determining factor in fixing the form of government, that the occupations of a people influence their political attitude and ability, and that revolutions are usually contests between those who have much and those who have little property."

[3] In his *Economic Origins of Jeffersonian Democracy* (1915, p. 16), Beard thus summarizes the views of Adams: "1. Society is divided into contending classes, of which the most important and striking are the gentlemen and the common people, or to speak in economic terms, the rich and the poor. 2. The passion for the acquisition of property or the augmentation of already acquired property is so great as to override considerations arising out of religious and moral sentiments. 3. Inevitably the rich will labor to increase their riches at the expense of the poor, and if unchecked, will probably, on account of their superior ingenuity and wisdom, absorb nearly all the wealth of the country. 4. Out of the contest for economic goods arise great political contests in society, particularly between the rich and the poor. Such contests have ended for the most part in the poor committing themselves to an absolute monarch to secure protection against the predatory rich."

of the respective proprietors, ensues a division of society into different interests and parties." [1]

The doctrine of economic determinism did not originate with Karl Marx. Nor does it point the way to communism except in his peculiar version.[2] John Adams believed that the class-struggle ended usually in the setting up of an absolute monarch—the tyrant of Grecian days, the dictator of our own time. So too Hugh Taylor regards the "man on horseback" as a biological necessity, a beneficent antidote to chaos.[3] Whether determinists or not, those who explore the future in the light of the past rarely report any encounter with communism. Ireland and Lennes have presented evidence, more persuasive than that of Marx, to show that we are moving towards a rigidly stratified society, with superior ability and power lodged in the upper classes.[4] Hilaire Belloc pictures the capitalist régime—unstable in equilibrium, incapable of guaranteeing security and sufficiency to the mass of wage-earners—as giving place to a servile society.[5] We are, he says, coming rapidly nearer to the establishment of compulsory labor among an unfree majority of non-owners for the benefit of a free minority of owners. The very legislation that is designed to improve the lot of the masses—employers' liability laws, insurance against sickness and unemployment, old-age pensions, the minimum wage—carries with it an implication of servitude. The State guarantees to the proletarian, as the master did to the slave, sufficiency and security; and the next step, the fatal corollary of the first, already foreshadowed in the attitude of the State towards its own employees, will lead it to impose the obligation to work. Something of the sort may be happening in Russia now, or even in Italy. Perhaps it is not inconsistent with the contention

[1] Madison goes on to say that "the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilised nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government."

[2] For a sketch of the Marxian theory see F. W. Coker, *Recent Political Thought* (1934), pp. 35-61; or M. Beer, *A History of British Socialism*, vol. II (1920), pp. 202-213.

[3] *Origin of Government* (1919).

[4] See Chapter II, pp. 37-38, for brief references to Ireland's *Democracy and the Human Equation* (1921) and Lennes' *Whither Democracy?* (1927).

[5] *The Servile State* (1912).

of Nicholas Berdyaev, that we are approaching an epoch analogous to the beginning of the Middle Ages.[1]

Marx professed to follow the scientific method. He believed that an analysis of the past would reveal the laws of evolution and enable him to predict the future. He took over the apparatus of Hegel's philosophy of history, but substituted for Hegel's Idea, as the great dynamic agent, the material conditions of life, and especially the productive forces. It is in response to the stimuli of the material environment, he maintains, that the superstructure of institutions and ideas is reared. Institutions are set up, modified, and overthrown by the clash of selfish interests; and, when the productive forces are being transformed, social crises occur because the old institutions no longer accord with the material environment. Now, the interests of capital and labor are absolutely opposed; there is a perpetual and intensifying class-struggle between those who own the means of production and those who have nothing to sell but their labor. As the capitalist system grows, the working classes likewise grow—in numbers, self-consciousness, and organization. Capital becomes centralized in large-scale enterprises, because the strong overpower the weak. The rich become richer and fewer. The poor become poorer and more numerous; sharing a common subjection and perceiving the need of solidarity, they prepare to strike when a propitious hour arrives. Since they form the vast bulk of consumers, the fact of their poverty and lack of purchasing-power leads to recurrent periods of overproduction, to industrial crises that grow ever more acute. At last capitalism has been so weakened by these successive prostrations that the proletariat are able to overthrow it. The class-struggle ceases. There are no more classes—no more exploiters, no more exploited.

There are reasons why Marx cannot be regarded as a competent guide. His parade of scientific detachment does not conceal an ethical purpose. He is an idealist in deterministic disguise, as Professor MacIver so well puts it; [2] "a dramatic and apocalyptic prophet," who attracts and comforts the exploited masses with a gospel of salvation. "In spite of his heroic effort to be scientific, and in spite of the pre-

[1] *The End of Our Time* (1933), p. 144. "The revolution which is slowly taking place in Europe," he says, "may have the effect of a reaction—as, for example, in the case of Fascism in Italy. But it is in reality directed against the foundations of modern history, against individualism, against juridicial formalism." It is a question, he explains (pp. 94-95), of "hallowing and justifying work. . . . By this path we should be obliged to revive rural economy and return to trades, organizing ourselves into economic associations and trade corporations."

[2] *Society: Its Structure and Changes* (1931), pp. 497 and 487.

tensions of his work," says George Soule,[1] "what he was really doing was to express his strong desire for what seemed to him a more just and palatable social order in terms which made its attainment appear more sure than did the vagaries of the utopian revolutionists." Being ridden by a preconceived theory, he excavates from the quarry of history the facts that will bolster up his position. What puzzles us most is the queer mixture of predestination and free will, of materialism and moral ideas.[2] Capitalism carries the germs of its own destruction, which is bound to occur at the appointed time; and yet, for some obscure reason, its actual collapse will be brought about by the organized and courageous efforts of the proletariat. Still more strange, we are asked to believe that, after the fall of capitalism, evolution comes to a dead stop. Former ages had resounded with the din of successive class-struggles. This biological characteristic disappears: when once the proletariat have triumphed there will be no more classes.[3]

The dynamic rôle of economics can easily be pushed too far.[4] It is limited by the fact that the total environment includes so many other elements and that the men who react to that environment are so variously constituted. Individuals may sacrifice material advantage for the sake of family or country or religion; they may seek the prestige of asceticism, like St. Simeon Stylites, or the satisfaction of self-sacrifice, like Father Damien. On the other hand they may ruin their material prospects by self-indulgence. It is not always enough to speak of such individuals as eccentrics or to regard their behavior as deviations from the norm that is set by the masses. Nationalism, one of the chief modern dynamics, is a mass-movement. Rarely can it be attributed to economic causes, as when one people seeks to escape from exploitation by another; and even then the consciousness of being a separate people precedes the economic grievance.[5] Professor F. L. Schuman asserts that the development of nationalism is intelligible only in terms of the

[1] *The Coming American Revolution* (1934), p. 108.

[2] *Ibid.*, p. 106.

[3] Similarly for Hegel the whole spiral process of history culminated in the perfection of the Prussian state.

[4] For a critical discussion of this point see MacIver, *op. cit.*, pp. 480-504.

[5] C. H. Hayes (*Essays on Nationalism*, 1926, p. 248) quotes Professor A. von Gennep as follows: "The fact remains that in our days a certain combination of ideas, sentiments, and institutions constitutes a special phenomenon which we call nationality and that this phenomenon cannot be eliminated by any argument whatsoever or by any procedure whatsoever, not even by economic pleas and achievements. Direct observation proves that, free choice being assured and material conditions being normal, economic interest is subordinated to sentimental. It is true of nationality as of love; sentiment comes first, and it is only after a blow that one tries to reason about it."

rise of the bourgeoisie to political power, that "the epoch of nationalism is the epoch of the political ascendancy of the bourgeoisie in the western nations." [1] This discovery rests, we are told, on "a broad historical perspective." As a matter of fact, it recalls Dr. F. A. Cook's expedition to the North pole: there being no evidence, none is offered. Nationalism spread over the west of Europe before there was any bourgeoisie of "vast wealth and economic power enabling them to secure control of governments and bind them to their desires." As we shall see, Tudor and Bourbon kings adopted mercantilism, not because business was strong enough to dictate public policy, but because it was weak and needed protection. If we come down to recent times, we find that nationalism is the cult of the peasantry. Do the machinations of a dominant bourgeoisie explain the nationalistic movements of the nineteenth century in the Balkans, in the Italian peninsula, in Ireland? Was it big business that gave the French-Canadians a national holiday, a national flag, and a national anthem, or that inspired the Boers at Majuba Hill and Spion Kop?

Are we not faced by something more fundamental than the pursuit of material welfare? Sir Arthur Keith finds the explanation in a biological urge.[2] "People who demand the right of self-determination," he says, "are unconsciously dominated by instincts which nature has implanted in human mentality for her own purposes—the production of new races. A people so dominated is deaf to the arguments of economists." [3] Thus, the people of the succession states would be more prosperous in a reconstituted Hapsburg Empire. The French-Canadians have handicapped themselves in business relationships by clinging stubbornly to their native tongue. The Irish of the Free State go farther still in trying to revive a language which is as strange to most of them as Hungarian or Russian; and at the same time they sacrifice the profitable English market for livestock and agricultural produce in order to emphasize their nationhood.

Must economic determinism, then, be thrown into the discard? It cannot be accepted in the relentless Marxian form as the basis of a philosophical system of evolution and a fatal culmination in classless communism. Marx shows the weakness of other system-builders—

[1] *International Politics* (1933), p. 332.

[2] N. Y. *Times Magazine*, Oct. 2, 1932, pp. 4 *et seq.* See also his *Nationality and Race* (1920).

[3] Again: "The creation of diverse races is an essential part of nature's scheme. Race competes against race; some go under, others prosper. It was by pitting race against race that nature brought man up the rungs of the evolutionary ladder.... Nationalism is an essential part of the machinery of human evolution."

Hegel, Schopenhauer, Nietzsche; in face of baffling complexities, he clings fondly and exclusively to his first great cause and insists on pushing it in a settled direction. But there is a chronology besides that of Archbishop Usher, and poetry besides that of Gertrude Stein. We can still believe in economic determinism without believing in some grandiose system that purports to be derived from it. In refusing to follow Marx, or even in admitting that, where they conflict, the biological urge is more potent than the economic, we need not deny that the latter generally prevails in shaping political activities or that at the least it profoundly affects them. Economic relationships afford the best clue to political relationships.[1]

ECONOMIC TENDENCIES TO-DAY

Fundamental economic changes are likely to affect the structure and functions of government. Instances of such interplay have been given; for example, the decline of the landed wealth of feudalism, in relative influence, before the movable wealth of the towns, and the consequent rise of the monarchy. We are confronted to-day with a situation that makes probable a momentous growth of public control over business, a vast enlargement of the economic functions of government. During the past generation, indeed, those functions have steadily expanded; and our political institutions, which were not designed to carry such a burden, have betrayed serious deficiencies. This is one reason why dictatorship has spread over so great a part of central and eastern Europe,[2] and why Congress has vested enormous powers in the hands of President Roosevelt. It explains also the setting-up of advisory economic councils in ten or twelve European States. Democracies and parliaments still survive where they have been established longest and have become most firmly rooted; but, even there, bureaucracy tends to overshadow popular representation. Perhaps we are entering an era of benevolent despotism; or perhaps democracy, chastened by experience, will reassert itself with a more effective organization. At

[1] As a rule, economic motives prevail over political motives. Bryce observes (*Modern Democracies*, vol. II, p. 547) that civic interests rank low with the average man, probably in fifth place. His chief concern is the occupation by which he makes a living and which, "whether he likes it or not, is a prime necessity."

[2] It is by no means the chief reason. Nowadays, as in ancient Greece and medieval Italy, popular government is giving way to tyranny, because an essential condition of its existence is consensus. When the great mass of the people no longer agree in approval of the existing social system, when a powerful minority wishes to overthrow it by force, the alternative is chaos or the reimposition of monarchical discipline. It was that discipline, applied through centuries, that created habitual obedience to law and paved the way for political "freedom."

any rate, we shall be better able to form an opinion if we have before us a brief sketch of the relations between business and government during the past four centuries.

These centuries may be divided into three periods, the first characterized by mercantilism, the second by *laissez-faire,* and the third by a resumption of public relations with business, which is sometimes called neo-mercantilism. The first period, the period of paternalism, extends to the last quarter of the eighteenth century. The appearance in 1776 of Adam Smith's *Wealth of Nations* may be taken as symptomatic of the new forces that were at work, the developing factory system and the great mechanical inventions. The same year is marked by the American Declaration of Independence, this being largely the outcome of dissatisfaction with the navigation acts and other features of the old colonial system.

The practice of mercantilism preceded any theory.[1] While as yet without a speculative basis, it advanced—slowly before the sixteenth century, more rapidly afterwards—because it accorded with the interests both of nascent capitalism and of the new national States of western Europe. Industry and commerce, then in an early stage of growth, needed the energetic help of the State for further expansion. The State felt itself dependent upon them in the search for new revenues. Money must be found not only for the maintenance of the court and administration, but also for military purposes. Precious metals were the most effective form of wealth; and in order to get them the State tried to secure a favorable balance of foreign trade, exporting as much as possible, importing as little as possible, and so receiving payments in gold and silver. Power rather than plenty was the object. By means of privileges and subsidies, prohibitions and monopolies, and by bringing in foreign artisans, new industries were hothoused. Colonies were established to provide a source of raw materials and a market for manufactures. Naval strength was fostered in various ways: the carrying trade was reserved to domestic ships; the planting of hemp and flax and oak-trees encouraged; the eating of fish on the old fast days required, even in Protestant England, for the benefit, not of religion, but of the fisheries, a chief school of seamanship. Nor was agriculture neglected. On every side business came to be subjected to restraints; and society as a whole, to appalling regimentation. There were private

[1] On the subject of mercantilism see G. Schmoller, *The Mercantile System* (1896) and G. T. Warner, *Landmarks of English Industrial History* (3rd ed., 1903).

monopolies and public undertakings, local and national tariffs, price-fixing, occupational restrictions, sumptuary laws under which people were supposed to grow and manufacture, eat and wear, what the government thought expedient—"in short," says Professor Boucke,[1] "the usual story of guidance that led to no goal, that spelled tyranny as often as drill for a purpose." [2]

LAISSEZ-FAIRE

We are often told that the excesses of paternalism, and its failures, bred revolt. This is not quite true, although protests were raised even in the days of Colbert, late in the seventeenth century, and although the French merchant Legendre then coined the phrase *laissez-faire*.[3] Mercantilism was not seriously threatened until private business interests, advancing in power and self-confidence, had passed beyond the need of State protection.[4] What had once seemed a boon was now resented as a burden. Why did the English business man of the late eighteenth century rail against the ineptitude of public administration? Why did he denounce all the activities of the State, beyond its minimum functions, as unsuccessful and injurious? England had become the center of world empire and world trade. The superiority of her agricultural methods was recognized everywhere. Still more marked was the superiority of her factories, now that a series of marvelous inventions had introduced the machine age of industry. It was in conformity with the needs of the English business community that the tutelage of the

[1] O. F. Boucke, *Laissez Faire and After* (1932), p. 37.

[2] It is well to notice, and may have a bearing on the future, that English mercantilism differed from the continental type. It never went to the extreme that characterized the paternalism of Colbert in France, for example. Regulation did not cover so wide an area (being chiefly active in the field of foreign and colonial trade) and was less onerous or less severely enforced. For long periods the American colonists could flout the navigation laws with impunity. The situation was very different in New France. There the whole internal life of the colony was subject to detailed prescriptions. See Francis Parkman, *The Old Régime in Canada* (rev. ed., 1898), especially pp. 257-280. Parkman sums up (pp. 444-445): "Artificial stimulants were applied, but freedom was withheld. Perpetual intervention of government, regulations, restrictions, a constant uncertainty what the authorities would do next, the fate of each man resting less with himself than with another, volition enfeebled, self-reliance paralyzed—the condition, in short, of a child held always under the rule of the father, in the main well-meaning and kind, sometimes generous, sometimes neglectful, often capricious, and rarely very wise—such were the influences under which Canada grew up. If she had prospered, it would have been a sheer miracle. A man, to be a man, must feel that he holds his fate, in some good measure, in his own hands."

[3] J. M. Keynes, *The End of Laissez-faire* (1926), p. 18. It was another Frenchman, d'Argenson, who (about 1751) brought the term into literary use. Bentham was the first English writer to use it (1793).

[4] Achille Loria, *The Economic Foundations of Society* (1907), p. 191.

State was pushed aside in favor of private initiative.[1] Spreading from England, *laissez-faire* set the standard of economic behavior almost everywhere in the West during the greater part of the last century.

The distinctive feature of *laissez-faire* was its self-regulating, automatic quality. In his admirable description of the system Sir Arthur Salter has made this plain.[2] "Over the whole range of human effort and human need," he says, "demand and supply found their adjustments without any one estimating the one or planning the other. The individual producer pushed and groped his way to a new or expanding market. He rarely troubled to guess the total demand for his product; for the share of the market which he could capture was more to him than the total market in which he had to find his place. His guide was no estimate of world demand and production, but the moving index of changing prices. If he and his competitors made more than the consumer, within whatever market he could reach, would buy, prices would fall; the less efficient and advantageously placed producers would lose and be squeezed out; supply would thus in time fall below demand; prices would rise; and a little later the prospect of higher prices would again attract more capital and enterprise to production. So supply and demand would circle round a central, though moving, point of equilibrium—tethered to it by an elastic but limited attachment." In the free play of competition the pursuit of profits brought about the maximum advantage of producers and consumers alike. The rise and fall of prices, registering the demand of the mass of consumers. determined the supply and so acted as a bar to excessive profits.

[1] R. H. Tawney holds (*The Acquisitive Society,* 1921, p. 10) that the philosophy of *laissez-faire* developed out of the migration of industry and consequently of population from the south of England to the coal measures of the north. "The economic expansion which concentrated population on the coal-measures was, in essence, an immense movement of colonization . . . ; and it was natural that in those regions of England, as in the American settlements, the characteristic philosophy should be that of the pioneer and the mining camp." The question is whether this reveals the source of the original impulse.— One consequence of the shift of industry and population was that the north of England, formerly the home of lost causes, became progressive and radical, while the south became the conservative stronghold. In view of its later political tendencies, it seems strange that the North should have supported Henry VI against the Yorkists, sent the Pilgrimage of Grace to oppose spoliation of the monasteries, and taken the side of Charles I against Parliament and of the Pretender against George I. Truly the Industrial Revolution wrought social change!

[2] *Recovery: the Second Effort* (1932), p. 14. See also his "Towards a Planned Economy," *The Atlantic Monthly,* vol. CLIII (1934), pp. 21-32.

OVERTHROW OF LAISSEZ-FAIRE

This is the language in which theorists expound *laissez-faire*. But it was in terms of a grievance, not of a theory, that capitalists denounced mercantilism in the latter part of the eighteenth century. Conscious of their growing strength, they felt themselves hampered at every turn by the regulations of an inefficient government. They had outgrown parental control. They wanted to go their own way. Gradually government itself was converted to the new view. Gradually the "hands-off" policy prevailed, though relics of mercantilism survived well into the nineteenth century; and, whether by mere coincidence or not, the most wonderful period of material progress in the world's history was identified with *laissez-faire*.[1] But, whatever the books might say about the proper attitude of government (according to a theoretical system), practical considerations determined its behavior. As abuses came to light, restrictions of a new kind—in the interest of the working classes —were imposed. Social legislation, which has assumed such formidable proportions to-day, began early in the last century; and, increasing in volume, it did a great deal to transform the system of free competition. A second factor in the transformation was the trade-union movement, this being largely outside of the scope of the law. In the third place, competition revealed an inherent tendency to destroy itself; in the course of the competitive struggle, as the weak gave way to the strong, great corporations began to dominate one phase of business after another and move forward to actual monopoly. The victims of this process of consolidation—consumers as well as small firms—clamored for public intervention. Finally, nationalism took a hand in economic warfare, stimulating exports, discouraging imports, and seizing colonies quite in the manner of the mercantilists.

As an example of social legislation we may take the English factory acts. In the first three-quarters of the nineteenth century twenty-two of these were passed, the first in 1802. In the beginning they were directed chiefly against the exploitation of the labor of women and children. Their scope widened after the middle of the century. The consolidated act of 1901 dealt with such matters as health and safety, dangerous and

[1] Sir Arthur Salter says (*Recovery: the Second Effort*, p. 13): "The triumphs of this system ... have often been sung; the marvellous outburst of scientific invention, multiplying nature's gifts beyond all imagining; the soaring fabric of material civilization, sheltering hundreds of millions in a comfort far beyond that of the primitive life of the solitary peasant, which has been the normal lot of most men throughout the ages; the breakfast table of typist and artisan enriched with the products of every quarter of the globe."

unhealthy industries, home work, education of children.[1] The freedom of employers has also been curtailed by elaborate legislation regarding shops, coal mines, workmen's compensation, and much besides. The so-called social services, providing old-age pensions and insurance against sickness and unemployment, impair the mobility of the price of labor; for the laborer now receives from the State an income in addition to what he derives from the sale of his capacity to work. Moreover, labor is no longer sold in a free market, with the price and hours determined by supply and demand. Not only has the State itself fixed in certain trades artificial minima below which wage rates must not fall, but the trade unions have grown so powerful that they can—by the threat of strikes (sympathetic strikes included) and the intimidation of strike-breakers—extort a scale of wages above what a free market would bring. According to William Green, president of the American Federation of Labor, the day has passed when labor might be bought and sold like electric power as a mere element in the process of production.[2] Because of their numbers and solidarity, organized workers can extort class privileges from an elected legislature. In certain trades they have created something like a monopoly with monopoly wages. Social services and static wage rates, John Strachey observes, are progressively "freezing" one of the most important variables of the market into a disastrous immobility. "The free market cannot function properly . . . , unless *all* its interconnected parts are movable. If one of them sticks, then naturally the whole machine will jam and ruin itself." [3]

But labor is not the only defective part of the mechanism. The free market has been further impaired by the growth of large-scale enterprises, tending towards monopoly. Competition logically results in combination. Small firms, unable to keep pace with elaborately equipped rivals, are left with the choice between bankruptcy and absorption. They choose the latter while they still have something to sell. As the big firms confront each other, they realize what a prodigious loss would be entailed by their own bankruptcy or even by a considerable interruption in the running of their plants. They seek stability by ending competition. We have become familiar with trusts and cartels, holding companies and interlocking directorates, price-fixing agree-

[1] C. W. Pipkin, *Social Politics and Modern Democracies* (2 vols., 1931), vol. I, pp. 42 *et seq.*

[2] In a Labor Day speech he demanded shorter hours, higher wages, universal unionization, and an increased control of industry by labor. Los Angeles *Times*, September 4, 1934.

[3] *The Coming Struggle for Power* (1932), pp. 141 and 143.

ments and divisions of the market. In one way or another the free operation of supply and demand is defeated, even in the face of legislative efforts to restore it. John Strachey has neatly described the situation in the United States.[1] The hidden roots of great corporations, which on the surface appear to stand in splendid isolation, interlace and intertwine in an incredible labyrinth, drawing nourishment from great central reservoirs of capital. The classic land of *laissez-faire* is the land of the trust.[2] "The whole of American life," he concludes, "is steadily coalescing and congealing into a vast conglomerate mass from which competition tends to be expelled." Eminent critics of the Roosevelt administration, like Senator Borah, contended that the National Industrial Recovery Act encouraged the formation of monopolies. The British government has deliberately established monopolies to take over new branches of production, as in the case of Imperial Airways and the Central Electricity Board. In Germany state-controlled trusts and state-controlled banks are numerous. So are public enterprises.

The characteristic form of big business to-day is that of the corporation, which places the wealth of many individuals, as stock-holders, under a central control and which separates ownership from control and management. In the United States corporations have entered one field after another and become dominant there, wholly or partially. They produce, according to recent statistics, ninety-four per cent of all manufactured goods.[3] They have attained gigantic size. The American Telephone and Telegraph Company has assets of almost five billion dollars, over 567,000 stockholders, and 454,000 employees.[4] The two hundred largest corporations not engaged in banking had, in 1930, combined assets of eighty-one billion dollars.[5] Evidently we must no longer think in terms of a multitude of small competing enterprises, directed by their owners, but in terms of huge units and of a competition that has changed in essential nature or disappeared. "A society in which production is governed by blind economic forces," we are told,[6] "is being replaced by one in which production is carried on under the ultimate control of a handful of individuals.... The organizations which they control

[1] *Op. cit.*, pp. 62-63.
[2] The tariff, which stands out as an exception to the practice of laissez-faire and which sheltered and fostered the trusts, was itself created by them.
[3] A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (1932), p. 14.
[4] *Ibid.*, p. 3.
[5] *Ibid.*, p. 19.
[6] *Ibid.*, p. 46.

have passed beyond the realm of private enterprise—they have become more nearly social institutions."

Professor Keynes was apparently the first to notice the tendency of big business to socialize itself.[1] The shareholders become dissociated from the management, he says; and, as a result, the management thinks less of making maximum profits than of securing the stability and reputation of the business, which is conspicuous in the public eye and vulnerable to public attack. By using the open market for the sale of its securities, the corporation has acquired, indeed, a quasi-public character.[2] But the divorce between ownership and control, which is due to the ever-widening dispersion of stock-ownership,[3] seems to carry with it still more momentous consequences. Ownership has become functionless. It is not active, but passive; it is not a means of work, but a means of gain, without the rendering of personal service.[4] Under the circumstances the State may feel justified in limiting profits, either directly or through taxation. There would be no such excuse for expropriating the stockholders; for a small number of them as directors often exercise efficient control over the management. Politicians might prove a poor substitute. As a further consequence of passive ownership, the principle of individual initiative is challenged as the motive force back of industry. We are asked to re-examine "the ends for which modern corporations can or will be run." [5]

The decline of *laissez-faire* became apparent towards the end of the nineteenth century. In England *social legislation* had proceeded so far that in 1885 Lord Wemyss, reviewing the enactments of the last fifteen years, solemnly warned the country against the progress of socialism; and Joseph Chamberlain, declaring that the stage of agitation

[1] J. M. Keynes, *The End of Laissez-faire* (1926), pp. 42-43.

[2] Berle and Means, *op. cit.*, p. 6.

[3] The principal shareholder owned in 1929 less than one per cent of the stock of the largest railway, the largest utility, and the largest industrial corporation in the United States. The percentages for the twenty largest shareholders were only 2.7, 4, and 5.1. Berle and Means, *op. cit.*, p. 47. As to the methods of establishing control without ownership see *ibid*, pp. 70-87.

[4] R. H. Tawney, *The Acquisitive Society* (1921), pp. 65-66.

[5] Berle and Means, *op. cit.*, p. 9. "Those who control the destinies of the typical modern corporation own so insignificant a fraction of the company's stock that the returns from running the corporation profitably accrue to them only in a very minor degree. The stockholders, on the other hand, to whom the profits of the corporation go, cannot be motivated by those profits to a more efficient use of the property, since they have surrendered all disposition of it to those in control of the enterprise. The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use."

had passed, brought forward his radical program.[1] In 1875, after a struggle of fifty years, *organized labor* won a signal triumph in England: the law now recognized collective bargaining and all its usual incidents (such as so-called peaceful picketing).[2] The closing years of the century witnessed a more and more rapid concentration of capital in *large-scale enterprises*. In fact, the phenomenon grew so marked in the United States that in 1890 Congress passed the Sherman Anti-trust Act as a means (which proved ineffective) of preventing combinations in restraint of trade. While these various influences were impairing the free play of competition at home, *nationalism* was erecting barriers against the normal flow of foreign trade.

The organized peace movement that followed the Napoleonic wars had laid emphasis upon the importance of free commercial intercourse. Although Great Britain stood alone in adopting free trade, the policy of revenue tariffs generally prevailed until the recrudescence of nationalism brought about a series of European wars. Then came the shift to high tariffs. It was begun by Russia in 1877, Germany in 1879, and France in 1881. In the United States the Republican party clung to the high emergency rates of the Civil War long after the excuse for them had vanished, and in time, by a series of measures, carried protection close to the point of excluding all goods that competed with domestic products. Great Britain did not fall into line until 1931. The setting up of tariff barriers struck one more blow at *laissez-faire*. We speak of an era of economic nationalism or neo-mercantilism.[3] It was marked not only by high protection, but also by imperialistic adventure.[4] There was fierce rivalry between the great powers in the search for markets and raw materials, in the establishment of colonies and protectorates wherever unappropriated land could be found, and in the exploitation of weak and backward states such as China and Persia. Imperialistic ambitions led to the great war. Once again, after the peace of 1919, internationalism seemed to be in the ascendant. Great hopes were centered in the League of Nations. But the failure of the League to halt Japan in 1932, the collapse of the economic and dis-

[1] C. W. Pipkin, *Social Politics and Modern Democracies* (2 vols., 1931), vol. I, p. 14.

[2] B. and S. Webb, *The History of Trade Unionism* (rev. ed., 1920), p. 291.

[3] See R. L. Buell, *International Relations* (rev. ed., 1929); P. T. Moon, *Imperialism and World Politics* (1926); F. L. Schuman, *International Politics* (rev. ed., 1937).

[4] If Great Britain still adhered to free trade, she was the first to feel the impulse towards colonial aggrandizement, as the events of the seventies clearly demonstrate. France soon followed suit, then Germany and other states. Moon, *op. cit.*, pp. 8-57.

armament conferences later on, the Nazi irruption in Germany, and the rape of Ethiopia—all these occurring at a time of severe business depression—played into the hands of the nationalists. Tariffs have been supplemented by import quotas and licenses, export bounties, the manipulation of railroad rates, in fact all sorts of impediments to international exchange. There is much talk of autarky, a closed economy for the nation. The change of outlook may be grasped by comparing Samuel Crowther's *America Self-contained* (1933) with W. C. Redfield's *Dependent America* (1926).

FUTURE PROSPECTS

Seventy-five years ago, perhaps even fifty years ago, it might be said that business was self-regulating. Business had broken the bonds of mercantilism in the late eighteenth century, escaped from the paternal solicitude of the State, and trusted itself to the play of a free competitive market. *Laissez-faire* was still dominant in 1885. But we look about us now and realize, as Sir Arthur Salter says, that "the full flood of competition has been canalized, locked, dammed, and diverted from its original course."[1] If we concerned ourselves only with the results, we might ascribe them to purposeful engineering. We recall, however, what Aristotle said about the importance of the genetic background. The actual historical process discloses no intention, no plan of any kind to destroy *laissez-faire*. As always happens, the transformation has taken place gradually and, for a long time, imperceptibly; forces that were in the beginning quite unrelated have converged from different directions; decade by decade slight modifications of the free market have accumulated. It is with something like amazement that we realize at last how far we have drifted from our moorings.

Having become conscious of the drift away from *laissez-faire*, we begin to speculate about our future destination. These speculations are primarily economic. But economic life generally leaves its impress upon political life. When business relationships take on a new character, the State must modify its instruments of control; and so our future destination concerns the form of government as well as the methods of production and exchange. The prophets have become numerous and, we should add, alarming. A temporary prostration of business, affecting their whole outlook, has been mistaken for the collapse of the existing order. Thus Nicholas Berdyaev contends that we are approaching a period analogous to the beginning of the Middle Ages, when

[1] *Recovery: the Second Effort* (1932), p. 22.

bankrupted peoples will enter upon a new path of self-denial, when work will be hallowed and justified, and when rural economy and trade associations will be revived.[1] On the other hand, the Utopian Society, which had recently hundreds of thousands of members in Southern California, indulges in a vision of leisure and plenty. It promises free education up to the age of twenty-five, a three-hour work-day for the next twenty years, and after that complete leisure and $200 a month.[2] This is a version of technocracy.[3] A surprising number of intellectuals have been converted to communism,[4] which in Russia has not always treated intellectuals more kindly than kulaks. They acquiesce, apparently, in the prospect of an oppressive autocracy and a rigorous social regimentation, as do the partisans of fascism. By comparison a socialist like Norman Thomas seems a bit watery and irresolute.[5]

Sir Arthur Salter and Walter Lippmann have charted a middle route, which would preserve much of what remains of the *laissez-faire* system and impose a minimum of deliberate regulation and control.[6] According to Salter, private business would supply the institutional self-discipline required to deal with its own defects, but government would be prepared to intervene at any time as the ultimate guardian of the public interest, to superintend planning, to coerce recalcitrant minorities, to coördinate the institutions set up by industry, and to stimulate and supplement voluntary action where weaknesses were revealed. Parliament, meeting for two or three months a year, would enact legislation in general terms. In the detailed application of the laws the ministers would act in conjunction with a national economic council.

In spite of the absence of Mussolini and the Black Shirts, one detects, in Sir Arthur's picture, a certain resemblance to the Italian scene. The question therefore arises: If there is to be no dictator, who will speak with authority? Where every activity is to be planned (and planners are notoriously quarrelsome), who will decide between the rival schemes? Surely not Parliament; for it has submitted tamely to

[1] *The End of Our Time* (1933), pp. 144 and 94.
[2] *The Nation*, vol. CXXXIX (1934), pp. 268-269.
[3] See G. A. Laing, *Towards Technocracy* (1933); Howard Scott *et al.*, *On Our Way* (1933).
[4] Emile Burns, *Capitalism, Communism, and the Transition* (1933); G. D. H. Cole, *A Guide Through World Chaos* (1932); John Strachey, *The Coming Struggle for Power* (1932) and *The Menace of Fascism* (1933).
[5] *The Choice before Us* (1934).
[6] Salter, *The Framework of an Ordered Society* (1933) and "Towards a Planned Economy," *The Atlantic Monthly*, vol. CLIII (1934), pp. 31-38; Lippmann, *The Method of Freedom* (1934).

a sixty-day session and a limited law-making function. Not the ministers; they remain, as now, responsible to Parliament. Can it be the all-pervasive planners, even though their rôle is the humble one of giving advice? Under a new scale of values, perhaps, the intellectuals will be obeyed because their superiority is recognized—and at last philosophers will be kings. (Sir Arthur studied Plato at Brasenose.) Unfortunately, we come back to the original difficulty: Who will keep the peace among the planners? But fantastic as the proposal appears in some of its details, it escapes one great error. Sir Arthur does not assume that to-morrow will be utterly unlike to-day. He is not mastered, in the manner of a Strachey or a Thomas, by a formula or a system. He is aware that no logic can predict the course of events and that the prophets who try to compress everything into an excogitated mold are always confounded. They are confounded because of the operation of factors whose obscurity kept them hidden from sight and whose future emergence could not have been foreseen. Who could have foreseen that in 1416 the herrings would leave the Sound and migrate to the coasts of England and that in consequence a pastoral and agricultural people would take to the sea?

Most of the prophets insist upon deliberate planning, planned economy, planned control.[1] They seldom understand the first implication of planning: before a remedy is applied it is necessary to know what is wrong. Upon correct diagnosis everything else depends. Without it all talk of planning in general or in detail is absurd. But what diagnostician can penetrate the complexity of an environment which, as John Dewey says, is too diversely crowded and too chaotic to afford a balance of direction for ideas? We have reared a monster of civilization that transcends our powers of observation and baffles our efforts to visualize more than fragments of it. Man has become an aphis on the machine. The wisest and best-equipped observer can see only a little part of the apparent chaos around him; and anything that purports to be an analysis of society is the result of imperfect observation and false simplification. Doubts are resolved for Norman Thomas or John Strachey by their inherited philosophy, just as Abbé Ferland, in his *Histoire du Canada,* settles the question of human origins by a reference to Genesis. But, although Thomas and Strachey are alike in their certainty about the future, they differ irreconcilably about the kind of future it is going to be. They unite in denouncing the visions of Salter

[1] For a moderate statement of the case for planning see George Soule, *A Planned Society* (1932).

and of the Fascist Mosley, who can be coupled in that way and in none other. In fact, nothing is more abhorrent to a planner than a plan that differs from his own. Walter Lippmann is right, therefore, when he insists that "an iron discipline is needed to make millions of people behave according to a plan. They do not naturally coördinate themselves properly. Absolutism is not merely incidental to a directed economy in its early phases. It is the basic principle of a directed economy." [1] How could a plan remain coherent in the face of the diverse political influences and group pressures that characterize democracy? A planned national economy is incompatible with democracy. There must be a benevolent despot like Stalin and a single controlled party, purified by constant "cleansings"—one party in power, as Tomsky said in 1927, and the rest in jail.

Despotism itself has to contend with the social lag. It cannot push and pull the masses about just as it wishes. Even when they are hurried along a route that had become more or less familiar in the past,—before the revolution the Russians had become familiar with autocracy, rapid industrialization, and the collective agriculture of the *mir*,—the masses set the pace in course of time and check deviations into the unknown. This explains why Stalin's progress has been marked by zig-zags, bewildering reversals of policy, sudden and sharp turns to the right or left. It explains why the collective farm is now so different from what was contemplated in 1929, why the collectivized farmer is allowed to possess a private garden of at least an acre and a quarter, sometimes two acres and a half, and why the individual farmer, outside the collective, is now permitted to trade in foodstuffs and to hire labor (which formerly would have stamped him as a kulak and led to his "liquidation"). It explains why persistent efforts to disrupt the family have been abandoned. But there is another obstacle to planning, which has been alluded to previously. The best of plans is likely to be invalidated by the intrusion of new and unforeseen factors; and when a long-term plan has been put into operation, everything being predicated upon it, adjustment to altered circumstances is not easy without wrecking the whole plan. Great loss is entailed by its collapse. What a multitude of disturbing factors history reveals, upsetting every premise! Consider the rôle of gunpowder, the printing press, the steam engine, the power loom, coal, oil, electricity. Students of Soviet Russia know that some of the most glaring failures of Gosplan have been due to the emergence of unforeseen factors.

[1] *The Method of Freedom* (1934), p. 42.

It may be said that in the past failure has been the characteristic feature of planning. The period of mercantilism, for example, reveals a vast graveyard of excogitated plans; and, if we were to pass from tomb to tomb and read the inscriptions upon each headstone, we would encounter nothing but tragic memorials of eager, frustrated youth. The plans died young. Here is the grave of Talon's model villages. He built three of them near Quebec, lavishing upon them the most meticulous, fatherly care. But in spite of encouragement and command they did not flourish. Settlers disliked compact inland villages, notwithstanding their military advantages.

In a recent book Tugwell and Hill praise many features of the Soviet experiment.[1] The real challenge to America, they say, is the challenge of the planning idea: Russia has proved that men can set up the system they want and make it obedient to their wishes. We must ask, Who are "they"? Surely not the Russian people; their wishes were not consulted. If the plan has been obedient to Stalin's wishes, those wishes have passed through strange metamorphoses. Was it according to plan that angry peasants should slaughter more than half the livestock in Russia? Aside from oxen (which are widely employed in Russian farming), seventeen and a half million horses perished. The new machines did not compensate for this loss; tractors provided, by 1934, only a little over three million horse-power, or would have done so if half of them had not been out of commission.[2] In the first six months of 1934, notwithstanding the solemn pledge of Molotoff, the production of light industry increased by little more than half the planned rate and that of heavy industry by almost twice—rather a serious discrepancy for any plan after so long an experience with planning. Instances like these can be produced in great number. What shall be said of the vast steel plant at Magnitogorsk, where the cost of coal, for transportation alone, is $7.60 a ton and where the local supply of ore would be exhausted in ten years if the mills ran at full capacity? What shall be said of a work-as-play educational scheme, heralded as one of the great Russian achievements and now utterly scrapped in favor of methods more rigorous than those commonly employed in American schools? Perhaps it may be said that details like these are of no im-

[1] R. G. Tugwell and H. C. Hill, *Our Economic Society and Its Problems* (1934).

[2] The failures of the Five-Year Plan, in both agriculture and industry, have been demonstrated from Soviet statistics by various writers. See, for example, E. Yourievsky, "A Reply to Stalin," New York *Times*, February 19, 1933. Also E. Lyons, *Assignment in Utopia* (1937), pp. 482-493 and 552-560.

portance. At least communism is safely established! In fact, the Bolsheviks have been subjecting communism to one dilution after another. What of the abandonment of equal wages, even as an ideal; the creation of a new bourgeoisie through the floating of immense internal loans; the substitution of dictatorial management for workers' control in the factories? The dream of world revolution vanishes. A fervent national patriotism displaces loyalty to the workers of the world. Russia, joining hands with France, as a potential ally, takes her place on the council of the League of Nations, which used to be the object of her derision. Stalin himself has led the Thermidorian reaction.

For specific and immediate objects, planning is serviceable and even necessary. With an income of two hundred marks a month, Bunny and Johannes Pinneberg did well to frame a household budget and provide for the buying of a suit of clothes every two years; [1] and Micawber would have escaped many a misfortune if he had followed his own financial precepts.[2] The farmer must use forethought in organizing his operations; he cannot be oblivious to the nature of the soil, the climate, the succession of the seasons.[3] But the question of planting artichokes or potatoes is different from the question of adjusting the whole of agricultural production to demand or the question of coördinating agricultural and industrial prices. It is the all-inclusive national plan that the theorists recommend. But how can such a plan succeed when it includes at the outset so many unknown factors and encounters, as time goes on, so many unexpected obstacles? Men react to a concrete environment, not to a paper scheme. In the grip of circumstance plans have a way of shriveling up.[4] That is why the great ruler, as John Morley depicts him,[5] abstains from playing the part of fate and feels his way slowly to the next step. "His compass is only true for a very short distance, and his chart has marks for no long course."

[1] Hans Fallada, *Little Man, What Now!*

[2] "Annual income £20, annual expenditure £19, 19, and six; result happiness. Annual income £20, annual expenditure £20, aught, and six; result misery. The blossom is blighted, the leaf is withered, the God of day goes down upon the weary scene, and—and in short you are forever floored."

[3] But, as Soule admits (*op. cit.*, pp. 129-130), "agricultural customs and ways of living represent a gradual accretion over many generations" and the planning is "largely a social outgrowth to be sure, but modified and improved in detail from time to time as the result of the observations and experiments of individuals" —their selective responses to environment, not plans.

[4] "No imagination can be too fertile, no cynicism too extreme, no language too biting, to picture and describe the possible vagaries, gyrations, and somersaults of the ambitious politician in the grip of circumstances." Augustine Birrell must have been thinking of the ambitious planner.

[5] *Voltaire* (1886), p. 184.

During the past few years we have been deluged with Utopian literature and badgered by quite a few Utopian experiments. Such phenomena have marked other periods of economic depression. It is equally true that society, recovering from hard times, has always returned to something like mental equilibrium. So to-day we seem to have started on our way back to sanity. We listen with less patience as the ideologists describe the specifications for a new earth and a new heaven. What we want and what we doubtless will get is an end to rash adventure. The familiar scene suits us better than chaos—a scene which, though always changing, never ceases to be familiar, because the changes take place so gradually that adjustment to them occasions no nervous strain.

PART II

THE STATE: ORIGIN AND LAWMAKING FUNCTION

CHAPTER V

THE STATE

SOMETHING has already been said about the terminology of politics; about its looseness, its vagueness, its lack of scientific precision. We constantly use words like "nation," "republic," "law," or "sovereignty" as if they had a specific and established meaning. For purposes of superficial discussion, in the barber shop or at the dinner table, they may suffice. But no serious argument can proceed very far without revealing a fatal incoherence: the same terms are being used in different senses. It becomes necessary to stop the argument and, if possible, agree upon definitions.

Now, the subject of this book is political institutions—that is, the institutions of the State. At the outset, therefore, we should know what the State is. Unfortunately there is no universal agreement on this point; our first casual inquiry may bring to light diverse views and incompatible definitions. For example, one writer emphasizes freedom as an essential mark of the State; another, subjection. Hegel regarded the State as the realization of the moral idea, the incorporation of the objective spirit, the actualization of concrete freedom. The Supreme Court of the United States once expressed the opinion that the State must have a written constitution and a government limited by it and established by the consent of free citizens.[1] On the other hand, Franz Oppenheimer says: [2] "Every state in history was or is a state of classes, a polity of superior and inferior social groups, based upon distinctions either of rank or property." According to Léon Duguit,[3] "there is a state whenever in a given society there exists a political differentiation [between rulers and ruled], however rudimentary or however complicated and developed it may be." If the author is a sociologist like Oppenheimer or a philosopher like Hegel, or an economist, or a lawyer, his peculiar prepossessions may lead him either to distort the reality by stressing some actual characteristic of the State and ignoring the rest, or to free himself altogether from reality and to picture the State,

[1] *Texas v. White,* 7 Wall., 700 (1868).
[2] *The State* (1914), p. 5.
[3] *Traité de droit constitutionnel,* vol. I (2nd ed., 1921), p. 395.

subjectively and theoretically, as he thinks it ought to be. Diversity of this kind is confusing. A German writer has said, with some exaggeration, that scarcely any two definitions of the State are alike. Yet we are dealing with the most fundamental of all the terms used in Politics.[1]

If various meanings are given to the word "state," how shall we discover the right one? An obvious method suggests itself at once. Let us turn from the word to the thing. Let us assemble the States, or numerous examples taken from the past and the present, analyze them, and so fasten upon the attributes that are common to all of them. This seems to be a sound and scientific procedure. Unfortunately, here again an embarrassing obstacle stands in the way. How can we be sure that what we are observing and analyzing is in fact a State? Who will tell us whether it is a State or not?

Surely our tentative list may properly include Egypt of the Pharaohs, Athens, Sparta, Rome, England in the time of Henry V, France in the time of Louis XIV, not to speak of contemporary examples. Professor Leonard T. Hobhouse denies this. He holds that "the 'state' in the true sense is developed only among people of the highest civilisation" and rests upon the principle of Citizenship, the Common Good, and Personal Right; and that Despotism, resting upon the principle of Force and Authority, is only a 'government.' "On this side, then, the state stands in strong contrast with the despotic empire. Its government rests not so much on the authority of a superior as on the consent of the bulk of its members.]' [2] As to the democracies of Greece, the great fissure between freeman and slave was maintained. "The free Athenian demos rules the enslaved mass; the Spartan rules the Perioecus and the Helot no more by a principle of right than the great king his motley crowd of subjects. So far as the state includes an unen-

[1] It may well seem curious, says R. M. MacIver (*The Modern State*, 1926, pp. 3-4) that so great and obvious a fact as the State should be the object of quite conflicting definitions. "Some writers define the state as essentially a class structure . . . , others regard it as the one organization that transcends class and stands for the whole community. Some interpret it as a power-system, others as a welfare-system. . . . Some view it entirely as a legal construction, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community 'organized for action under legal rules.' Some identify it with the nation, others regard nationality as incidental or unnecessary or even as a falsifying element which perverts the nature and functions of the state. Some regard it as no more than a mutual insurance society, others as the very texture of all our life. To some it is a necessary evil, and to a very few an evil that is or will be some day unnecessary, while to others it is 'the world the spirit has made for itself.' Some class the state as one in the order of 'corporations,' and others think of it as indistinguishable from society itself."

[2] *Morals in Evolution* (rev. ed., 1915), pp. 60, 66, 69.

franchised population, it abandons the principle of right and falls back on that of force,"—that is, loses the character of statehood.

Professor MacIver is more tolerant.[1] He gets around the difficulty by recognizing two categories or types: the democratic State, in which the general will plays a conscious, direct, and active rôle; and the dynastic State, a lower form, in which the general will is not co-extensive with the community or is merely acquiescent or subservient. This lower type includes class-controlled States, empires, and so-called democracies "in which the government is controlled by a privileged portion of the total community." The Greek commonwealths are "transitional forms rather than distinct state types. Perhaps they should not be included within the classification of states any more than the *pithecanthropus* is to be included among the races of men."

The Greek political thinker, we are told,[2] had no word corresponding to the modern term 'state.' "It is only the city, the *polis,* of which he could speak, and we are very apt to misinterpret his meaning when we translate it as state. It is the city-community, not our 'state,' to which he attributed these all-comprehensive functions and powers.... In respect of social forms our world has become differentiated far beyond the Greek or even the Roman." It grows clear[3] that MacIver's complaint is based on the omnicompetence that the Greeks attributed to the πόλις: their failure to distinguish it from the community; to realize the difference between law and custom; to make room for divergence in life, religion, and opinion; to give freedom to cultural associations.

Professor Herman Finer excludes both the Greek commonwealths and Rome. He denies statehood to the former because the term 'state' was unknown to them, because of their small size, and because they emphasized, (not supremacy and obedience, but the enjoyment of rights!)[4] These points are made by a writer who prides himself upon

[1] *The Modern State* (1926), pp 338-362.

[2] *Ibid.,* p. 87. *Cf.* G. E. G. Catlin, *The Science and Method of Politics* (1927), p. 139: "The 'Polis' which formed the centre of Aristotle's thought on τὰ πόλιτικα could more appropriately be described as the 'city community' than as the 'state.'"

[3] *Ibid.,* pp. 87-88.

[4] *The Theory and Practice of Modern Government* (2 vols., 1932), pp. 8-9. "To the Greeks the term State was unknown: our scholars invented it for them. ...Nor has the fully developed Periclean Polis ...anything we may equate with modern government: the emphasis, as classical students have taught us (rightly?), was upon the enjoyment of rights and community, not upon supremacy and obedience. Nor did Polis ever denote any fellowship but one whose members were few enough to dwell together in a small area—this, indeed, being properly recognized as a condition of fellowship. Aristotle said: 'Ten men are too few for a city; a hundred thousand are too many.' When, at the Renaissance, the world became conscious of the legacy of Greece, States had grown so vast in area,

his realism. They might well surprise us into asking a number of questions. Was obedience so little valued in Sparta? Is MacIver so utterly wrong in complaining of the tyranny exercised over individuals and groups? As to Rome, Finer says, "the citizen-community was, as it were, a 'political guild,' a close corporation, living on the exploitation of slaves, the profits from which contributed largely to the glory of that civilization and the possibility of personal political activity, which only citizens enjoyed."[1] Rome was not a State, because the citizens formed a close corporation and exploited slaves. Moreover, early Rome was called *civitas,* "the community of those with full citizen rights and duties," or *res publica,* "that which was a common quality and a common possession of all who belonged to the community of citizens"; the later designation, *imperium,* referred to qualities possessed by rulers. "These terms have not ceased to be used; but they are certainly not identical with 'State.'"

The Greeks and the Romans, then, did not set up the State; or so we are asked to believe, partly on the ground that they had no word identical with our word state! In fact, Professor Finer asserts that the State made its first appearance in the sixteenth century, approximately at the time when Machiavelli first employed the term *lo stato* in *The Prince.*[2] The State "is hardly, even in its most venerable pillars, older than Luther and Shakespeare, and some of its essential engines were developed only yesterday. The State will not mean to us what it actually is unless we recognize its extreme youth. In the perspective of world history it is a pretentious juvenile, lately come of age, insisting upon its maturity among jealous elders."

This is a bold and even fantastic assertion. It is invalidated by Professor Finer himself. In most elaborate fashion he evolves a definition which does not exclude ancient Athens and Rome any more than England and France in the sixteenth century.[3] Note Finer's language. "The State," he says, "is a territorial association in which social and

and their political institutions were so different from those of classical times, that men could only find the word 'city' for Polis, 'city,' that is, a town with communal life, but not a country."

Later on, when I shall have formulated a definition of the State, it will appear that Professor Finer is not dealing with essential attributes. The State may be big or little; it may be governed by an autocrat or by the whole adult population; it may be inhabited mainly by serfs or mainly by freemen. Its existence does not depend upon the word that happens to be used to describe it or upon the ultimate ends which philosophers may offer as the reason for its existence.

[1] *Ibid.,* p. 9.
[2] *Ibid.,* p. 5.
[3] *Ibid.,* pp. 5-22.

individual forces of every kind struggle in all their great variety to control its government vested with supreme legitimate power." This can, at any rate, be easily understood. But it is not final. Two pages further on Professor Finer says: "We come now to the main result of the discussion; that the State is simply an order in which there is superordination and subordination of individuals and groups *to each other,* and that this order, obtained and maintained by social power, operates in the name, and with the title, of supreme authority." The second definition, put forward as an improvement upon the first, is quite inconsistent with it; no longer do territoriality and legitimacy find a place; once essential, they are now dropped without explanation of any kind. The strange shift of ground has been altogether arbitrary. For the moment, however, we are interested in a different consideration. Professor Finer tells us that, if we propose a list of States for observation and analysis, we must (for some obscure reason) exclude everything before the sixteenth century. He then proceeds to define the State in terms that are applicable irrespective of size, irrespective of slaveholding, irrespective of limitations on citizenship.

We started by looking at a few definitions of the State, and encountered disagreement. We turned then to the State itself only to meet with similar confusion. How is it possible to say that any given community is a State without establishing beforehand the essential attributes of statehood? Having traveled around the circle, we are driven back to definition. Does this mean that the quest is hopeless? Does it mean that, in the face of disagreement, some arbitrary choice must be made? The answer is clear. Apply the test of good usage. Ignore the eccentrics, with their individual prejudices or teleological philosophies, and concentrate upon the writers of authority, the men of recognized position in the field of politics. Take down from the bookshelves the works of twenty modern authors who are generally rated high for sanity and sound judgment. A surprising approach to unanimity will appear.

STATE AND GOVERNMENT

One ground of cleavage and dispute deserves attention. This has to do with government. While most authorities regard government merely as an essential instrument or contrivance of the State, a small minority insist that State and government are identical. Such is the attitude, for example, of Henri Chardon, eminent authority on French ad-

ministration.[1] "What is the exact meaning of the word State? Ask a thousand Frenchmen: the thousand Frenchmen can give no answer. Perhaps, in their embarrassment, they will turn to the dictionary of the French Academy. They will find that the dictionary of the French Academy recognizes no less than seven meanings of the word.... But the thousand Frenchmen, having reflected a bit, will see clearly only one thing, that they use the word State in an eighth sense which the dictionary of the Academy has not defined and which they confusedly attribute to this significant word.... If you should press them, they would at last answer with impatience: 'Oh, we know well enough what the State is: according to the era, it is Louis XIV, Napoleon I, William II, Czar Nicholas, Mussolini, Millerand, Poincaré, or their ministers.' The thousand Frenchmen are right. There is nothing else in the State. ... However, most men still accept the notion that the State is a mysterious being of which they form the cells and which follows its destinies outside and above them."

Again, take G. D. H. Cole of Oxford: [2] "What is a State? A State is nothing more or less than the political machinery of government in a community. The civilised world of to-day consists of a number of independent and sovereign communities, of which many have other communities dependent upon them. Each independent community expresses itself in its relation to others through its machinery of government, *i.e.* through the State. Each independent community, and most of the dependent communities, use their States also for many internal acts affecting the relations of individuals and groups one to another and to the whole. States are thus governmental institutions existing to express common purposes and undertake common actions on behalf of communities." Cole then refers to organized groups, such as churches and trade unions. "All these special associations, I shall be told, are just as much a part of the State as the Government itself; for the State is the community, and there is no difference between them. Such an argument takes my breath away; but it is with this facile identification of the community and the State that the advocates of state sovereignty throw dust into people's eyes. The answer to it is simple. If the State is the community and the community the State, why all this pother about the sphere of state action? Why advocate or oppose State Socialism, since it is manifest that, however our industry may be organized, it is the State that organizes it? Why denounce the

[1] *L'Organisation de la République pour la paix* (1926), p. 4.
[2] *Self-government in Industry* (rev. ed., 1919), pp. 119-121.

Trades Disputes act—are not the Trade Unions a part of the State? ... The fact that the State claims to be the community and in fact exercises the greatest part of the community's power does nothing to prove that the State is rightfully the community, or its sole representative, or that it has an absolute claim upon the individual's loyalty and service." [1]

Cole's identification of State and government finds support in certain familiar expressions. When we speak of a federal State or a centralized State, we are thinking in terms of governmental form. When we speak of state interference or state aid or state socialism, we are thinking in terms of governmental activity. Cole concludes from this that the State and government are one. But the true conclusion seems to be that the phrases are loose and misleading. They are commonly employed because of the peculiar relation existing between State and government. Although the State is a territorial association, it can act effectively only through the medium of its government. When the government does something in the name of the State, it may be said that the State does that thing through the medium of its government. It is this situation which leads Professor Harold J. Laski to say that "a working theory of the State must, in fact, be conceived in administrative terms. Its will is the decision arrived at by a small number of men to whom is confided the legal power of making decisions.... The State is in fact that small body of men to whom is confided the legal power of making decisions.... The State is in fact that small body of men to whom the actual operation of its will is confided.... For the State is, for the purposes of practical administration, the government." [2] Yet State and government are by no means identified in his definition.[3]

Whatever confusion still exists in the use of the word "state" by

[1] For a criticism of Cole's position, see S. G. Hobson (a fellow Guild Socialist), *National Guilds and the State* (1920), especially p. 101; and G. C. Field, *Guild Socialism—a Critical Examination* (1920), p. 106. Field says: "The state is an organized society, and like all organized societies it can only act through certain individuals, sometimes the majority of all its members, but more often the body which we may call the government.... But that does not alter the fact that the society consists of all its members. And the state consists of all its citizens, however passive may be the part which some of the citizens play in the actual work of the state."

[2] *A Grammar of Politics* (1925), pp. 35, 41, 131. Cf. W. G. Sumner and A. G. Keller, *The Science of Society*, vol. I (1927), p. 699: "A state is a group occupying a defined territory in so far as it is organized so as to make its force available to execute its will, within and without, as formulated by the constituted authorities. More specifically, the word refers to the organization and regulation alone...." Also note Léon Duguit, *op. cit.*, vol. I, p. 395.

[3] *Ibid.*, p. 21; and *The State in Theory and Practice* (1935), pp. 8-9.

writers of authority may be attributed, in part, to the history of the word. The thing itself, the actual State, has existed for thousands of years. But the word that is now applied to it has been in use for little more than four centuries; and it was applied at first to the ruler or government, not to the territorial society. On this subject important contributions have recently been made.[1]

In the later Middle Ages the English expressed their constitutional ideas in Latin, French, and English. The terms *status, estat* or *état,* and "estate" or "state" alike conveyed the sense of standing or position. One could have standing or position with respect to land, as an owner or possessor; and so, by successive ellipses, men came to speak of an estate of land, and in time, more briefly, of an estate. One could have standing with respect to a class, as a member of the class; and, in time, the word estate came to indicate the class itself (for example, the three estates of the realm, first mentioned in the Treaty of Troyes, 1420). Finally, one could have standing with respect to authority; and so we find references to the state of monarchy, the state of Parliament. The king, like other rulers of the community, has position or state. He is the State. So, the king's secretaries are called, first, secretaries of the royal estate and, later, secretaries of state. The evidence from Italy points in the same direction. The word *lo stato* was first applied to the rulers and their dependents.

It is an easy transition from the king or governing body of a community to the organized community living under a government. Professor Barker quotes a passage from *The Prince* of Machiavelli to show that the transition had occurred in Italy by 1513; that *lo stato* might thus mean either the government or the community that was being governed. As to England, the *New English Dictionary* gives citations of similar import from Grafton in 1568 and from Crompton in 1587. In the sixteenth century and afterwards the word state may refer to the government or to the community that is governed or even to the territory that the community inhabits.[2] But in the days when monarchy

[1] H. C. Dowdall, "The Word 'State,'" *Law Quarterly Review,* vol. xxxix (1923), pp. 98-125; Pollard and Barker, "The Word 'State,'" London *Times Literary Supplement,* Sept. 23, 1920, p. 618. See also Herman Finer, *op. cit.,* vol. I, pp. 8-12.

[2] In the case of *Texas v. White* Chief Justice Chase, considering the word state, said: "It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. It is not difficult to see that in all these senses the

was still powerful the first meaning was preferred. Only with the establishment of popular control over government did the existing usage gradually supplant it. According to Professor Pollard, "it was not until the nineteenth century that 'the state' acquired its modern meaning, nor until the vogue of the comparative study of states that a generic word was found necessary to indicate 'the State' as distinguished from its particular manifestation as a city, a monarchy, or a class." Louis XIV was doubtless correct in saying that he was the State. But usage has changed: Stalin or Mussolini or Hitler can be no more than government. To-day the State is a territorial society.

Usage will no longer permit the identification of government and State. When we say that Italy is a national State, that Liechtenstein is a very small State, or that the French State was enlarged by the recovery of Alsace-Lorraine, obviously we are not thinking of government at all. When revolution occurs in Mexico and the Huerta régime is overthrown, the existence of the Mexican State continues. There is a new government, that of Carranza, which is recognized, in time, by the governments of other States. The distinction between State and government was correctly laid down by the Supreme Court of the United States in 1870. There having been a collision in San Francisco Bay between the French transport *Euryale* and the American ship *Sapphire,* the Emperor Napoleon III, as owner of the *Euryale,* had claimed damages. Before the Supreme Court heard the case on appeal Napoleon had been deposed and a republican government set up in France. The court held: "The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale,* not as an individual, but as sovereign of France.... On his deposition the sovereignty does not change, but merely the person in whom it resides. The foreign state is the real and true owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual persons or party in power, is but the agent or representative of the national sovereignty. A change in such a representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it.... The vessel has always belonged and still belongs to the French nation." [1]

primary conception is that of a people or community." The Chief Justice was not quite so felicitous in the sentences which followed.

[1] *The Sapphire,* II Wall., 164.

A State may disappear. Like Carthage, it may be conquered and annexed. Like Scotland, it may, without compulsion, merge its identity with that of another State. But its existence is not affected by violent internal commotions and changes in the form of government. The Russian State persisted through the revolutions of 1917. The recognition of new States, such as followed the successful revolt of English and Spanish colonies in the New World, is quite a different thing from the recognition of new governments and, comparatively speaking, a rare occurrence. States are so long-lived that the quality of permanence is usually attributed to them. More than three hundred years ago Hugo Grotius wrote: [1] "Isocrates, and after him the Emperor Julian, said that states are immortal; that is, they can continue to exist because a people belongs to the class of bodies that are made up of separate members, but are comprehended under a single name, for the reason that they have 'a single essential character,' as Plutarch says, or a single spirit, as Paul the jurist says.... Furthermore, it makes no difference in what way a people is governed, whether by a royal person, or by an aristocracy, or by popular government. The Roman people, in fact, is the same under kings, consuls, and emperors. Nay more, though the king rules with absolute power, the people will be the same as it was before, when it was its own master, provided that the king governs it as the head of that people and not of another. For the same power, which resides in the king as the head, remains in the people as the whole body, of which the head is a part...." [2]

DEFINITION OF THE STATE

State and government, then, are by no means the same thing. Government is an essential element of the State. There are two other

[1] *De Jure Belli ac Pacis* (Carnegie Endowment ed., 1925), vol. II, pp. 310-311 and 314.

[2] It is interesting to note that Aristotle (*Politics*, Bk. III, chap. 3) takes a different position. "This, too, is a matter of inquiry, whether we shall say that a city [State] is the same while it is inhabited by the same race of men, though some of them are perpetually dying, others coming into the world, as we say that a river or a fountain is the same, though the waters are continually changing; or when a revolution takes place shall we say that the men are the same, but the city [State] is different; for a city [State] is a community, it is a community of citizens; but if the mode of government should alter, and become of another sort, it would seem a necessary consequence that the city [State] is not the same; as we regard the tragic chorus as different from the comic, though it may probably consist of the same performers: thus every other community or composition is said to be different if the species of composition is different; as in music the same hands produce different harmony, as the Doric and Phrygian. If this is true, it is evident that when we speak of a city [State] as being the same, we refer to the government there established; and this, whether it is called by

essential elements: people and territory. A State exists, according to Oppenheim,[1] "when a people is settled in a country under its own sovereign government"; and, according to Gilchrist,[2] "when a number of people, living on a definite territory, are unified under a government which in internal affairs is the organ for expressing their sovereignty, and in external affairs is independent of other governments." Laski defines the State as "a territorial society divided into government and subjects claiming, within its allotted physical area, a supremacy over all other institutions";[3] and MacIver defines it as "an association which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order."[4] These four definitions convey a similar, or even an identical, meaning. They fairly represent the weight of authority as determined by comparing the views of more than a score of reputable writers. Phraseology varies; emphasis varies; but most definitions agree in ascribing to the State the three essential elements of people, government, and territory.[5]

Respecting the territorial element, Léon Duguit goes close to the line of heresy, if, indeed, he does not cross it. He is chiefly interested in the differentiation between rulers and ruled which takes place "in almost all human societies, large or small, primitive or civilized" and

the same name or any other, or inhabited by the same men or different. But whether or not it is right to dissolve the community when the constitution is altered is another question."

[1] L. Oppenheim, *International Law*, vol. I (4th ed., 1928), p. 135.

[2] R. N. Gilchrist, *Principles of Political Science* (3rd ed., 1927), p. 17.

[3] H. J. Laski, *A Grammar of Politics* (1925), p. 21. Laski continues: "It is, in fact, the final legal depository of the social will. It sets the perspective of all other organizations. It brings within its power all forms of human activity the control of which it deems desirable." In a later book, *The State in Theory and Practice* (1935), pp. 8-9, he says: "By a state I mean a society of this kind [a group living and working together for the satisfaction of their mutual wants] which is integrated by possessing a coercive authority legally supreme over any individual or group which is a part of the society.... Such a society is a state when the way of life to which both individuals and associations must conform is defined by a coercive authority binding upon them all.... This power is called sovereignty; and it is by the possession of sovereignty that the state is distinguished from all other forms of human association."

[4] R. M. MacIver, *The Modern State* (1926), p. 22.

[5] By isolating their definitions from the explanatory comment that is offered later some writers are misrepresented. Thus A. Esmein (*Eléments de droit constitutionnel*, 8th ed., 2 vols., 1927) defines the State, at the very outset, as "the juridical manifestation of the nation," but shortly afterwards indicates that the nation must possess an authoritative government and a determined territory. Similarly, Henry Sidgwick (*The Elements of Politics*, 4th ed., 1919, p. 221) makes no mention of territory in his definition, but explains on the same page that the people are assumed to be in settled occupation of a certain territory.

which alone constitutes "what we call public power.... Taking the word in the most general sense, we may say that there is a State whenever in a given society there exists a political differentiation, however rudimentary or however developed it may be. The word State designates the rulers... or else the society itself in which the differentiation between rulers and ruled exists and in which, for that very reason, a public power exists." [1] It appears, then, that he gives two meanings to the word state. He ignores territory. But in the second of his five volumes,[2] he admits that territory "is the material limit of the effective action of the rulers. It is that, all that, and only that. Territory is not an indispensable element in the formation of the State. What I mean is that quite conceivably a political differentiation may occur in a society that has not been fixed upon a determined territory. In the general sense of the word, there will nevertheless be a State. But," he adds—and the concession is of great importance,—"modern civilized societies are fixed on determined territories, and the action of rulers is extended to a determined territory." [3]

The attitude of Woodrow Wilson resembles that of Léon Duguit.[4] Admitting that modern usage always limits sovereignty to a definite land, he describes the State as "a people organized for law within a definite territory." He insists, nevertheless, that "the first builders of government would not have found such a definition intelligible. They could not have understood why they might not move their whole people, 'bag and baggage,' to other lands or why, for the matter of that, they might not keep them moving their tents and possessions unrestingly from place to place in perpetual migration, without in the least disturbing the integrity or even the administration of their infant 'State.' Each organized group of men had other means of knowing their unity than mere neighborhood to one another; other means of distinguishing themselves from similar groups of men than distance or the intervention of mountain or stream. The original governments were knit together by bonds closer than those of geography, more real than the bonds of mere contiguity. They were held together by real or assumed kinship." [5] People in the nomadic, pastoral stage, before

[1] *Traité de droit constitutionnel,* vol. I (1921), pp. 394-395.

[2] *Ibid.,* vol. II (1923), p. 46.

[3] Eduard Meyer, *Geschichte des Altertums* (3rd ed., 5 vols., 1909), vol. I, pp. 10-12, regards the State as a primeval organization that antedates the pastoral tribe and may be associated with the hunting pack.

[4] *The State* (rev. ed., 1898), p. 8.

[5] Wilson asks (*ibid.,* p. 7) how the modern mind can "conceive distinctly a *travelling* political organization, a State without territorial boundaries or the need

they had fixed themselves on the land as cultivators, had some form of government. Why should they be denied the title to statehood?

Sir John Seeley does not regard territoriality as an essential attribute of the State. Political science, he maintains,[1] should not concern itself only with so-called civilized States. There are lower as well as higher organisms. Why should Aristotle "almost exclude from his investigation all states but that very peculiar kind of state which flourished in his own country?" Why should we not say that States are found in the deserts of Arabia and in other regions where the soil is unfruitful and discourages fixed settlement and agriculture? There is, Seeley insists, a common characteristic that marks primitive nomadic tribes as well as the most advanced people—the principle of government. If a society is held together by the principle of government, it constitutes a State.

TERRITORY ESSENTIAL

Such views are rarely encountered to-day. They have been rejected, not on arbitrary or theoretical grounds, but because of certain practical considerations. The conduct of international relations would be seriously impeded without the requirement of a defined territory. According to W. E. Hall, the most eminent authority on international law at the end of the nineteenth century, this requirement is not the result of strictly necessary circumstances.[2] "Abstractedly there is no reason why a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities.... [But] there might be difficulty in subjecting such societies to restraint, or in some cases being sure of their identity." This is the capital point. It must be possible to identify the State so as to enforce international obligations. Concrete experience has persuaded the expositors of international law that fixed territory must be a condition of statehood; and their realistic view has generally been

of them, composed of persons, but associated with no fixed habitation. And yet such were the early tribal states,—nomadic groups, now and again hunting, fishing, or tending their herds by this or that particular river or upon this or that familiar mountain slope or inland seashore, but never regarding themselves or regarded by their neighbors as finally identified with any definite territory. Historians have pointed out the abundant evidences of these facts that are to be found in the history of Europe no further back than the fifth century of our own era. The Franks came pouring into the Roman empire just because they had no idea theretofore of being confined to any particular Frank-*land*. They left no France behind them at the sources of the Rhine; and their kings quitted those earlier seats of their race, not as kings of France, but as kings of the Franks."

[1] *Introduction to Political Science* (1896), pp. 31-37.

[2] *A Treatise on International Law* (6th ed., 1909), p. 19.

accepted by other students of politics. Agreement is all but universal. People and government are not enough; the occupation of a fixed territory is also essential. Otherwise the State could not readily be identified and held to account.

Something further must be added. The relationship of the people to the territory must give reasonable promise of permanence. Otherwise, how could a State give solid guarantees for the fulfilment of its obligations? How could it acquire the rights that are correlative to such obligations? If the duration of this relationship between people and territory is wholly uncertain, says Hall, a territorial society "cannot ask other communities to enter into executory contracts with it, and at any moment it may cease to be a body capable of being held responsible for the effects of its present acts. . . ." [1]

The territorial character of the State assumes great importance in international dealings. The embarrassments that would occur without it may be illustrated by the experience of France in Morocco.[2] It was generally supposed, at the beginning of the nineteenth century, that the sultan ruled Morocco and that he could be held responsible for tribal invasions of Oban, a province of Algeria. The atlas showed Morocco in a solid color, a single entity like France or Spain; Fez, its capital, the seat of the shereefian government. But the actual situation of the sultan was quite different from what Europeans supposed it to be. The State was not a geographical conception; the relation between ruler and ruled was personal, not territorial. The sultan's authority depended upon his being recognized by other religious chiefs who were, like himself, descended from the Prophet. He ruled over the Makhzen (the so-called submitted tribes), but not over the Siba, who refused to become his vassals; and yet Makhzen and Siba dwelt side by side in all parts of Morocco. Under such peculiar circumstances, France could extort from the government at Fez promises which did not bind the Siba in any way, or chastise the Siba without impairing the prestige of the sultan.

A State must have both population and territory. But, whatever may be said from the standpoint of economic or military or moral advantage, mere size is not taken into account.[3] All that we ask is whether

[1] *Ibid.*, p. 18.

[2] H. A. Gibbons, *An Introduction to World Politics* (1922), pp. 207-209.

[3] Among independent states we list to-day Monaco, with an area of 390 acres and a population of some 22,000; Liechtenstein, with an area of 65 square miles and a population of some 10,000; Luxemburg, with an area of 999 square miles and a population of 285,000. There are five other states, all in Latin America, with populations ranging from 467,000 to 859,000; and eight others,

the territorial group has a stable government, free from external control. The fact that it satisfies such a condition indicates that its size is sufficient. Of course, a very small State leads a hazardous life; it may find difficulty in fulfilling its obligations or even in maintaining its existence. Alongside of such giants as the United States and the U.S.S.R. we rank such pigmies as Monaco and Liechtenstein as independent States. But the weakness of both is manifest. Monaco, by treaty with France in 1918, came close to the status of a protectorate; and Liechtenstein has entered the Swiss postal and customs systems. In 1920 the latter was refused admission to the League of Nations, because the assembly felt that so small a State would be unable to discharge the obligations of membership.

In ancient times a large population and a large territory might well be regarded as obstacles to good government. Aristotle remarks that there is an appropriate size for all things—animals, plants, machines, as well as States; and that a ship would not properly be a ship if it were nine inches long or a quarter of a mile long. With respect to the State a point might be reached where it would be very difficult to adapt a form of government to it. How would citizens be summoned to the assembly? The herald must have the voice of a stentor! [1] A large population and territory in Aristotle's day necessitated despotic rule; under such conditions popular government was impossible. It was impossible, not merely because means of communication were difficult and slow, but also because the Greeks clung passionately to the institution of the city-state and because the principles of representation and federation, though known, had not been carried beyond a rudimentary stage.[2] Popular government could be applied only to small States. The alternative was empire of the Persian or Macedonian type. Later on, as Rome grew through conquest, the local *comitia* and Senate tried to govern the outlying provinces. But the burden proved too great. Republican institutions gave way.

The present situation is very different. Printing-press, telephone, and radio; railroad, automobile, and airplane; and so many other

half in Europe and half in Latin America, with populations ranging from one to two millions.

In a few definitions of the State we meet with such phrases as "a numerous assemblage of human beings" (T. E. Holland) and "a community of persons more or less numerous" (J. W. Garner). Qualifications of this sort appear to be quite unnecessary and also vague enough to be meaningless.

[1] *Politics*, iv, 7.

[2] But see Chapter XX as to representation in Greece and Rome.

modern agencies have removed the bars to communication, annihilated space, and altered our whole conception of size. Aristotle could only imagine a ship that was a quarter of a mile long and which therefore would not be a ship; but the length of the *Queen Mary* is almost a fifth of a mile. Aristotle thought in terms of the *ecclesia* and the carrying-power of the herald's voice; but over the radio President Franklin D. Roosevelt had fire-side chats with the people of a continent, and King George V was heard throughout the British Empire, scattered over all the seven seas. No stentor could perform such magic. Aristotle thought that 100,000 citizens would be too many; but the population of the United States was over 100,000,000 in 1920 and that of the U.S.S.R. should be well over 200,000,000 by 1950. The area of the first is more than three and a half million square miles; of the second more than eight million. India, moving forward to Dominion status (independence) through federation, has a population of 350,000,000.

The difference is not due to mechanical devices alone. It rests also upon improved political devices. The representative system, growing familiar to Europe from the twelfth and thirteenth centuries and now taking root in Asia and Africa, has vastly extended the scope of democratic institutions. During the last century and a half the federal system, despite repudiation of it in some countries, has proved its great value. It has reconciled local autonomy with national unity, diversity with uniformity; it has enabled local communities to retain much of their individual character and yet coöperate for certain purposes in a single State. By itself, representation makes it possible to extend self-government over vast areas and vast populations which otherwise could be held together only by a despot. Combined with federalism, it eliminates the old problem of size. Federalism meets the further complication of heterogeneity. It allows local peculiarities of culture to persist and common elements to combine. Quebec and Ontario, Rhode Island and New Mexico, White Russia and Turkmenistan afford illustrations.

The principles of representation and federalism, operating in a transformed mechanical environment, have invalidated some of the political premises of antiquity. While Plato thought that the State should be limited to 5040 households and Aristotle held that a citizenry of 100,000 was excessive, to-day we sometimes contemplate a world-state with a population of two billions or so. At the same time the relative

merits of large and small States continue to be discussed.[1] The justification of small States seems to rest upon the nostalgia of biblical and classical students and upon the appreciation of the artistic achievements of Athens and Florence. But such considerations do not disguise the fact that, under prevailing conditions, the future lies with big States. Economic strength and military strength have a survival value. God aids the big battalions. The precarious existence of Belgium or Yugoslavia depends upon the jealousies of the Great Powers.

In war numbers are important. Other things being equal, they are decisive. But economic resources cannot be left out of account. Not only is war costly, but it requires also high efficiency in the technical processes of industry. Size of population may be a vital factor in economic superiority. This is the day of large-scale mass-production; and in such countries as the United States and Russia manufacturers have the advantage of a huge and stable domestic market whose tariff walls or other obstacles foreign competitors cannot surmount. But, when a manufacturer produces for a small home market, he is limited in many ways. How can he afford to install expensive labor-saving machinery? How can he afford to maintain laboratories, with a corps of chemists and engineers, and endlessly introduce refinements into his methods and his product? In a word, how can he "rationalize" his business and so, at heavy original cost, meet the quality and price of American automobiles or American shoes or American steam-shovels? It was chiefly the handicap of the small domestic markets and the consequent impossibility of the economies of mass-production

[1] For example, criticism of small States will be found in Heinrich von Treitschke's *Politics* (2 vols., 1916) and in Lord Acton's *The History of Freedom and Other Essays* (1907). Acton says (p. 295): "In order to maintain their integrity they must attach themselves by confederations, or family alliances, to greater powers, and thus lose something of their independence. Their tendency is to isolate and shut off their inhabitants, to narrow the horizon of their views, and to dwarf in some degree the proportions of their ideas. Public opinion cannot maintain its liberty and its purity in such small dimensions, and the currents that come from larger communities sweep over a contracted territory. In a small and homogeneous population there is hardly room for a natural classification of society, or for inner groups of interest that set bounds to sovereign power."—A different view is taken by H. A. L. Fisher in *The Value of Small States* (1914), republished six years later in his *Studies in History and Politics*. Fisher has a good deal to say about the contributions that Judea, Athens, Florence, and Geneva made to civilization and about "the world's debt" to them. However, he is not oblivious to some of the limitations that are emphasized by Acton and Treitschke. He shares the view of Ratzel (given in his *Politische Geographie*) that, following the line of historical development, the small States must eventually be absorbed by the larger. Is this the inevitable tendency? Looking back upon the collapse of great empires in the past, Auguste Comte suggests quite a different evolution.

that, in the third decade of this century, converted so many European industrialists and politicians to the project of a United States of Europe.[1] With the death of its foremost champion, Aristide Briand, in 1932, and the triumph of Hitler's Nazi, the project is no longer timely. But some measure of European consolidation appears to be an economic necessity for the future.

[1] See, for example: Count R. N. Coudenhove-Kalergi, *Pan-Europe* (1926); Paul Hutchinson, *The United States of Europe* (1929); Édouard Herriot, *The United States of Europe* (1930); and F. Miller and H. Hill, *The Giant of the Western World* (1930).

CHAPTER VI

ORIGIN OF THE STATE: (1) KINSHIP AND RELIGION

MEN have always been curious about origins. In seeking to penetrate the mysteries of the past and find out the how and why of things, they have been satisfied with explanations that have varied with the credulity of the age. At one time divine interposition was accepted as a sufficient answer: it was a stroke of Neptune's trident that created the ravine of Peneios. Nowadays, we not only reject miracles, but remain skeptical in the face of *a priori* reasoning and mere surmise. We demand evidence. According to the evidence, we will say that things happened so, or that they probably did, or possibly did, or certainly did not. Any one of such conclusions is valuable. The inquiry has still been worth while even when it reveals that nothing positive can be established. At least, myths have been discredited, shams exposed, impostures detected. In the phrase of René Viviani, we have furthered human progress by extinguishing lights in heaven that never shall be relit. And so, when curiosity impels us to explore the obscure beginnings of the State, there may be little hope of discovering positive certainties. What we want is a review and appraisal of the evidence. The verdict may show that very little is known or ever can be known, but that the little is nevertheless enough to rule out any exuberance of speculation.

The search for origins means much more than the satisfaction of idle curiosity. It is a necessary method of dealing with political phenomena, because the present loses its true significance whenever it is separated from the past. What exists is never new; it always has a history upon which its present form depends; and the idea that, at a given moment, something quite new is being fashioned is merely a delusion. We cannot understand any contemporary institution, therefore, without some knowledge of its genetic background. We cannot understand the process of institution-building, as it goes on before our eyes, without some knowledge of the way in which institutions have been built in the past. We must watch men at work a hundred years

ago, a thousand years ago, and in times still more remote; and the best way to watch and also to understand is to take a specific institution—it being a monument of human endeavor, the result of prolonged activity—and find out how it was constituted. In the first chapter of this book the assertion was made—and not without evidence to support it—that men do their building much like the coral insects, without conscious design. Now, the State is one of man's chief institutions. Did it, likewise, come into existence gradually, planlessly, as the result of innumerable successive adjustments between man and his environment?

The genetic inquiry may serve other purposes. If we can find out what forces molded the State, perhaps its present working may become more intelligible. The engineer who restores roads should know how they were laid originally; the breeder of Buff Orpingtons should know what diverse elements were combined to produce that interesting variety. Would we be disposed to tinker so light-heartedly with the State, if its nature were better known? Would we be able to say that the State is a permanent necessity, that the anarchist lives forever in a dream-world, and that the Marxian idea of a classless society is just one of those myths which, as Georges Sorel claimed, must be associated with all great social movements?

The inquiry is one which will hardly be undertaken without reluctance. There is an appalling mass of scientific and pseudo-scientific literature, much of it highly specialized; and the specialists often disagree over fundamentals. They have rarely shown themselves capable of getting free from immediate details and formulating generalizations. Indeed, much of the evidence is inconclusive or even contradictory, affording no adequate basis for generalization; former attempts to picture the course of social evolution have, like Herbert Spencer's, failed utterly and emphasized the need of greater caution. Nevertheless, it is possible to get some solid footing in the quagmire of controversy. No student of politics can afford to say that he found the task difficult and gave it up. Unpacking his instruments, he must survey the routes that intrepid explorers have charted so imperfectly. Which is the route most likely to lead to our destination, the origin of the State? Is it the route of kinship and religion that should be followed; or the route of economic activity and the accumulation of property; or of the enterprising individual and the passive crowd that obeys and subordinates itself; or of conquest and forcible exploitation? Obviously there is quite a lot of surveying to do.

The task is a hard one. But it is somewhat simplified by the fact that the Age of Exploration—the search for the origins of the State—began less than a century ago. Sir Henry Sumner Maine, belonging to the school of historical jurisprudence, is one of the first great names encountered. Then the quest was continued by ethnologists and sociologists, whose tireless efforts have done so much to raise the standard of scholarship. In the seventeenth and eighteenth centuries, it is true, much was written about the origin of the State. But the men who wrote depended, like medieval cartographers, almost wholly upon the imagination. To support particular conceptions of what State and government ought to be, they brought forward *a priori* theories, most often the theory of the social contract. Is it conceivable that men once believed in the social contract? They once believed that the earth is flat; some men believe it still. To-day the theory of the social contract is important as an illustration of credulity and as evidence that in this post-Darwinian age our attitude towards political problems has made remarkable advances. If politics has not become a science, it has borrowed not a little of the scientific spirit and the scientific method.

THEORY OF THE SOCIAL CONTRACT

The theory of the social contract, which was invented by the Greek sophists and condemned both by Plato and Aristotle, reappeared in the eleventh century. It found a secure lodgment in Western Europe because it accorded with prevailing modes of thought. Covenants between the Lord and his people or between the king and his people were familiar to students of the Bible; the feudal relationship between lord and vassal was essentially a contractual relationship; and Roman law, which exerted so powerful an influence from the twelfth century, made it clear that most of the positive rules obeyed by men are created by contract.[1] By the close of the sixteenth century, the theory was accepted almost universally. It postulated a state of nature as the original condition of mankind and a social contract as the means of escape from it. But, being a mere creature of the imagination and therefore possessed of speculative amplitude, it could be made to account for any social or political phenomena. Consequently it assumed various forms and was used for various purposes. The arguments of three famous writers will serve to show how effectively it might be employed to support inconsistent conclusions.

[1] Sir Henry Maine observes in his *Ancient Law* (5th ed., 1874), p. 309: "It is a theory which, though nursed to importance by political passions, derived all its sap from the speculations of lawyers."

The Leviathan, by Thomas Hobbes appeared in 1651; *Two Treatises of Government,* by John Locke, in 1690; *The Social Contract,* by Jean Jacques Rousseau, in 1762. All three of these authors pictured mankind as living primevally in a state of nature. But as each sought to establish different conclusions and vindicate different principles, a corresponding difference had to mark his premises: each version of the state of nature varied widely from the others. What did they wish to prove? Hobbes, writing while the memory of the civil war and the king's execution was still vivid, set out to justify the rule of the Stuarts—government by prerogative; he believed that England could be saved only by absolute monarchy. Locke was inspired by the "glorious revolution" of 1688 and by its ideal of constitutional monarchy. Rousseau was the champion of popular sovereignty.

The state of nature, as Hobbes described it, was a condition of unmitigated selfishness and rapacity. Men had no sense of right and wrong; they fell upon each other with savage ferocity; their lives were "solitary, poor, nasty, brutish, and short." The situation became intolerable. It was from the sheer necessity of self-preservation that men contracted themselves out of the state of nature and formed a civil society. By mutual covenant they agreed to surrender their natural rights into the hands of a common superior. The king did not subject himself to any conditions; he profited from the contract without being a party to it. For the future, however arbitrary his rule might be, the people retained no ultimate right to rise against it. The authority of the sovereign was final and irrevocable.

John Locke set out to justify the deposition of James II. He had to show, therefore, that the state of nature, instead of being brutal and wretched, was merely insecure; that misery did not make *any* sort of alternative preferable; and that the contract established a limited, not an absolute monarchy. His state of nature did not imply an utter absence of legal constraint. There existed a law of nature, "as intelligible and plain to a rational creature and a studier of that law as the positive laws of the commonwealth"; and men generally obeyed it. But the law of nature did not exist in the form of an enforceable code; it was altogether subjective, a matter of conscience for each individual; and when, through ignorance or self-interest, violations occurred, there was no "known and indifferent judge" authorized to punish offenders. What was needed? An authority to enforce the law. And so the contract—a matter of convenience rather than necessity; a contract which bound king as well as people and which implied

a possible forfeiture of the throne whenever the king committed a breach of the agreement. The people did not surrender all their rights, Locke insists; for they could not reasonably be supposed to sacrifice more than was necessary to secure the benefits of civil society.

While Hobbes' state of nature was intolerable and Locke's was inconvenient, Rousseau's was idyllic. Men were as yet uncontaminated by the enervating influence of civilization; they sought their own happiness untrammeled by social laws and social institutions. What happened, then, to corrupt this perfect scene? What serpent crept into this simple Eden? Numbers increased; the arts developed; private property emerged. Circumstances made it desirable to substitute, by contract, civil freedom for natural freedom. By a covenant of each with all and all with each, sovereignty was erected. But that sovereignty belonged, not to the king, but to the community, to the general will. The king was not independent of the contract, as with Hobbes; or bound by the contract, as with Locke. His power, which in any case was confined to executive matters, could be modified or taken away at the caprice of the general will.

Even such a brief sketch will suffice to show that the theory of the social contract was remote from actualities and oblivious to facts. Nothing like the state of nature ever existed. The most primitive peoples that anthropologists have described live under a regulative system of some sort and conform to rigid customary modes of behavior.[1] It is quite unhistorical to suppose that such men would resort to a contract. The very idea of contract belongs to a later stage of social development than the hypothesis demands; the conditions of a contract presuppose a system of law to support it. "No trustworthy primitive record can be read," says Maine,[2] "without perceiving that the habit of mind which induces us to make good a promise is as yet insufficiently developed, and that acts of flagrant perfidy are often mentioned without blame and sometimes described with approbation." Primitive man did not possess the maturity of outlook which the making of a social contract assumes. Of course, social contracts have

[1] Some travelers, encountering no functionaries or organs of regulation, report that certain tribes have no government at all. But Sumner and Keller (*The Science of Society*, 1927, vol. I, pp. 461, 464) observe: "Regulation is there, whether or not it is called government.... These are cases of government in its germ-form. Members of small aggregates, chiefly kin-groups, live under a simple and unorganized public opinion which has not yet developed agencies of any definiteness for its expression and enforcement. Only the old, the natural depositories of the mores and traditions, exercise an influence comparable to their experience and knowledge of precedent...."

[2] Sir Henry Sumner Maine, *Ancient Law* (5th ed., 1874), p. 312.

become familiar in modern times. The *Mayflower* pilgrims, in 1620, solemnly and mutually, in the presence of God and one another, covenanted and combined themselves into a civil body politic. This did not, however, mark the origin of the State. The pilgrims were subjects of a State that had existed for hundreds of years, and they remained subjects of England after setting up their body politic. When the United States of America came into being by virtue of a solemn compact (the Articles of Confederation), the State had been, through long ages, familiar both as an idea and as a fact.

Indeed, no one now pretends that the theory of the social contract possesses any historical validity. Hobbes himself, after discussing the state of nature, admitted that "it was never generally so." The exponents of the theory were trying, says Professor Ernest Barker,[1] "to explain, not the chronological antecedents, but the logical presuppositions of the State—to show, not how it came to be, but on what assumption we can explain its being." This can scarcely be regarded as a vindication of what Sir Frederick Pollock calls "one of the most successful and fatal of political impostures." Fiction, so persuasively disguised as fact, had an enormous vogue even at the end of the skeptical eighteenth century. An excogitated doctrine masqueraded triumphantly as the truth. It did a great deal of damage in obscuring the problem of origins and in delaying the application of correct methods of inquiry. This much may be said in its favor: it supplanted delusions of the Middle Ages that were still more absurd, particularly the theory of the divine origin of the State.

Yet, if we insist upon discarding the doctrines of theologians and philosophers, what can we offer in their place? For one thing, we can offer a new way of looking at political and social phenomena. Our attitude is fundamentally different. History has taught us something; science has taught us something. It is no longer possible to think of the State as a conscious invention, suddenly introduced as an antidote to confusion and chaos. The State must have evolved from rudimentary and inchoate beginnings, by a process of growth that was so slow as to have been all but imperceptible. Through the play of stimulus and response, circumstances changed, and institutions changed with them. The need for a more highly organized authority manifested itself gradually, and it was satisfied gradually, as man's capacity for association developed. The prevailing view is thus expressed by Sumner and

[1] *The Study of Political Science and Its Relation to the Cognate Sciences* (1928), p. 19.

Keller:[1] "As there are no chasms or even sharply marked lines of demarcation between periods of evolution, but zones of transition only, it is as impossible to say at what point the state first appears as it is to determine when mores become laws, or at what hour the child becomes a youth or the youth a man. Formerly he was a youth; now he is a man.... Similarly with the developing regulative institutions: it is uncertain just when it takes on the state-form." Even if the full records of that development were available, we would not be able to say precisely when the State began.

But the origin of the State is nowhere recorded. To the philosopher that is an advantage; fancy thrives when no brutal facts can contradict it. On the other hand, the scientific method, which can live only in an atmosphere of facts, might well seem inapplicable. It took time and ingenuity to discover indirect ways of supplying the facts. There are two chief ways. One of them is suggested by the work of the archeologist, who tries to reconstruct past civilizations by making excavations at Pompeii and Herculaneum, by rifling the tomb of Tut-ankh-amen, or by digging up the skeletons of ancient men and animals; and who, with the help of geology, can fix the approximate age of the Java or Piltdown man. So, too, the comparative study of ancient law detects many strange survivals, fragments of institutions that must have flourished before historical times. When such fragments are found frequently enough in the earliest records of various peoples, a scientific reconstruction of the past becomes possible.[2] Such was the method of Sir Henry Maine.

In the investigation of contemporary societies ethnology has discovered a second way of providing the facts. The ethnological investigation of social groups has revealed both similarity and diversity. When two groups, living perhaps thousands of miles apart, are found

[1] *The Science of Society* (4 vols., 1927), vol. I, p. 695.

[2] Institutions, or their relics, often survive after they have become meaningless. "In the time of Cicero the state had a character as advanced and independent as it has in England and France; and those who speculated upon its origin often forgot as completely to connect it with the family as in modern times did Hobbes and Locke.... But certain institutions still existed in Rome, which were of immemorial antiquity, and which to Cicero and his contemporaries had become quite unintelligible, but which, attentively considered and compared with traditionary history by modern scholars, have betrayed the secret of the development of the Roman state out of the family. Particularly, there was the institution of the *gens*. The second name of every Roman, ending in *ius*, Fabius, Julius, Tullius, showed to what *gens* he belonged, and yet Cicero almost confesses that the nature and meaning of the *gens* are quite obscure to him. But Athens had just the same institution, and the analogy of other primitive communities shows us that we have here the clan, that is, the conventional family...." Sir John R. Seeley, *Introduction to Political Science* (1896), pp. 56-58.

to possess similar institutions, such as agriculture or the chieftainship, they may be regarded as having reached the same stage of development. But examples of many different stages of development abound. The culture of one community may be highly advanced, though vestiges of antecedent forms remain; that of another may still be primitive, though transition to a higher level has already begun. Would it be possible, by comparative study, to arrange these societies along a scale of cultural evolution and by this means sketch the path of progress towards the State? Would it be possible, by applying this scale to the European peoples as they first appear in historical times, to illuminate their past more effectively than comparative jurisprudence has managed to do? To perform such tasks the ethnological evidence is not altogether adequate. There is not enough of it; and some of it can be accepted only with strong reservations. Nor can we be at all sure that the life of the so-called primitive peoples of to-day gives a key to the pre-historical past of the progressive races of Europe or that such peoples have the capacity to move forward to the European level of civilization. Both environment and biological heritage may have condemned them to inferiority. This does not mean, however, that the contributions of anthropology and ethnology lack importance. In any attempt to ascertain the beginnings of the State they will prove immensely helpful.

MAINE'S PATRIARCHAL THEORY

Aristotle believed that the State took form as a natural expansion of the family. The society of many families, he observes,[1] "is called a village, and a village is most naturally composed of the descendants of one family, the children and the children's children, for which reason states were originally governed by kings, as the barbarian states now are, which are composed of those who had before submitted to kingly government; for every family is governed by the elder, as are the branches thereof, on account of their relation thereunto.... And when many villages so entirely join themselves together as in every respect to form but one society, that society is a state, and contains, in itself, if I may so speak, the end and perfection of government." According to Aristotle, then, the State makes it appearance as a kinship group, an outgrowth of the family; and the authority of the earliest kings is derived from the authority of the head of the family. Sir Henry Maine's Patriarchal Theory, elaborated in his

[1] *Politics*, I, 2.

Ancient Law (1861) and *The Early History of Institutions* (1874), maintains the same position. It is well to note, however, that Maine did not claim universal validity for his theory. Having gathered legal evidence from certain peoples, such as the Hebrews, Greeks, Romans, and Hindus, he refrained from generalizing beyond the range of his investigation and from assuming that what held good for these people must equally hold good for others. His critics often displayed less caution. They even tried to convict him of gross errors by introducing evidence from the aborigines of Australia and other backward races.

Let us look first at the patriarchal theory, then at its critics. "In most of the Greek states and in Rome," says Maine,[1] "there long remained the vestiges of an ascending series of groups out of which the State was at first constituted. The Family, House, and Tribe of the Romans may be taken as the type of them, and they are so described to us that we can scarcely help conceiving them as a system of concentric circles which have gradually expanded from the same point. The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregation of families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the commonwealth. Are we at liberty to follow these indications, and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of the original family? Of this we may at least be certain, that all ancient societies regarded themselves as having proceeded from one original stock, and even labored under an incapacity for comprehending any reason except this for their holding together in political union."

Thus, the family was the primal unit of political society, "the seedbed of all larger growths of government," as Woodrow Wilson calls it.[2] Over the family the father or patriarch ruled with autocratic power. By virtue of the *patria potestas,* the flocks and herds of his sons belonged to him, and his domination extended to life and death, being as unqualified over his children and their dependents as over his slaves.[3] Patriarchal authority and the cohesion of the family were both vastly strengthened by the bond of religion, which, indeed, seems to have been at first merely the expression of kinship.[4] The hallowed ceremonies of ancestor-worship were conducted at the family altar.

[1] *Ancient Law* (5th ed., 1874), pp. 128-129.
[2] *The State* (rev. ed., 1898), p. 13.
[3] *Ancient Law,* p. 124.
[4] Wilson, *op. cit.,* p. 15.

There the living came into the presence of their great dead, the spirits of the departed, who exercised power for evil as well as good and who must therefore be appeased by the meticulous performance of secret rites. "This worship," says Helen Bosanquet,[1] "so essential to living and dead, could be offered only by the direct descendants of the dead, because they alone knew the necessary ritual. Every family had its own peculiar cult, to which no stranger was ever admitted, and which alone could appease and satisfy the gods of that family. The cult was handed from father to son, from generation to generation, and could not be lost without condemning the whole series of ancestors to eternal misery." As the repository of these religious mysteries, the patriarch enjoyed, along with his secular authority, the veneration belonging to a high priest.

But, with the birth of new generations, a change occurs. The family shell is broken, because there is no longer any living male ancestor, a grandfather or great-grandfather, who can claim patriarchal authority over the whole group and maintain its domestic unity. The single family has become several families. Yet these families are conscious of an ultimate relationship. Bound together by ties of blood and religion, they remain closely associated in a wider fellowship-group, the *gens*. The members of the *gens* worship common ancestors and owe obedience to some selected elder—perhaps the oldest living ascendant or the most capable. Similarly the *gens* broadens into the tribe; and, as pastoral pursuits give way to agriculture and to settlement upon the land, tribes unite to form the State. The king may be regarded as the symbol of consanguinity; the derivation of the English word "king" implies that in his veins the blood of the original family runs purest. It is the primordial family and its patriarchal discipline that prepare the way for the State; in Rome, the *patria potestas*, gradually disappearing in its original form, is perpetuated as the *imperium* of the kings and of the Republican magistrates who supplanted them.[2]

A belief in common lineage was as characteristic of the early State

[1] *The Family* (1906), p. 17.

[2] Maine, *Ancient Law*, p. 138; *Early History of Institutions*, p. 117. Cf. W. E. Heitland, *The Roman Republic* (3 vols., 1909), vol. I, No. 41: "The power of the Father of the Family was surely the model [of the *imperium*]. The *imperium* included the power of life and death." Sumner and Keller, *op. cit.*, vol. I, pp. 467-468, say: "Maine . . . asserted that the chieftainship developed out of the *patria potestas* of the man-family head. . . . Nevertheless, Maine's derivation is too simple; though it may cover the classical situation, it will not do as a generalization of ethnographical evidence." If Maine is right respecting the great European peoples who created modern civilization, evidence from backward Negroes or Asiatics is of little importance.

as of the family, *gens*, and tribe. Yet Maine admits that this fundamental assumption did not always accord with the facts. It is well established that, among European peoples, "men of alien descent were admitted to, and amalgamated with, the original brotherhood. Adverting to Rome singly, we perceive that the primary group, the Family, was being constantly adulterated by the process of adoption, while stories seem to have been always current respecting the exotic origin of one of the original Tribes, and concerning a large addition to the Houses made by one of the early kings. The composition of the state, uniformly assumed to be natural, was nevertheless known to be in great measure artificial. This conflict between belief or theory and notorious fact is at first sight extremely perplexing; but what it really illustrates is the efficiency with which Legal Fictions do their work in the infancy of society. The earliest and most extensively employed of legal fictions was that which permitted family relations to be created artificially, and there is none to which I conceive mankind to be more deeply indebted.... The expedient which in those times commanded favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted; and it is precisely the good faith of this fiction, and the closeness with which it seemed to imitate reality, that we cannot now hope to understand.... The conclusion, then, which is suggested by the evidence, is, not that all societies were formed by descent from the same ancestor, but that all of them which had any permanence and solidity either were so descended or assumed that they were." [1] Maine might have added something more: the assumption led to the reality; through intermarriage, fictitious kinship was in time converted into actual kinship.[2]

The nomadic tribes that combined to form a State were related kinship groups. As Maine contends,[3] "the history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions" and that "political rights are attainable in no terms whatever except connexion in blood, real or artificial." But, when tribes settled on the land and formed a territorial State, a new and competing principle was introduced; local contiguity

[1] *Ancient Law*, pp. 130-131.

[2] "It should be realized, however, that in case of propinquity all will become akin to one another in a short time.... It is evident that unrelated proximity is a sort of theoretical stage deserving of little attention. Intermarriage and the blood-tie speedily supersede it, in any case." Sumner and Keller, *op. cit.*, vol. I, p. 420.

[3] *Op. cit.*, pp. 129 and 132.

began to supplant blood-relationship as the basis of common political action. This was, indeed, a startling revolution; "the idea that a number of persons should exercise political rights in common simply because they happen to live within the same geographical limits was utterly strange and monstrous to primitive antiquity."[1] However, the transition from the principle of kinship to that of local contiguity was not abrupt. It was, Maine insists,[2] "exceedingly gradual" and marked by violent struggles, such as the conflict between the patrician *gentes* and the plebeians of Rome. In Athens the kinship tie persisted stubbornly. It was not till the beginning of the sixth century B.C. that Solon, by means of a property qualification, tried to hurry its decline, or till the end of that century that Cleisthenes was able to break up the gentile organization and combine fragments of different *gentes* in the new tribes. How slowly the notion of territorial sovereignty supplanted the notion of tribal sovereignty in medieval England may be illustrated by the change in the official title of kings: John was the first king of *England,* his predecessors having been kings of the *English.* But the ties of blood and land are not mutually exclusive. The modern phenomenon of nationalism has placed a new emphasis upon consanguinity; and the national groups, which Sir Arthur Keith regards as the instruments of nature in the production of new races, have become through the centuries more homogeneous in blood than anthropologists like to acknowledge and have shown a readiness to intensify their homogeneity by isolating themselves, in some measure and even in despite of economic injury, from alien peoples.

KINSHIP AND RELIGION

It would be a mistake to stress the dynamic rôle of kinship in the shaping of primitive society and at the same time to ignore the welding-power of religion. Religion was, indeed, inseparably linked with kinship. "It may be said to have been the thought of which kinship was the embodiment," says Woodrow Wilson.[3] "It was the sign and seal of

[1] *Ibid.,* p. 131.

[2] *The Early History of Institutions* (ed. of 1890), pp. 72-74.

[3] *Op. cit.,* p. 15. Says Professor R. N. Gilchrist (*Principles of Political Science,* 3rd ed., 1927, pp. 89-90): "Common worship was a most important element in welding together families and tribes. This worship was often ancestor-worship. Common devotion to ancestors provided a permanent basis of union. As we have already seen, in early events the family played an all-important part. *The family was as much a religious as a natural association* [my italics]. Common worship was more essential than even kinship. The wife, the son, or the adopted son were all initiated into the family religion. With the extension of the family into the tribe, common worship continued to be the bond of union. Tribal union, too, was impos-

the common blood, the expression of its oneness, its sanctity, its obligation." The cause for which Horatius fought was the combined cause of kinship and religion: "the ashes of his fathers and the temples of his gods." Whenever anyone joined a Roman family by the process of adoption, he was admitted to the solemn mysteries of ancestor-worship, from which all strangers were rigorously excluded, thus taking upon himself the most solemn duties and acquiring the most sacred privileges. The family gods became his gods; its ancestors became his ancestors—as effectively, says Woodrow Wilson,[1] as if he had opened his veins to receive their blood. The situation was the same when a family was adopted into the *gens* or a *gens* into the tribe.

Although Aristotle is almost entirely silent on the subject, the immense potency of religion in the formation of the State is generally accepted. "Historically," says Sir John Seeley,[2] "religion is a ruling influence in most states during the period of growth; in some conspicuous cases it seems almost to create the state; and many centuries commonly elapse before it becomes possible to distinguish the two ideas of state and church, much more to think of dividing the two institutions." The State may seem to be rooted in the family; it may seem to be rooted in the church. But the roots are not really distinct. "The family influence and the religious influence operate side by side." Thus the nucleus of the Roman world-state was a group of sacred shrines—the Ara Maxima by the Tiber, the shrine of Faunus on the Palatine, and the temple of Jupiter on the Capitoline. But, while we may say that Rome grew out of a primitive church, we must also say, according to Seeley, that she grew out of a league of tribes and clans. "The tribal character is just as manifest as the theocratic character in that primitive community." Probably, in attaching the same importance to kinship and religion, Seeley errs. Consider, for example, the conclusion of Edward Westermarck.[3] While admitting that the archaic State was a religious as well as a political community and that the common religion added to its strength, he believes that the natural im-

sible except for those who performed the same religious ceremonies. Worship thus provided a bond of union in the earliest civic communities, when as yet the end of civic unity was not recognized. This is further proved by the character of primitive law. No legal obligation existed between families and tribes unless the religion was common. The sanction of law was religion, and, as it was the terrible aspect of religion that appealed to primitive minds, the breaking of law was followed by terrible punishment."

[1] *Op. cit.*, pp. 14-15.

[2] *Introduction to Political Science*, pp. 62 and 64-65.

[3] *The Origin and Development of the Moral Ideas* (2 vols., 1908), vol. I, pp. 225-226.

portance of religion has often been overrated. "On the one hand, the political fusion between different communities took place before the religious fusion and was obviously the cause of it; on the other hand the mere tie of a common religion has never proved sufficient to bind together neighboring tribes or peoples so as to form one nation. The Greek states had both the same religion and the same language, but nevertheless remained distinct states." [1]

Undoubtedly religion held a peculiar place in the minds of men who, with good reason, dreaded the operation of natural forces without understanding them at all. The poor savage "saw God in clouds and heard him in the wind." To the departed spirits he attributed good fortune and bad fortune alike. He was superstitious; and it is because of this superstition, because of the belief that the spirits could be offended by the slightest act of disrespect and propitiated by appropriate acts of intercession, that, according to some modern anthropologists, monarchy was established and the State brought into being. First came the magician or shaman, then the priest-king or sacred king. This view finds no place in the writings of Sir Henry Maine, although he recognized the great importance of religion in primitive societies. But it may be interpolated here, while religion is being discussed, as a later effort to bridge the gulf between the *patria potestas*—the autocratic power of the family head—and the authority of the early kings. It is not altogether clear how the *patria potestas* could have found successive re-expressions in the *gens*, the tribe, and the State.

The rise of the magician and of his kingly successor has been the special thesis of Sir James G. Frazer. Among his numerous publications the most widely known is *The Golden Bough: a Study in Magic and Religion*, of which an abridged one-volume edition appeared in 1922.[2] According to Frazer's theory, the first form of tribal government was the gerontocracy or council of old men, representing the various families. Whatever control they exercised was due to the fact that they alone were familiar with the esoteric mysteries of the tribal religion

[1] Westermarck combats Seeley's assertion that "in the East to this day nationality and religion are almost convertible terms." As to the Mohammedans, a Turk does not readily tolerate an Arab; an Arab does not get on well with a Persian; a Syrian does not like an Egyptian.

[2] In its third edition *The Golden Bough* consists of twelve small volumes; the last, appearing in 1915, contained bibliography and index. Among the eminent converts to Frazer's position may be mentioned W. J. Perry. See his *The Children of the Sun* and *The Origin of Magic and Religion*, both published in 1923. But while Frazer supposes that the State was created over and over again by this process, Perry is a diffusionist; in his opinion the State was originated in Egypt and imitated elsewhere.

and that they knew all that could be known about the unseen spiritual world. Out of the gerontocracy emerged the magician, a resolute and ambitious man, a clever and unscrupulous man, who pretended to extraordinary powers of divination and sorcery. The fertility of the soil, rain or drought, the success or failure of crops seemed to depend more upon his incantations and rituals than upon human effort. His influence, especially among an agricultural people, assumed enormous proportions. The magician eventually made himself priest-king.

This theory reveals serious weaknesses. First of all, it is hard to believe that such a transition from magician to king was a natural and inevitable process that occurred among various peoples, in many different parts of the world; it is much easier to accept the view of W. J. Perry that it occurred but once, in Egypt, and that the institution of the sacred kingship spread to other regions by diffusion. Professor W. C. MacLeod offers further criticism.[1] The shaman or magician, being commonly an unstable and emotional person, would have been ill-fitted to assume the functions of leader. Moreover, the shamanship, instead of being primitive, evolved comparatively late, after pastoral pursuits had given way to agriculture and after the office of chief or king had already come into existence; therefore the shaman, instead of creating the kingly office, may merely have usurped it and grafted on to it new and sacred characteristics. We may add that recent ethnological evidence does not tend to strengthen Frazer's theory. For example, H. I. Hogbin controverts the conclusions of the latter respecting the tabu. In Polynesia, he says,[2] "the sphere of supernatural punishment by no means covers the whole field of binding obligations; it is limited to certain specific rules of conduct which have special characteristics in common." However, in a recent volume Sir James Frazer makes no sweeping claims. He says: [3] "The foregoing evidence, summary as it is, may suffice to prove that many peoples have regarded their rulers, whether chiefs or kings, with superstitious awe as beings of a higher

[1] *The Origin and History of Politics* (1931), pp. 90-97.

[2] *Law and Order in Polynesia* (1934), p. 79. On the other hand, note the conclusions of W. H. R. Rivers in *Social Organization* (1924), pp. 162 and 165. But Hogbin is evidently much more reliable than Rivers. Of the latter's *History of Melanesian Society* (1914) Malinowski said: "I cannot recognize one single feature of Melanesian culture, in spite of my several years' residence in that area." *New Republic*, vol. L (1927), p. 111.

[3] *The Devil's Advocate* (1927). And notice on p. 5 a further qualification. There is a strong presumption, Frazer says, that stable and permanent institutions rest on something more solid than superstition. "No institution founded wholly on superstition, that is on falsehood, can be permanent. If it does not answer to some real human need, if its foundations are not laid broad and deep in the nature of things, it must perish, and the sooner the better."

order and endowed with mightier powers than common folk. Imbued with such a profound veneration for their governers and with such an exaggerated conception of their power, they cannot but have yielded them a prompter and more implicit obedience than if they had known them to be men of common mold just like themselves. If that is so, I may claim to have proved my first proposition, which is, that among certain races and at certain times superstition has strengthened the respect for government, especially monarchical government, and has thereby contributed to the establishment and maintenance of civil order." So vague a statement can scarcely be held to conflict with the position of Sir Henry Maine. It is one thing to claim that the magician founded the State; and another simply to acknowledge that religion had a powerful influence in the patriarchal family, as well as in the larger groups based upon the family, and that there was in religion at all times a plentiful element of superstition.

CHAPTER VII

ORIGIN OF THE STATE: (2) PROPERTY AND FORCE

IN the decade that followed the publication of *Ancient Law,* the patriarchal theory was subjected to severe attacks. These attacks seemed more damaging than they really were and created the impression that the essential validity of Maine's position had been destroyed. As a matter of fact they did not involve any question of the existence of the patriarchate or of its connection with the origin of the State. They simply denied Maine's claim that the patriarchal family was primeval; [1] and that claim could hardly be regarded as a necessary part of his argument. But so remarkable was the anthropological vista set before the scientific world through the erudition of John Ferguson McLennan and Lewis H. Morgan that the patriarchal theory suffered a temporary eclipse.

It was not only the patriarchate that, for the time, suffered at the hands of the anthropologists. As a primordial institution, the family itself disappeared. Both McLennan and Morgan discovered what they took to be relics of an early period of sexual promiscuity. For example, the former noted among existing tribes the wide prevalence of matrilineal descent (the reckoning of kinship through the women), which seemed to imply the uncertainty of male parentage; the latter noted the prevalence of the so-called classificatory system, which, attributing to each individual many parents, many husbands or wives, many brothers and sisters, likewise suggested loose marital relations.[2] Other institutions, such as exogamy and totemism, had apparently flourished in pre-

[1] See *Ancient Law,* p. 123. Maine contended, in his *Early History of Institutions* (1874), p. 66, that his position was still secure so long as the argument was confined to the Aryan, Semitic, and Uralian races. "At most, it is asserted that, among the recorded usages of portions of these races, there are obscure indications of another and earlier state of things." These "obscure indications" were discovered in the legends, folk-lore, and institutions of ancient Europe and India by McLennan; in those of the Semitic peoples by Robertson Smith; and in those of the Celts by S. Reinach.

[2] Malinowski maintains (*s.v.* "Kinship," *Encyclopaedia Britannica,* 14th ed., 1929) that such titles are merely formal and that, by change in the emotional tone of address or by the use of adjectives, the actual relationship (*e.g.,* that of father or husband) is always distinguished. But according to Edward Jenks (*A Short History of Politics,* 1900, pp. 11-12), or the opinion that he held more than a

patriarchal times. Meanwhile, a Swiss writer, Bachofen, had acquired some fame by a fanciful sketch of social evolution.[1] His first stage was one of chaos and sexual promiscuity; then followed the matriarchate, women having grown weary of lawlessness and, with the help of religious superstition, having imposed their rule; but in time men found the abuses of matriarchal authority unendurable and, asserting their superior physical strength, introduced the patriarchate. Each stage was a universal stage of culture which must mark the progress of all societies. This conception of successive stages in social development, proceeding from lower to higher forms and gradually reaching more perfect adjustments, met with the approval of the sociologists. In Herbert Spencer's *Principles of Sociology* we get a picture of orderly progress from one stage to another: first promiscuity; then group marriage, a somewhat crude approach to the regulation of sex; the clan, based upon matrilineal descent; the *gens,* based upon patrilineal descent; and at last the modern family.

No such position is tenable to-day.[2] Neither promiscuity nor group marriage ever prevailed unless in isolated and exceptional cases. "There seems to be no evidence that a stage of promiscuity ever existed," says A. A. Goldenweiser;[3] "again, the condition of group marriage, far from being an universal antecedent of individual marriage, seems to constitute, in the rare instances where it occurs, an outgrowth of a preceding state of individual marriage." According to Edward Westermarck,[4] "no one of the customs alleged as relics of an ancient state of indiscriminate cohabitation of the sexes, or 'communal marriage,' presupposes the former existence of such a state. The numerous facts put forward in support of the hypothesis do not entitle us to assume that promiscuity has ever been the prevailing form of sexual relations among

generation ago, "all the women of his marriage totem in his generation are a man's wives.... Mr. Fison tells an amusing story of a missionary who, to increase his familiarity with his native converts, was made by the process of adoption the brother of his man-servant. Happening to meet the man's wife the missionary pleasantly explained that he was now her brother. Whereupon the lady instantly corrected him by saying, 'Oh no, you are not my brother, you are my husband.'"

[1] J. J. Bachofen, *Das Mutterrecht* (1861).

[2] Yet Edward Jenks, in *A Short History of Politics* (1900) and in *The State and the Nation* (1919), reversing Maine's evolutionary process (successive expansions from the family), goes from hunting pack to tribe, from tribe to clan, from clan to family, from family to individual. His anthropology is out-of-date. However, he does give adequate attention to the patriarchal family as a forerunner of the State.

[3] *Early Civilization* (1922), p. 24.

[4] *The History of Human Marriage* (5th ed., 3 vols., 1922), vol. I, pp. 297 and 336. See also his observations on p. 283.

a single people, far less that it has constituted a general stage in the social development of man, and least of all that such a stage formed the starting-point of all human history.... It is not, of course, impossible that among some peoples the intercourse between the sexes may have been almost promiscuous. But the hypothesis according to which promiscuity has formed a general stage in the social history of mankind... is in my opinion one of the most unscientific ever set forth within the whole domain of sociological speculation." Professor Bronislaw Malinowski has expressed similar views.[1] In fact, it is now generally agreed that the family is a universal form of social organization and has been a feature of human relationships from the very beginning.[2] After weighing the evidence, Professor MacIver concludes that "the family has no origin, in the sense that there ever existed a stage of human life from which the family was absent or another stage at which it came into being."[3] According to Professor Malinowski, "the age-long experience of mankind... teaches us that the institutions of marriage and the family have never been absent in human history, that they form the indispensable foundation for the structure of human society, and that, however they might become modified in the future, they will never be destroyed nor their influence sensibly impaired.... The members of the household are as a rule as closely bound together in a native tribe as they are in a European society.... In no ethnographic area is the family absent as a domestic institution."[4]

Nevertheless, two broad types of family are met with—the patrilineal and the matrilineal, distinguished by the fact that status and name are transmitted through the male and female line respectively. Many writers have accepted the erroneous explanation given by Bachofen and McLennan. They have assumed that matriliny (sometimes called mother-right) everywhere preceded patriliny (father-right) as a universal stage of evolution, looking back to a time when paternity was

[1] Malinowski says (*s.v.* "Kinship," *Enc. Brit.*) that among peoples who, at certain times and under certain circumstances, permit freedom of sexual intercourse, such temporary sexual freedom does not mean freedom of parenthood. "Conception is not left to the chance of free intercourse, even when that is allowed, but its necessary condition is marriage. Parenthood, to be normal, must be made legitimate, that is, based upon a socially approved, but individual marriage contract." Otherwise, abortion is performed, or the woman punished, or the putative father forced into marriage. In his introduction to Hogbin's *Law and Order in Polynesia* (1934), p. xlv, Malinowski condemns the theories of sexual promiscuity and of group marriage.

[2] A. A. Goldenweiser, *op. cit.*, p. 24.

[3] *Society: Its Structure and Changes* (1931), p. 116.

[4] *Op. cit.* And see his statement in the introduction to Hogbin's *Law and Order in Polynesia* (1934), p. xliv.

uncertain. With the advance of ethnological inquiry this assumption has steadily lost ground.[1] The matrilineal system is not particularly prevalent among the lowest savages, as it ought to be if it represents a universal early stage; [2] and, on the other hand, it is found among peoples who are fully aware of the fact of paternity.[3] There is certainly no evidence to show that it generally preceded the patrilineal system.[4] According to Rivers, Lowie, and others, it is impossible to attach priority to either one.[5] Indeed, the old conception of universal stages of development finds little support among contemporary anthropologists.[6] Although Robert Briffault has recently tried to resuscitate it,[7] Bachofen's theory of the matriarchate has long been dead.[8] It survives only

[1] Westermarck, *op. cit.*, vol. I, p. 278.

[2] *Ibid.*, p. 280.

[3] R. M. MacIver, *The Modern State* (1926), p. 118.

[4] According to Goldenweiser (*op. cit.*, p. 24): "The development of the gens out of the clan has apparently occurred only in a few instances." According to W. H. R. Rivers (*Social Organization*, 1924, p. 99), occasionally, in America, highly organized matrilineal peoples have imposed their system on ruder patrilineal peoples.

[5] Rivers, *op. cit.*, p. 98. R. H. Lowie (*Primitive Society*, 1920, p. 185) says: "To sum up. There is no fixed succession of maternal and paternal descent; sibless tribes may pass directly into the matrilineal or patrilineal condition; if the highest civilizations emphasize the paternal side of the family, so do many of the lowest; and the social history of any particular people cannot be reconstituted from any generally valid scheme of social evolution, but only in the light of its known and probable cultural relations with neighboring peoples." Harry Elmer Barnes (*Sociology and Political Theory*, 1924, p. 50) discerns no general tendency for a change from maternal to paternal descent and is doubtful if there is evidence of one single case of such a change. "It cannot be shown that maternal kinship is related to a lower material culture."

[6] "Modern ethnology rejects the notion of unilinear evolution; it does not, in other words, believe that some mystic *vis politica* urges all societies alike to traverse the same stages towards a strongly centralized state. Hence, it is not possible to grade peoples according to the degree in which they approach that goal; if several distinct paths are conceivable, progress along any two of them becomes incommensurable." Lowie, *The Origin of the State* (1927), p. 112. In response to MacLeod's criticism of Oppenheimer's African evidence because of its inconsistency with American evidence, Lowie says (*ibid.*, p. 35): "obviously the contention lacks cogency, for the development need not be assumed to be parallel on the two continents." Oppenheimer himself emphasizes the fact that the American huntsman could not develop into a pastoralist because of the absence of the larger herding animals, such as cattle or camels. *The State* (1914), p. 52.

[7] *The Mothers* (3 vols., 1927).

[8] "There could never have been a genuine matriarchy, or gynecocracy—a real rule by women," according to Sumner and Keller, *The Science of Society*, vol. I, p. 459. "There is no mother-rule, still less woman-rule in primitive society," according to R. M. MacIver, *The Modern State*, p. 29. Helen Bosanquet (*The Family*, p. 34) says that with few exceptions man is undisputed master over both wife and children, no matter whether the children are called by his name or the mother's. "In so far as the authority within the family rests with the father, the patriarchal family may be said to co-exist with a system of kinship through the mother, and at the earliest stages of development." What preceded the patriarchal family, as Maine depicted it, was a less highly developed form of the patriarchal family.

in the occasional use of incorrect and misleading terms, such as "matriarchal" for "matrilineal" or "mother-right" for "matriliny."

Sir Henry Maine has not suffered greatly, it appears, at the hands of the ethnologists. Malinowski says that, from the patriarchal traditions of the Bible and classical antiquity, as well as from Aristotle and other early sociologists, "we might conclude with Sir Henry Maine that it would be impossible to imagine any form of social organization at the beginning of human culture but that of the patriarchal family"; and then, having reviewed the features of primitive society, as established by modern anthropology, he concludes: "We return to the simple view so long prevalent in tradition and prescientific thought, but now we have established it by a survey and analysis of facts, made it precise—and at the same time qualified it considerably." [1] The qualifications chiefly concern the larger kinship groups—*gens* and tribe; and although "tribal kinship bears only a remote, at times mainly figurative, resemblance to family ties," it is beyond doubt an extension of them; and "the main force which brings about the extension is the existing strength of the family tie."

The family is primordial. Whether or not the patriarchal family was preceded by some other type of family is a matter of little concern to our inquiry into the genesis of the State. One circumstance deserves attention, however. The evidence that might suggest the existence of an earlier type is taken almost entirely from other peoples and other regions than those which engaged the attention of Sir Henry Maine. Why should the so-called primitive tribes of the Pacific or Africa afford any safe analogy to the efficient races which have dominated the European stage? Their arrested development may be due to biological inferiority or to defective environment or to both. Their peculiar institutions, being largely the outcome of their own character and situation, may reflect degeneracy rather than primitiveness. It is not necessary to believe that the ancestors of Pericles or Julius Caesar resembled the natives of Australia or Eddystone Island. In fact, ethnologists nowadays are most reluctant to plot out any succession of universal cultural stages.[2] The diffusionist school believe, not that like culture-forms arise naturally from like conditions, not that similar institutions

[1] *S.v.* "Kinship," *Encyclopaedia Britannica,* 14th ed., 1929.

[2] One must add that a great deal of ethnological data is still a matter of controversy because investigators in the same field see quite different things or interpret the same things quite differently; or because some investigators, familiar with the labors of others, find what they expected to find, not what actually exists. The unanimous testimony of half a dozen "independent witnesses" may be utterly valueless.

are invented by various peoples independently, but that there is usually a single point of origin and a process of borrowing or imitation.

ORIGIN OF GOVERNMENT

At any rate, Maine's patriarchal family and the kinship groups derived from it (*gens* and tribe) must be accepted as realities. What remains obscure is the way in which tribal government developed. Was the cohesive principle of kinship strong enough to explain the presence of authoritative government when tribes united, settled on the land, and brought the State into being? Can we be satisfied with Maine's contention that the chieftainship in general, and particularly the *imperium* of the Roman monarchy and republic, developed out of the *patria potestas?* Contemporary writers are inclined to give it serious consideration. W. E. Heitland, in *The Roman Republic,*[1] insists that "the power of the Father of the Family was surely the model" of the *imperium.* According to Professor MacIver, "the natural authority of the paterfamilias prepared the way for the tribal chief." [2] Sumner and Keller admit that "the development of the patriarchate was the necessary antecedent to the development of the state" and that, while Maine's derivation of the chieftainship from the *patria potestas* cannot stand as a generalization of ethnographical evidence, "it may cover the classical situation." [3] This last, measured statement concedes a great deal; for, if Maine's theory holds good for Greeks and Romans, it can hardly be invalidated by modern findings in Africa and Polynesia.

What is the nature of the "ethnographical evidence" which has just been mentioned? The patriarchate, according to Sumner and Keller,[4] was "a long way down the line of development" from the formation of the State. Although the patriarchal principle existed in the tribes, it had done its work and been transmuted into political forms, these writers maintain, long before the State arose. There is little profit "in debating whether the chieftainship did or did not come out of the *patria potestas* of the father-family;" for, while "all social forms find some of their deepest roots in the family, the derivation may be a long one and quite

[1] Three vols., 1909. See vol. I, No. 41.

[2] *The Modern State* (1926), p. 43. MacIver continues: "The former wields authority over wife and children, he is guardian and interpreter of custom, the priest and often the medicine-man within the circle. As the 'old men' convert sporadic meetings into the regular 'council of elders,' their functions receive in part the support of the wider community, and in part are transferred to the chiefs or leaders who, here too, 'naturally' arise."

[3] *The Science of Society,* vol. I, pp. 703 and 468.

[4] *Ibid.,* p. 703.

indirect." [1] For a "long" time tribal government rested with a council of elders, a council of family-heads or patriarchs, among whom there was no distinction in authority; and government did not take on recognizable outlines before the appearance of the genuine chieftain. "Here is a stage that must not be leaped over in deriving the chief from the family-head. . . ." [2] How, then, do Sumner and Keller explain the rise of the chieftain? [3] He comes to the front in a period of storm and stress. "War evidently exerts a powerful influence over the establishment of the chieftainship, as it does in general over the integration of government." The struggle for existence had taught respect for strength and efficiency; and in time of crisis the claims of kinship must be sunk into the background, giving way to basic and final qualifications of body and mind. The man of parts gets and retains power. "It matters little whether he rises out of the military force, the council, or the priesthood."

The ethnological evidence,—or rather the verdict upon that evidence, —as presented by Sumner and Keller, would make it possible, apparently, to entertain several different theories of the origin of the chieftain or king and so of authoritative government. Perhaps the chieftain rose out of the priesthood, somewhat in the manner suggested by Sir James G. Frazer, through the influence of religious superstition and magic. That theory has already received some attention.[4] Perhaps he rose out of the military force, as a consequence of systematic warfare. Here we have the theory of conquest, associated particularly with the names of Gumplowiecz and Oppenheimer, and accepted by many sociologists,[5] Sumner and Keller included.[6] It can be discussed more effectively later on in connection with certain broad economic changes that mark social evolution. These economic changes, we shall see, have become the basis of a third theory, according to which government and State are rooted in private property. A fourth theory is that of the enterprising individual. It has been formulated, among others, by Professor W. C. MacLeod.[7]

MacLeod maintains that "the state (and, incidentally, social classes)

[1] *Ibid.*, p. 502.
[2] *Ibid.*, pp. 467-473.
[3] *Ibid.*, pp. 470-479.
[4] *Supra*, pp. 112-114.
[5] "Today this may be said to be *the* sociological theory of political origins and development." H. E. Barnes, *Sociology and Political Theory* (1924), p. 52.
[6] *The Science of Society* (1927), vol. I, pp. 699 *et seq.*
[7] *The Origin of the State* (1924) and *The Origin and History of Politics* (1931), pp. 98-102.

originated as functions of developing personal leadership and the institution of the hereditary chiefship. The theory contends that it is thus possible to explain the origin of the state and social stratification without the intervention of conquests, magic, or necessary economic organizational influences.... Finally, we must note that the theory is rendered inherently probable, not only in view of our available data on the culture history of the institution of chiefship, but also in view of the inherent improbability of alternative theories of the origin of the state. The theory, in outline, contends that the probable line of evolution, the probable chain of causes, has been as follows. Among human as well as among other vertebrate animal groups, peculiarly assertive, energetic, and domineering individuals appear, and create for themselves the functions of leaders. While it is a fact that the qualities of leadership were developed in the course of reaction to the social environment, the potentialities, the psycho-physical character of the leadership type of animal, are not acquired, but inherited. Families of leaders tended to produce leaders continuously. Dominant individuals then initiated the practice of attempting to secure to their relatives and heirs their own functions or office. The tendency to make the office hereditary in a family was facilitated, possibly, by the contemporaneous development of inheritance of other privileges or property.... In one or more human groups leadership persisted sufficiently long in one family to have given rise to the conception of leadership as an office, an office to be perpetuated from generation to generation, to be institutionalized, in other words; and the conception of this office as being the right or property of a given lineage. This developing concept of permanent office and its inheritability tended to spread through imitation from the activating or originating groups to more passive groups." [1]

[1] *The Origin and History of Politics* (1931), pp. 98-99. MacLeod continues (pp. 100-101): "Human groups from the very dawn of humanity needed leadership. In the dawn, the functions of the leader could only have been those of any leader of an animal horde. With the development of institutions of culture, there appeared ceremonies to direct. With the development of commutation of murder and of injury, of trade, of property, there were formal judgments to be made. With the evolution of military technique, there was military strategy to be directed.... Now, *given hereditary chiefship, we are at the same time* given the institutions we are here primarily concerned with; we are given *the state and, coincidentally, social stratification or social classes.* Government of the group by a king or supreme magistrate, judge, and legislator has arisen. The distinguishing of the chief's line as a superior lineage or family possessed of the supreme prerogative of government has, *by the very fact of its differentiation from the group as a whole, made the rest of the group commoners!*" (MacLeod assumes that the State could not come into existence without social stratification.) Then there appears a caste of nobility, closely related in blood to the royal

If it may be said that, in some form, no less than four theories of the origin of government are compatible with the findings of modern anthropology, those findings must obviously be vague, and open to various interpretations. Indeed, they are in many instances unreliable and contradictory. Thus, one often finds Dr. W. H. R. Rivers cited with approval on the subject of law-enforcement in Melanesia and neighboring regions, although the later researches of Malinowski and Hogbin indicate that he was mistaken in what he professed to see and in what he deduced therefrom. It is not surprising that the heterogeneous mass of ethnological "evidence" can be made to yield data in support of contradictory conclusions, that by a careful selection of the material mere conjecture can be given a look of probability. Religion and superstition exert a tremendous influence among primitive men; the need of leadership opens the way to those who have the will and capacity to lead; warfare, involving the very survival of the group, demands concentration of power. Are we to attribute the growth of government to one of these factors? If so, which one? In appraising the different hypotheses or theories, we must insist upon their consonance with certain fundamentals.

In the first place, this much is fairly well established: among progressive peoples the pathway to the State lies through the patriarchal family and the larger kinship groups derived from it. The patriarch is an autocrat; he demands and receives obedience from his dependents. Patriarchal discipline leaves its impress on all members of the tribe and so affects their attitude towards the council of elders, or patriarchs, which regulates tribal affairs. In the absence of conclusive evidence to the contrary, it is natural to believe, with Maine, that in this way the *patria potestas* was transmitted from family to tribe. The great strength of the kinship bond, of the religious bond that accompanied it, and of veneration for age and experience cannot be denied.[1] It was from this background that the individual chief or king emerged.

In the second place, no explanation of the growth of tribal govern-

family and enjoying special prerogatives; a bourgeois class, acquiring wealth, but debarred from entering the noble class; and a slave class, composed of debtors who have been forced to surrender economic freedom. All belong to the kinship group, being closely or remotely related to the chief or king. Chattel slaves are merely added to this genealogical pyramid.

[1] "Only the old, the natural repositories of the mores and traditions, exercise an influence referable to their experience and knowledge of precedent; and it might be remarked here that they continue to retain prestige under higher organization, as the names 'elders,' 'senators,' 'gerontes,' indicate. . . . Respect for experience and wisdom is a primordial sentiment fathered by the actual exigencies of life." Sumner and Keller, *op. cit.*, vol. I, pp. 464 and 466.

ment, its increase in power and its concentration, can overlook the part played by private property. It is inconceivable that any one should minimize the importance of property in prehistorical times unless he were ignorant of its intimate relation with government in recorded history.[1] Yet many writers attach little significance to the accumulation of property or to the economic changes that brought it about. Sumner and Keller lay great stress upon warfare, yet fail to see that warfare, being based upon cupidity, cannot become systematic without the incentive of spoils in the form of pastoral herds or surplus crops.[2] MacLeod admits that the need of leadership increases with cultural development, but gives only a passing mention to property in that connection. It is Maine's capital deficiency that he does not clearly perceive the underlying economic factors. On the other hand, his contemporary, Lewis H. Morgan, gives the State an economic origin, the accumulation of property bringing about more complicated conditions and requiring more advanced political agencies to cope with them.[3] Morgan's position is confirmed by the institutional history of later times—by the predominance commonly accorded to material causes.

PROPERTY AS A FACTOR

The institutions that mark any particular era are likely to be those which best accommodate themselves to the prevailing methods of production. The key to social behavior must be sought in the economic system. "The basic factor in any given society," says Professor Laski,[4] "is the way it earns its living; all social relations are built upon provision for those primary material appetites without satisfying which

[1] Thus Laski can say that the protection of private property is the main assumption upon which the English Common Law rests. *The State in Theory and Practice* (1935), p. 103.

[2] Sumner and Keller are not altogether oblivious to the importance of property. Thus (*op. cit.*, vol. I, p. 502): "One author [Muckel] finds that the origin of property is bound up with the formation of the family; that the power of the chief grows with the increase of property; and that 'usually the same stage of the chieftainship is found conformed with the same stage of property.' He thinks that it is the family that creates both the property-forms and those of the chieftainship. Such a parallel development of two of the most important human institutions is yet another example of consistency in the mores.'

[3] H. E. Barnes, *op. cit.*, p. 52.

[4] *The State in Theory and Practice* (1935), p. 91. Laski continues (pp. 91-92): "We cannot write the history of law without looking at its roots in the methods of economic production. We cannot explain the history of religious doctrines without relating them to the social background in which they evolved; and the key to that social background is always to be found in the relationships built upon the methods of production.... We are urging that the social superstructure is rooted in these economic foundations; that, accordingly, to change the relations of the latter is to change the relations of the former."

life cannot endure. And an analysis of society will always reveal the close connexion between its institutions and culture and the method of satisfying material appetites. As these methods change, so also will the institutions and culture of the society change.... Changes in the methods of economic production appear to be the most vital factor in the making of changes in all other social patterns we know. For changes in those methods determine the changes of social relationships; and these, in their turn, are subtly interwoven with all the cultural habits of men."

In order to understand the origin of government and the State we must observe how the kinship group earned its living. Among primitive peoples there are three successive economic stages that mark the growing importance of property and that bring about corresponding changes in social organization. We may call them the huntsman stage, the herdsman or pastoral stage, and the husbandman or agricultural stage. They are universal stages in the sense that groups generally passed from one to the other, from lower to higher. But in some regions, where the appropriate wild animals were not available for domestication, pastoral life was impossible: before the advent of the white man, the native of Australia or North America had nothing but the dingo or dog, to which the Eskimo added the reindeer. In other regions the resources were very limited: Peru had only the llama and alpaca. Huntsmen might remain huntsmen permanently or pass directly to agriculture, skipping the intermediate pastoral stage. They might skip it also, not because the opportunity to domesticate animals was wanting, but because they imitated the practice of more advanced neighbors, or even because they happened upon rich river-bottoms whose alluvial soil was extremely productive.

The huntsman led a miserable existence. Moving about in quest of game and of wild berries or roots, he had little property except a few crude weapons and tools. His dwelling was of the humblest description —a cave or bark shelter, or bough hut or tepee. The fact that he had learned the secret of fire does not imply much progress in the art of cooking. He rarely made any provision for the future. After a successful hunt, he gorged. His life was an alternation of orgy and privation, the latter sometimes ending in cannibalism. Without a regular or balanced diet, he was doomed to physical inferiority.

The escape from primeval savagery came through the domestication of wild animals. Jenks rightly describes the art of taming these animals and making them serve the purposes of man as one of the great

discoveries of the world.[1] We do not know whether the discovery was made independently by various savage groups or whether it was made only once and spread by the process of diffusion. The facts are, of course, unknown. How domestication began is a matter of surmise, of unverifiable conclusions from general principles. It seems probable that the domestic animal was first of all a pet.[2] Among primitive men the keeping of pets is practically universal wherever attractable animals are found;[3] for the savage, if reckless and greedy, is also affectionate and playful. Young animals, we may suppose, were captured during the hunt. The savages kept them as playthings—for amusement, not for profit. But in a period of scarcity the sentiment of affection gave way before the pangs of hunger; and the pets were slaughtered for food. After repeated incidents of that kind the lesson was learned: a good way to provide against future periods of scarcity was to keep a supply of tamed animals. Still later, it became apparent that the animals were useful for other purposes besides supplying meat in times of privation: the horse provided rapid means of movement; the cow provided milk; the sheep provided wool. Finally, the embryo herdsman found out that his flocks and herds could be vastly increased by systematic breeding. The accumulation of surplus wealth had begun.[4] The flocks and herds were the predominant form of wealth (the Latin word *pecunia*—derived from *pecus*, cattle—first means property in cattle, then money). But other forms of property made their appearance. In such a period of rapid economic change, the spirit of progress affected many of the mechanical arts and showed itself, for example, in improved clothing, weapons, and domestic utensils.

Communism did not exist in primitive society.[5] Or rather, it existed only in the limited sense that property belonged to the family. "The problem of property, its secure possession and orderly disposal, is solved by a certain form of family organization. The problem of the family, its permanence against the waning and variability of the initial

[1] *Op. cit.*, p. 23. His sketch of pastoral society (pp. 16-43) is excellent. On the domestication of animals see O. T. Mason, *The Origins of Invention* (1895).

[2] A less tenable conjecture connects domestication with totemism. It assumes that certain animals, being venerated and protected, were easily trained. But surely such venerated animals, after being tamed, would not be eaten.

[3] See the article on the "Domestication of Animals" in the *En. Brit.* (14th ed., 1929). "The Australians have never domesticated any animals, but they like pets. They catch rats, opossums, wallabies, frogs or young birds for playthings."

[4] The pastoralist saved his wealth (that is, his cattle) to produce further wealth and, counting that wealth by the head (*per capita*), became a capitalist in the original sense of the word.

[5] R. M. MacIver, *The Modern State* (1926), p. 31. Village communities like the Russian *Mir*, MacIver says, are relatively advanced social formations.

sex-impulse, is solved by its association with the unswerving desire for the control of property." [1] Whatever may have been the earlier form of the family, pastoral life—bringing with it substantial property interests—increased the social dominance of the male. It strengthened, if it did not create, the patriarchate.[2] The patriarch enjoyed absolute control over the family, which etymologically conveys the meaning of servant or slave, and over all its property. If a dispute arose within the family, he settled it. But who settled the disputes over property that must have occurred with great frequency between the different families? Obviously, sufficient power must reside with the tribal authorities to settle such disputes, to regulate and safeguard the rights of ownership, when the earlier practice of self-help (*lex talionis*) gave way. In a pastoral community human life tends to become less important than property; it is well to recall the punishment that was meted out to horse-thieves and cattle-rustlers in the pioneer West of the United States. The gradual increase of private property entailed a corresponding intensification of social control within the tribe; and at the same time an organized military force was needed to beat off the plundering raids of adjacent tribes. The circumstances called for individual leadership. Some member of the council of patriarchs would naturally assert himself, because of either his superior ability or his superior wealth or both, and perhaps with the assistance of a little religious hocus-pocus. Like the family patriarch, the tribal chief or king responds to the requirements of a new economic age. Like other kinds of property, the office came to be associated with his family, and to be inherited in a like manner. In times of unusual stress, when war or domestic violence threatened, the office might go, not to the eldest, but to the most competent of the chiefly lineage.

In the rise of the chieftain the main impulse was economic. Even the need of organized military defense must be attributed to the fact that the tribal herds provoked the rapacity of neighboring huntsmen and herdsmen. But when once the economic situation had developed to

[1] Ibid.

[2] According to MacIver (*op. cit.*, p. 32) the relatively settled pastoral life undoubtedly "accorded with, and in a sense made necessary, the patriarchal family." He believes, as do some others, that the matrilineal family preceded the patrilineal. Property brought about the change. "The control and above all the inheritance of this self-breeding wealth ... must have been a strong influence against a system which sent the sons away from the home of the father to that of the father-in-law. ... With the inheritance of substantial property the importance of ancestry grew. The name of the father was the symbol of heirship; the patronymic (such as -son or -ing or -off, mac- or de- or ben-) became a permanent title."

a point that made leadership imperative, a particular aspirant may have been successful because of the force of his personality or because of his pretension to magical powers. Frazer's shaman may have attained the coveted position, or MacLeod's enterprising individual, or both of these combined in the same person. One difficulty about the theories of Frazer and MacLeod is that they are too exclusive and that they overlook the factor of kinship as well as that of property. The position of the patriarch—venerated because of his experience and wisdom—was so impregnable that the selection of a chief outside the council of elders can hardly be conceived except as a very rare occurrence.

Long before the office of chief existed, individual members of the council, on account of superior capacity, must have dominated their fellows and enjoyed a position of leadership at critical junctures. In this way temporary needs were satisfied. The permanent leader or hereditary chief emerged only when more than occasional exigencies had to be met—when the complexity of property interests and the chronic danger from alien robbers demanded constant attention. The evolution of the chieftain and of authoritative government were as gradual as most institutional changes. The economic changes, which brought about both the social and political, had nothing sudden or cataclysmic about them. It took centuries, no doubt, to convert the huntsman into a herdsman or the herdsman into a husbandman—or to give the pastoral tribe an hereditary ruler.

The rise of social classes occurs in pastoral society through the unequal distribution of wealth. "An especially clever breeder," says Franz Oppenheimer,[1] "will see his herd increase rapidly, while an especially careful watchman and bold hunter will preserve his from decimation by beasts of prey. The element of luck also affects the result. One of these herders finds an especially good grazing ground and healthful watering place; the other one loses his entire stock through pestilence, or through a snowfall or sandstorm. Distinctions in fortune quickly bring about class distinctions." Besides nobles and commoners, there were slaves. Captives were no longer killed and perhaps eaten. The pastoralist had plenty to eat, but felt the need of supplementing the labor resources of the family to care for his expanding herd and to protect it from beasts of prey and human marauders. He invented slavery as a substitute for cannibalism.[2] It was a beneficent invention; and, not-

[1] *The State* (1914), p. 34.

[2] Thereby, says Oppenheimer (*op. cit.*, p. 37), he created "the seedling of the state, the first economic exploitation of man by man.... The idea of using a

withstanding our later attitude towards slavery, it marked a great social advance. But in this case, as in so many others, economic considerations were paramount: a more humane spirit was the result, not the cause, of social amelioration.[1]

The institution of private property and its systematic development brought the nomadic herdsman to the threshold of the State. The chief or king took the place of the council of elders because the complicated business of regulating and protecting property called for a concentration of power. Economic inequality produced social stratification, which some sociologists postulate, arbitrarily, as an essential mark of the State; and alongside of rich and poor, nobles and commoners, appeared the chattel slaves, who are styled by Oppenheimer "servile labor motors." Oppenheimer acknowledges that herdsmen "have developed a whole series of the elements of statehood" and that "in the tribes which have progressed further, they have developed this in its totality, with the single exception of the definite occupation of a circumscribed territory." [2]

AGRICULTURE AND THE TERRITORIAL STATE

How was the final element of territoriality acquired? It was acquired, just as Maine contends, when the kinship group settled on the land and became agriculturists. Unfortunately, the actual circumstances of the shift to agricultural pursuits must always remain unknown.[3] The rudiments of agriculture may have been learned before or after the domestication of animals: probably afterwards, says Sir Alfred Hall;

human being as a labor motor could only come about on an economic plane on which a body of wealth had developed, call it capital, which can be increased only with the assistance of a dependent labor force. This stage is first reached by the herdsmen."

[1] Jenks, *op. cit.*, p. 29. Oppenheimer observes (*op. cit.*, p. 68): *"The moment when first the conqueror spared his victim in order to exploit him in productive work, was of incomparable historical importance. It gave birth to nation and state, to right and to the higher economics, with all the developments and ramifications which have grown and which will hereafter grow out of them.* The root of everything human reaches down into the dark soil of the animal—love and art, no less than state, justice and economics." The italics are Oppenheimer's.

[2] *Op. cit.*, p. 33. Again (pp. 39-40): "With the introduction of slaves into the tribal economy of the herdsman, the state, in its essential elements, is completed, except that it has not as yet acquired a definitely prescribed territorial limit."

[3] Sir A. D. Hall, "Agriculture: a General Survey," *En. Brit.* (14th ed., 1929). "When agriculture does emerge in written history in the time of the Greeks and Romans, it is already a highly developed art, which has behind it long centuries of empiric progress, the fruit of observation and of trial and error." Wheat grains of a comparatively advanced type have been found in predynastic Egyptian tombs, in a Mesopotamian house dating back to 3500 B.C., and in Swiss and Italian dwellings associated with neolithic man.

possibly as soon, says Edward Jenks. Even the savage huntsman gathers certain grains as food; the Australian aborigines, though ignorant of agriculture, gather the seeds of the *nardoo,* a wild plant, and bruise them in a rude mortar. Let us suppose, Jenks suggests,[1] that in some richer country the huntsmen gather more than they can consume at the time, bury the surplus in an earth-heap or mound, and return to that summer camp after an unusually wet winter. They "might well discover that the stored-up grains had sprouted and assumed something like the shape in which the huntsmen had known the ears when they had gathered them in the forest the previous autumn. Such an object lesson would hardly be lost, even on the savage mind. The same thing might well happen to the wild yams or other edible roots which are some of the earliest food of man. Whenever the savage had begun to act on the idea this suggested, agriculture, in its most primitive form, would have come into existence. The rest was only a question of time."

But, no matter how early the first rudiments became known, systematic agriculture made its appearance only after a very long interval. As compared with pastoral pursuits, it entailed too much hard work. The Germans, Caesar tells us,[2] did not "study" agriculture, but lived on milk, cheese, and meat. It was not through ignorance that they did so. They found pastoral life less laborious. With this consideration in mind, we must ask why the pastoralist ultimately turned to agriculture. He acted under compulsion. Population increased and pressed upon the means of sustenance.[3] The herdsman needs much more land than the husbandman. As the pastoral tribe grew in numbers and as flocks and herds multiplied, it became desirable, perhaps even necessary, to rely, in part at least, upon agriculture. The transition was not abrupt. The herdsman started agricultural pursuits in a small way, and experimentally. His methods were, at first, as crude as his tools. Year after year he cropped the same patch of ground until the fertility of the soil was exhausted, and then repeated the process with new patches. Ultimately, to save the trouble of clearing new land, he returned to one of the old patches and discovered the great secret, that fertility returns when land is left fallow. This discovery marked a great advance.

[1] *A Short History of Politics,* p. 44.

[2] *Gallic War,* VI, 22.

[3] Oppenheimer maintains, however, that land had not acquired a "natural scarcity," but that an artificial or "legal" scarcity had been brought about by conquest and subjugation. *Op. cit.,* pp. 9-14. For a reply to Oppenheimer see William C. MacLeod, *The Origin and History of Politics* (1931), pp. 145-147.

The two-field system, under which one field is sown each year and the other left fallow, was introduced.[1]

The shift to agriculture may have taken place first in the alluvial valleys of the Nile and Euphrates, or of the Chinese rivers. While these rich river-bottoms were enormously productive when cultivated, the surrounding regions afforded meager pasturage. When a pastoral kinship group settled on the land,[2] the State began. The group had already set up a government; it now acquired territoriality.

But it is often contended that the State began in a different way. According to the conquest theory, so favorably received by sociologists, it began when the herdsmen conquered the husbandmen or peasants.[3] Oppenheimer, the most prominent apologist of this theory, maintains that "the cause of the genesis of all states is the contact between peasants and herdsmen, between laborers and robbers, between bottom lands and prairies."[4] The herdsmen were highly efficient in warlike pursuits.[5] Being well-nourished, they attained a full physical development and increased rapidly in numbers; being disciplined under the family patriarchate and the tribal government, they excelled in tactical maneuvers; moving about compactly in a great train, they made every stopping-place an armed camp. They grew more and more accustomed to make use of slave labor and engage in warfare. They drove the

[1] Edward Jenks, *A Short History of Politics* (1900), pp. 46-54. In some backward countries the two-field system still prevails. It was generally superseded, however, by the three-field system, which is much more economical. The peasant hit upon the discovery that the fertility of land is less quickly exhausted when crops are alternated (oats one year, beans the next, for example) than when the same crop is continued. Only one field of the three, one-third instead of half the land, is left fallow each year. Experiments at a much later time showed how the land could be kept constantly in use by fertilizing it and by following some special rotation of crops. Centuries of progress have brought us back to the one-field system in a new form.

[2] In countries where, through lack of the large herding animals, pastoral pursuits are impossible, it is the huntsmen who take to agriculture.

[3] Oppenheimer says (*op. cit.*, p. 14) that "deductively, there is the absolute certainty that the State, as history shows it, the class-state, could not have come about except through warlike subjugation." But he has given the word "state" a peculiar definition. "Every state in history was or is a *state of classes*, a polity of superior and inferior social groups, based upon distinctions either of rank or property." The conquest theory thus becomes an explanation of the origin of social classes rather then of the origin of the State. Even so, according to Oppenheimer himself, social classes appear, before any conquest has taken place, among the herdsmen.

[4] *Op. cit.*, p. 53.

[5] "The same tried order, handed down from untold ages, regulates the warlike march of the tribe of herdsmen while on the hunt, in war and in peaceable wandering. Thus they become professional fighters, irresistible until the state develops higher and mightier organizations. Herdsman and warrior become identical concepts." *Ibid.*, p. 45.

savage huntsman to the remote highlands and mountains or reduced him to the position of a client who paid a small tribute in the form of spoils of the chase or gave his services as a scout. The primitive peasants or "grubbers" were still more helpless. Living in isolation from one another, either unorganized or connected in the feeblest sort of association, and being totally deficient in warlike propensities, they could not withstand a vigorous attack. Nor could they retreat; they were bound to the soil that gave them sustenance. The triumphant herdsmen, abandoning their earlier practice of pillage and plunder, for a time contented themselves with exacting tribute, then settled among the peasants as a ruling caste. Ultimately, the two separate groups of conquerors and conquered were welded into a single nationality.[1]

The objections to the conquest theory are both numerous and cogent. Although Oppenheimer presents much more ethnological evidence than did his predecessor Gumplowiecz,[2] the evidence is far from conclusive. With regard to his most striking examples, which are taken from Negro Africa, MacLeod points out that the conquerors were merely "agents in the spread or diffusion of particular ancient forms of the state"; they did not invent something new.[3] Moreover, in no single case does Oppenheimer show that the conquered husbandmen were not already organized in a State. Let us take the case of Egypt. "The incursion of the Hyksos," he says, "whereby for over five hundred years Egypt was subject to the shepherd tribes of the eastern and northern deserts . . . is the first authenticated foundation of a state."[4] But what of the cities and temples which the conquerors destroyed and what of King Timaeus whom they overthrew? They conquered a State.

The strangest feature of the conquest theory is the condition assigned to the peasants. In order to establish his theory, Oppenheimer has been forced to picture them as miserable grubbers of the soil, lacking any sort of government, easy victims to the highly organized and socially advanced herdsmen. He gives no facts whatever to support such an unwarranted assumption; and until the facts are forthcoming the view must prevail that the highly developed herdsmen became husbandmen, that pastoral pursuits gradually gave way to agriculture as population pressed upon subsistence. Oppenheimer denies that there

[1] *Ibid.*, pp. 27-81.

[2] Sumner and Keller (*op. cit.*, vol. I, p. 707) admit that, in default of evidence, Gumplowiecz deduced from modern political structure what *must have been* the earlier stages; but they hold that it would be difficult to suggest conclusive evidence *against* the views he arrived at deductively.

[3] *The Origin and History of Politics* (1931), p. 56.

[4] *The State*, p. 63.

could have been any "natural" scarcity of land that would lead a pastoral people to take to agriculture; [1] the testimony from economics, he says, is "absolute, mathematical and binding." But that testimony has been refuted.[2]

Finally, a survey of human institutions in historical times shows that social changes take place through successive minor adjustments and gradual modifications. It teaches us to expect continuity. The social historian, while aware that this continuity is sometimes interrupted, does not believe that accident or sudden upheaval can permanently deflect the stream of evolution. There is a cataclysmic and accidental quality about conquest which hardly suits the creator of one of man's chief institutions. Our skepticism increases when we are told that the State "could not have come about except through warlike subjugation" and that everywhere, "at all places on this planet where the development of tribes has at all attained a higher form, the State grew from the subjugation of one group by another;" [3] that the State was created in this fashion, not once, but over and over again. Nor is it clear why the rich herdsmen should wish to conquer the peasants, who, according to Oppenheimer's own description, had no surplus that would attract the cupidity of a plunderer.[4] It is not the intention here, by criticizing the conquest theory, to imply that warfare played no part in molding political institutions. Private property, in the form of flocks and herds, afforded an incentive to looting, which in turn had to be checked by systematic defense and by punitive expeditions. The need of military leadership was certainly a factor in creating the chieftainship and strengthening its powers. But Professor MacIver is supported by the weight of evidence when he declares that "the emergence of the state was not due to force, although in the process of expansion force undoubtedly played a part." [5]

One further aspect of the conquest theory deserves mention. Oppenheimer defines the State in a peculiar way. "Every state in history," he contends, "was or is a *state of classes,* a polity of superior and inferior social groups, based upon distinctions either of rank or property." [6]

[1] *Ibid.,* pp. 9-14.
[2] MacLeod, *op. cit.,* pp. 144-147.
[3] Oppenheimer, *op. cit.,* pp. 14 and 20.
[4] *Ibid.,* p. 31.
[5] *The Modern State,* p. 222. Similarly, Sir John Seeley considers conquest as the means, not of originating the State, but of producing a new and abnormal type of State, which he calls "inorganic." *Introduction to Political Science,* pp. 73-75.
[6] *The State,* p. 5. See also p. 15.

To him the essential characteristic of the State is social stratification; and therefore, as Professor Lowie points out,[1] the theory is "properly not a theory of the state at all, but of hereditary social classes." Now Oppenheimer sets out to prove that social stratification occurs through conquest, through the imposition of one group on another; but incidentally he pictures it as occurring, among pastoralists, without conquest. In two passages he admits that the herdsmen acquired all the elements of statehood except territoriality.[2] He tells how social classes took shape among them.[3] He says that, with the institution of slavery, the economic basis of the State was introduced and that the entire mode of life of the herdsman compelled him to "make more and more use of the 'political means' "—that is, the unrequited appropriation of labor.[4] Certainly, internal conditions, without conquest, have sufficed to produce hereditary social classes among peoples of the South Seas and of the North American Pacific coast.[5]

CONCLUSION

It may be well to summarize the views expressed here. The State is composed of three elements: people, government, and territory. From the beginning, groups of people are bound together by the cohesive force of kinship and religion. The family is the primordial unit, which expands into sibs (*gentes,* clans) and the tribe. Among pastoral people, patriarchal discipline prepares the way for tribal government; tribesmen who are accustomed to give unquestioning obedience to their respective family heads naturally accept the authority of the council of elders or patriarchs and of the chieftain who rises out of the council. But the emergence of government—that is, an intensified regulative system—within the kinship group must be associated with economic causes, with the adoption of pastoral pursuits and the accumulation of surplus wealth. Property introduces all sorts of complications. There are disputes within the tribe to be settled; there are raids by avaricious neighbors to be repelled. The situation calls for individual leadership. Some member of the council, more energetic and enterprising than his fellows (and for that reason more wealthy), pushes his way to the

[1] R. H. Lowie, *The Origin of the State* (1927), p. 36.
[2] *The State,* pp. 33 and 40.
[3] *Ibid.,* pp. 34-42.
[4] Oppenheimer may imply, though not in clear language, that social stratification cannot be carried beyond an embryonic state without conquest. Sumner and Keller maintain (*op. cit.,* vol. I, p. 701) that "systematic slavery . . . does not appear until the development of agriculture."
[5] R. H. Lowie, *The Origin of the State* (1927), pp. 37-42.

front with or without the assistance of religious superstition. He, or some one who later essays the same rôle, is recognized as chieftain. Since the qualities of leadership are likely to be inherited, the office becomes attached to a particular family and is transmitted like other forms of property. Government exists. But, although the pastoralists may confine their wanderings within roughly determined geographical limits, they are still nomads.

The territorial State does not appear until population begins to press upon subsistence. Then one of two courses may be followed: new land may be acquired by migration or the old land put to more productive use. Fertile pasturage, when brought under cultivation, will support a much larger population; and the tribesmen have long been familiar with the possibility of raising grain and vegetables from wild seed. Rather than leave the region to which they have become attached, they supplement the prevailing pastoral economy with the rudiments of agriculture. Gradually the herdsmen become husbandmen. The transition takes place slowly, as, by trial and error or by the imitation of some neighboring agriculturists, the methods of tillage are improved and their potentialities realized. Along with the new system of production come great social changes: above all, the sharpening of class distinctions, the systematic resort to slavery, the emphasis placed upon military life (first for defense, then for conquest), and the establishment of monarchy. With settlement upon the land and the acquisition of fixed abodes, the original kinship tie gives way, naturally but stubbornly, to the new territorial tie. It never disappears. What actually occurs is a fusion of the two principles in the shape of territorial kinship. Indeed, kinship not only survives as a social force, but, under the name of nationalism, must be recognized as one of the chief factors in modern civilization.

In some such way the State arose. But, if it had a multiple origin, arising independently among different peoples at different times, the course of events must have varied with the character and circumstances of each people. In particular, where there were no herding animals to be tamed, the huntsman may have taken to agriculture without passing through the pastoral stage. Again, the rise of government, though primarily connected with economic factors, may have been influenced considerably by the exigencies of warfare, or by the ambition of an outstanding personality and by his playing upon religious superstition. Nor can we altogether deny the possibility that some pastoral tribe may have conquered and exploited an agricultural tribe that had not

yet developed any effective system of government. What we must insist upon is that, generally, the territorial State was the outcome of economic changes operating within the kinship group.

But it is not certain that the State was originated more than once. Extreme diffusionists, like G. Elliot Smith and W. J. Perry, believe in a unitary origin: the place, Egypt; the time, about 5000 B.C. "From Egypt," says Professor MacLeod, in explaining their position, "the state with its sacred kingship diffused to neighboring peoples, along with agriculture and other advanced features of the pre-dynastic Nile civilization. Other peoples did not invent the state; they borrowed the idea from the Egyptians." [1] If this contention has found few supporters, it is, nevertheless, more plausible than the conquest theory. In historical times the rôle of diffusion, as compared with convergence or parallel development,[2] has been indeed a notable one.

[1] *The Origin and History of Politics* (1931), p. 79. To quote again from the same page: "Perry adopts Cherry's contention that agriculture was originated by the Egyptians in the Nile Valley, sometime not very long before 5,000 B.C. From its very initiation in this valley, agriculture was based upon and linked with irrigation. Agriculture and irrigation elsewhere in the world is (*sic*) the result of the diffusion of these linked techniques from predynastic Egypt. The Egyptians were the sole inventors of agriculture, and of the first kingship which arose out of the public magician's aggrandizement through his control of the spiritual powers which affected agriculture." Originally Perry acceped the conquest theory as applied to Egypt. But very soon he was converted to Frazer's theory of the public magician.

[2] By parallel development we imply that, because human beings are fundamentally alike, they tend to evolve similar cultures in similar circumstances.

CHAPTER VIII

SOVEREIGNTY

IT has already been shown that the State, as defined by most authoritative writers, consists of three elements: people, government, and territory. In such definitions the government is accorded a special quality. It is habitually obeyed, says Sidgwick; it is superior to individual wishes, says Esmein; it claims unlimited authority, says Zimmern; it is endowed with coercive power, says MacIver; it expresses group sovereignty, says Gilchrist; it is sovereign, says Oppenheim. Although various terms are used for the purposes of a definition, it will be found, as each writer proceeds to make his meaning clearer, that the power attributed to the government is sovereignty.

What, then, is sovereignty? The word comes to us from the Latin *super* (above) and means superiority or supremacy. In the layman's view, according to Bryce,[1] the sovereign is obeyed because he is acknowledged to be at the top and because he can get his own way and make others go that way. Two ideas are combined: actual power and some title to exercise it. The sovereign is "legally supreme over any individual or group," says Laski; [2] he possesses "supreme coercive power." Sovereignty, according to Edward Jenks,[3] is "an authority which, in the last resort, controls absolutely and beyond appeal the actions of every individual member of the community." Without giving further evidence of the commonly accepted meaning of the term, we may say that sovereign power is held to be supreme and final. It cannot be limited, we are sometimes told; the person or body imposing

[1] *Studies in History and Jurisprudence* (2 vols., 1901), vol. II, p. 504.

[2] *The State in Theory and Practice* (1935), p. 9. "Such a society is a state when the way of life to which both individuals and associations must conform is defined by a coercive authority binding upon them all.... This power is called sovereignty; and it is by the possession of sovereignty that the state is distinguished from all other forms of human association."—In *Remarks on the Use and Abuse of Some Political Terms* (1832; ed. by Raleigh, 1898) Sir George Cornewall Lewis defines sovereignty as follows: "As long as government exists, the power of the person or persons in whom sovereignty resides, over the whole community, is absolute and unlimited. The sovereign has the complete disposal of the life, rights, and duties of every member of the community."

[3] *A Short History of Politics* (1900), p. 151.

the limitation is sovereign.[1] Yet, when we come to closer grips with sovereignty, passing from abstractions to facts, both the immunity from limitation and the supremacy or finality will prove somewhat dubious. Indeed, we should be driven to modify or even discard the term unless we agreed to say that *this* body is sovereign in one sense, *that* body in another—unless we recognized several different sovereigns in the same community and split up sovereignty into a number of fragments.

It is frequently maintained, however, that sovereignty cannot be divided. Since the Civil War this has become a favorite American doctrine; force, not argument, seems to have crushed that theory of dual sovereignty—of sovereignty divided between the American nation and the states—which was widely entertained from the time of Hamilton and Madison.[2] "Sovereignty, as thus expressing the State's supreme will, is necessarily a unity and indivisible," says Professor W. W. Willoughby.[3] "That there cannot be in the same being two wills, each supreme, is obvious." Similarly, Professor Garner argues that the highest will of the State cannot be divided without producing several wills and that "the existence of several supreme wills, each equally capable of issuing commands and exacting obedience, would obviously result in conflicts and an ultimate paralysis of the state."[4] So much for theory.

When he comes to practical analysis, Professor Garner himself indulges in fragmentation. He has a legal sovereign (Parliament, in Great Britain) and a political sovereign (the electorate). This looks like inconsistency. But he contends that "a little reflection" will show that the legal and political sovereigns are merely "two different manifestations of one and the same sovereign through different channels."[5] Unfortunately, he does not show how that conclusion may be reached by any amount of reflection; and, since he admits that the two "wills" may not harmonize and that the "commands" of the political sovereign may not be obeyed by the legal (though they "ought" to be obeyed), he hardly succeeds in fusing the two sovereigns. No incantation can make them fuse. Having separate wills, which may conflict, how can they be manifestations of the same sovereignty? The ardor that is

[1] J. W. Burgess, *Political Science and Comparative Constitutional Law* (2 vols., 1890), vol. I, p. 53.

[2] Note their views in the *Federalist*, numbers 32 and 39 respectively.

[3] *The American Constitutional System* (1904), p. 5.

[4] *Political Science and Government* (1928), p. 173.

[5] *Ibid.*, p. 162. The same position is taken by R. N. Gilchrist, *op. cit.*, p. 99. 'The organization of political sovereignty leads to legal sovereignty. The two are aspects of the one sovereignty of the state."

sometimes displayed in maintaining the theory of indivisibility and in brushing aside discordant facts illustrates the danger of using the deductive method in politics—the danger of starting with an abstract notion instead of observing the facts and generalizing from them. As will be shown a little later, practical considerations require us at least to abandon the contention that there is only one kind of sovereignty and that it is found only in one place. In so doing, we shall travel in excellent company. The eminence of the writers who believe in divisibility cannot be matched on the other side of the controversy.[1]

It is also a matter of dispute as to whether sovereignty belongs to the State or to the government of the State. Many American writers, because of the peculiar character of the American polity, hold that the State—they are not referring to the states composing the Union—is sovereign, its government being subordinate to that sovereignty; and that the State, formulating a constitution, therein sets up the government and fixes its range of powers. This theory is not easily applied to Great Britain, where there is no written or codified constitution and where Parliament is legally supreme. But in America, says Burgess, "we have a great advantage in regard to this subject. With us the government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty." [2] Governments, as Garner puts it, "possess no sovereignty, no original unlimited authority, but only derivative power delegated by the state through its constitution." [3]

But this is only an *a priori* philosophical idea. Apart from its three elements of people, government, and territory, the State is an abstraction; whatever it may be said to possess is primarily the possession of one of the three. Legal sovereignty cannot be attributed to the State directly. It must be sought in the people or the government. Who will assert that the Roman State in the time of Diocletian or the French

[1] For example, Bryce, *op. cit.*, vol. II, pp. 506-608; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915), pp. 68-73; H. Sidgwick, *The Elements of Politics* (4th ed., 1919), pp. 623-658; R. M. MacIver, *The Modern State* (1926), pp. 9-16; A. Esmein, *Eléments de droit constitutionnel* (6th ed., 1914), pp. 298-299; Léon Duguit, *Traité de droit constitutionnel* (2nd ed., 5 vols.), vol. I (1921), pp. 473 *et seq.*, and vol. II (1923), pp. 110 *et seq.* Many of those who have analyzed the peculiar institutions of the British Empire take the same position: for example, K. C. Wheare, *The Statute of Westminster* (1933), pp. 22-25. I am not referring here to the contention of the pluralists, that a share of sovereignty should be accorded to organized groups, such as trade unions and churches.

[2] *Op. cit.*, vol. I, p. 57. Willoughby (*op. cit.*, pp. 4-5) holds the same position.

[3] *Op. cit.*, p. 49.

State in the time of Louis XIV derived its sovereignty from the people? According to the position taken in this book, it is the government that exercises legal sovereignty; and that view is shared by most of the authoritative writers in the field. Government is sometimes imposed upon the people against their will; more often it operates with their passive acquiescence; and it may come under their direct control. In all three cases it is the government which regulates internal affairs and conducts relations with other States.

It is an error to suppose that constitutional arrangements are not part of the mechanism of government. In France, let us say, the mechanism of government includes not only parliament and the councils of communes, districts, and departments, but also the constitution and the National Assembly which amends the constitution. The governmental apparatus may be simple or elaborate; the grades of hierarchical authority may be few or many; but from the top issues the authentic voice of command. In Great Britain that voice issues from Parliament; and no one denies that Parliament is a part of the apparatus of government. Suppose Parliament passed a law setting up a written constitution and withdrawing from itself the right to abolish universal suffrage or the House of Lords unless by a two-thirds vote in both houses, repeated after a general election, would sovereignty then be taken away from the government and lodged in the State? There would have been a change in the organization of government. That is all.

The contention that sovereignty may be limited or divided or viewed as an attribute of government is often repudiated, and with a good deal of heat.[1] In the course of this discussion, other grounds of controversy will appear. As soon as we look below the surface and try to give precision to the vague conception of sovereignty, we meet with all sorts of unexpected embarrassments. Some of them are concrete. They rise, as the conception itself should, from observing the actual operations of government; and they will receive some attention here. Others have been created by the philosophers. In exploring the abstract nature of sovereignty, they have, as Bryce remarks,—with an emphasis rarely found in his writings,—engaged in many barren discussions and

[1] But not often by sociologists. Cf. Harry Elmer Barnes, *Sociology and Political Theory* (1924), p. 5: "Its alleged qualities of originality, universality, absoluteness and lack of finite limitations have long since been dissolved under criticism, and now even its quality of unity is challenged. Still others doubt its essential reality, and claim that nothing more than political authority, limited sharply by the interdependence of modern national states, can be postulated or established. They would further doubt, indeed, whether any determinate political superior can be identified in the usages and fluctuations of social pressure."

dragged us through "a dusty desert of words rather than of substance." [1] Frequently they have done so with an ulterior motive—"to get a speculative basis for a practical propaganda." [2] MacIver also complains of "much needless mystery." [3] Both Bryce and MacIver, taking a realistic view of sovereignty and scraping off the philosophic incrustations that have disfigured it, have helped to clarify some difficult problems. On the other hand, we are sometimes told that the theory of sovereignty, having been utterly discredited, should be kept out of political discussions.[4]

Professor Laski takes this position.[5] He does so mainly on ethical grounds, and not because of the confusion which he himself has helped to create by failing, so often, to distinguish between fact and theory, between what is and what ought to be. The theory elevates national patriotism above the interests of humanity, he contends, and above ethical considerations; it gives the State the right to coerce organized groups like the trade unions, which he, as a socialist, seems to defend without any criticism of their ethics. He labors under the delusion—clearly established by passages in his numerous books—that by changing a theory we change the facts. It is a common delusion among philosophers. They have become so accustomed to the higher altitudes and have lived so long in the stratosphere of excogitated ideas that actual conditions at the earth's surface have been forgotten or dismissed as irrelevant. The only reason for scrapping the theory is that, since the time of Bodin (1576), the term sovereignty has been enveloped in a fog of controversy. It has been examined from every point of view and has acquired specialized, and apparently inconsistent, meanings. As the student passes from one mode of treatment to an-

[1] *Op. cit.*, vol. II, pp. 503-504.

[2] *Ibid.*, p. 552.

[3] *The Modern State* (1926), p. 8. The nature of sovereignty, he says, "has been surrounded by a halo that dates back to the tribal reverence which alone, in primitive ages, could sanction the obedience it must command.... This magic of sovereignty became transformed into legal prerogative, divine origin passing into divine right. When that proud title fell in turn from the relaxing grasp of monarchism, it was transferred from the person to the incarnated state. The mystic name that had exalted the obvious reality of the king now crowned a being as mystic as itself, the omnipresent majesty of the state.... The new sovereign dwelt apart in a shadowy realm of abstractions, powerful over the mind of man in so far as they elude his understanding."

[4] A. F. Bentley, *The Process of Government* (1908), p. 264, says: "As soon as it gets out of the pages of the law-book or the political pamphlet, it is a piteous, thread-bare joke. So long as there is plenty of firm earth under foot there is no advantage in trying to sail the clouds in a cartoonist's airship."

[5] Laski argues (*A Grammar of Politics*, p. 44) that "it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered."

other, he is baffled in trying to reconcile them. He may reach the conclusion that the problem has half a dozen solutions, each one possibly correct when it carries the proper label of law, ethics, and so on. Commonly he gets lost in the labyrinth of theories because of his failure to see that by continually resorting to the facts he might find a way out.

But cogent reasons may be advanced for keeping the term "sovereignty." In the course of three and a half centuries, for example, it has held a foremost place in political literature, perhaps attracting more attention than any other phase of government. It has been discussed acutely and thoroughly from every possible standpoint. Where can the student find a better sample problem for investigation? At least he will become aware of the pitfalls which confront the unwary. He will learn to detect fallacies, separate esoteric and mystical nonsense from the truth, recognize the danger of substituting the imagination for hard work and of arbitrarily simplifying complicated phenomena. He will find that the fashion in theory changes as new interests rise and demand philosophic justification.

In politics, of course, we are dealing with things, not words. Yet the things must have names; and, notwithstanding the vagaries that appear in the discussion of sovereignty, there is no more reason to drop that name than the name "state" or "republic" or "federation," each capable of being defined so variously. By dropping the word, we should not avoid controversy; for a vast deal of the quarreling and confusion centers, not about the word, but about the thing. It is impossible to drop the thing itself, because it exists. Indeed, one of the most effective means of getting to know the character of any system of government is to find out where sovereignty, in its various forms, is located. It is impossible to drop the word; for popular usage will not surrender to the behests of a few specialists.

Whatever is written about sovereignty to-day usually takes its color, either by way of elucidation or criticism, from the teachings of John Austin.[1] Austin held that in every State sovereignty resides with a determinate person or body of persons entitled to receive, and actually receiving, the habitual obedience of the bulk of the population and being subject to no limitation or command by a superior. Where, then,

[1] His first ten lectures at University College, London, were published in 1832 under the title of *The Province of Jurisprudence Determined,* and republished thirty years later, after Sir Henry Maine had drawn attention to their great merit. They may also be found in Austin's *Lectures on Jurisprudence* (2 vols., various editions).

do we discover sovereignty in the United States? Congress and the state legislatures issue commands; they make laws which the courts will recognize and apply. One constantly hears, even in the law reports, that, in their respective fields, as fixed by constitutional provisions, they are sovereign bodies. According to Austin, such language is incorrect. It would be little more absurd to say that a city council or county board of supervisors is sovereign because it can give legal expression to its will within prescribed limits.[1] Congress also is limited; it derives its authority from the Constitution; and if it attempts to go beyond the powers therein enumerated, the courts are likely to hold such a usurpation invalid. The sovereign of the United States is the body which can amend the Constitution and, by doing so, give commands to every other organ of government. The amending body is supreme government; Congress is a subordinate legislature.

The amending body, some critics say, is not well-suited to the rôle of sovereign. In the first place, it is subject to a constitutional limitation: no state (that is, no member of the union) may be deprived of equal suffrage in the Senate without its own consent. In that one matter each state of the union is sovereign. This leads Professor Laski to observe, somewhat extravagantly, that in a theoretic sense "the United States has no sovereign organ" and that "a peculiar historical experiment has therefore devised the means of building a State from which the conception of sovereignty is absent."[2] In the second place, the sovereign amending body is criticized as being both complex and inert. It may assume four different forms, the simplest combining the two houses of Congress and of the forty-eight state legislatures, the most elaborate combining these with a national convention and conventions in the several states; and all the coöperating agencies must

[1] "There is an apparent absurdity in comparing the legislature of the United States to an English railway company or a municipal corporation, but the comparison is just. Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Great Eastern Railway Company can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the Constitution, is invalid; a law passed by the Great Eastern Railway Company in excess of the powers given by Act of Parliament, or, in other words, by the legal constitution of the company, is also invalid." Both Congress and the company are subordinate law-making bodies. Dicey, *Law of the Constitution* (8th ed., 1915), p. 146.

[2] *A Grammar of Politics* (1925), p. 49. He adds: "We may, of course, ... prize so highly the theory of sovereignty as to urge that a society which does not possess it is not a State at all. But a political philosophy which rejects the title of the United States to Statehood is unlikely to apply to a world of realities." Laski declares (p. 53) that "the discovery of sovereignty in a federal State is, practically, an impossible adventure."

be regarded (presumably) as manifestations of the same sovereign.[1]

The amending body is quiescent over long periods. More than sixty years elapsed between the Twelfth Amendment to the American Constitution and the Thirteenth; more than forty years between the Fifteenth and the Sixteenth. Sidgwick contends that, if the word 'government' is applied to such a body, "it is used in a sense materially different from its ordinary meaning. For ordinarily we conceive an organ of government to exercise its functions regularly, at comparatively short intervals.... Surely it strains language to say that during these sixty years citizens of the United States 'habitually obeyed' this inert composite entity."[2] Such considerations lead Bryce to conclude that in countries with a rigid constitution—rigid because not alterable by the ordinary process of legislation—sovereignty is divided between the legislature, which is in constant action, and the amending body, which is in abeyance for long intervals.[3] "The Sovereignty of each of these authorities will then be, to the lawyer's mind, a partial Sovereignty," he says.[4] "But it will none the less be a true Sovereignty, sufficient for the purposes of the lawyer." This is a fatally weak part of Bryce's otherwise illuminating discussion of sovereignty. There can be no question that Congress and the state legislatures are subordinate

[1] Much may depend upon which of the four combinations is employed. It is pertinent to ask, therefore, whether we have here only one sovereign, or four. If the four are identical (philosophically), why did Congress require, contrary to all practice in the past, that the twenty-first amendment should be ratified by conventions, not legislatures? Again, the simplest form of procedure necessitates the positive coöperation of the two houses of Congress (by a two-thirds vote) and the two houses of thirty-six state legislatures—seventy-four different bodies. An amendment can be defeated by thirty-four per cent of the vote in one house of Congress or by fifty-one per cent of the vote in one house of thirteen state legislatures. Can this be, from the realistic standpoint, indivisible sovereignty? What if one house of a single state legislature could veto the process, as under the earlier constitution, the Articles of Confederation? Then, say the exponents of indivisibility, each one of the member states is sovereign. They argue, of course, that under the existing system sovereignty is undivided because no affirmative action can be taken without the agreement of the seventy-four bodies. But it might be argued against them that sovereignty belongs to the minority that can thwart the majority will.

[2] *The Elements of Politics,* pp. 27-28.

[3] *Studies in History and Jurisprudence,* vol. II, p. 506. Bryce's specific application of this doctrine to the United States is given on page 507. It does not make matters clearer when he adds: "These complications, however, do not affect the general principle. In every country the legal Sovereign is to be found in the authority, be it a Person or a Body, whose expressed will binds others, and whose will is not liable to be overruled by the expressed will of any one placed above him or it." Does not a constitutional amendment possess higher validity than a statute?

[4] *Ibid.,* vol. II, p. 507. Bryce further contends (p. 508) that sovereignty may be divided between two or more authorities; for example, between the President and Congress.

law-making bodies, already limited by the Constitution and subject to further limitation by constitutional amendment. Bryce and Sidgwick are both mistaken in assuming that the sovereign is inert. The sovereign speaks through the Constitution. As long as the Constitution lasts its voice of command can be heard. A command is no less a command because it remains the same for a century and a half. A constitutional amendment is necessary only when the sovereign wants to change the manual of arms—perhaps introduce the goose-step.

The process of constitutional amendment will be discussed in Chapter XV. For immediate purposes it will be enough to give here a few additional illustrations. In Belgium parliament can, by itself, amend the constitution, but by a method far more elaborate than that of ordinary legislation. The two houses, having proposed an amendment, are at once dissolved; and for ratification there must be a two-thirds vote in each of the newly-elected houses, a quorum of two-thirds of all the members being present. This method is simpler than the American. Yet Sidgwick observes: "Now surely it is misleading to say that there is in Belgium a sovereign with power legally unlimited, when the process of changing constitutional laws is hampered by these elaborate legal conditions!" [1] No such criticism can be directed against the French arrangements. The two chambers of the legislature, having declared, in separate resolutions and by an absolute majority, that a constitutional revision is necessary, meet together in National Assembly and adopt amendments by an absolute majority of the combined membership. Since the initiative rests with the two chambers, they must be regarded as forming part of the sovereign. They first act separately; then in combination as National Assembly. Australia unites parliamentary initiative with popular ratification: an absolute majority is required in the two houses,[2] and in the popular vote a majority not only in the Commonwealth, but also in a majority of the member states. This method was borrowed from Switzerland, where there is, however, no requirement of an absolute majority in proposing an

[1] *Op cit.*, p. 655. Laski (*A Grammar of Politics*, p. 53) considers it doubtful "whether, in the Austinian sense, Belgium may be called a sovereign State at all.... It might, as a matter of theory, prove impossible to alter the Constitution. In that background either Belgium is not a sovereign State in its internal affairs... or its sovereignty resides in the electorate. But any electorate is an indeterminate body which is legally bound to act through organs and agents; and it is, according to Austin, the characteristic of sovereignty to be determinate and illimitable."

[2] The executive may submit a proposed amendment in spite of the opposition of one house, if the other house has repeated the proposal after an interval of three months

amendment. The Swiss constitution may also be amended by referendum when 50,000 voters present an initiative petition.[1]

Enough has been said to show that the sovereign may assume widely different forms and that some of the forms seem, to critical eyes, artificial and unreal. In devising the framework of government, men sometimes have shown too much ingenuity; at the apex of the pyramid they have set up a sovereign which is only now and then articulate enough to issue new commands. Nevertheless, however strangely the amending body may be constituted, it is, in a certain sense, sovereign; but because it is by no means the only kind of sovereign that we shall meet with, we must give it a special name. It is the legal sovereign, the *de jure* sovereign. To its commands the law attributes unlimited force. As compared with those intermediate authorities which exercise delegated powers, it is legally supreme.

Even from this restricted standpoint we meet with occasional difficulties. One at least should be noticed here. The commands of the sovereign are not always legally sustained against a disobedient subordinate. They should be sustained if a law is, as Dicey says,[2] a rule which will be enforced by the courts; and in certain countries they are. British courts will protect an act of Parliament, as American and Canadian courts will protect the constitution, against any infringement. But in France, for example, the validity of a parliamentary statute cannot be questioned in the courts on the ground that it is *ultra vires*. The French legislature is morally bound to respect the constitution and habitually does so; but, being judge of its own powers, it is not limited in the same legal manner as are the Canadian Parliament and the American Congress.

DE JURE AND DE FACTO SOVEREIGNTY

We are confronted by a difficulty of a different sort as we analyze the situation in Fascist Italy or Soviet Russia. On October 28, 1922, when Mussolini's Black Shirts marched on Rome, the constitution of Italy was the Charter of 1848, and the legal (*de jure*) sovereign was Parliament.[3] Mussolini became prime minister in the correct manner, by royal appointment. He proceeded to govern through Parliament

[1] Constitution, arts. 121-123. The constitution also provides for "total revision" (arts. 119-120), but no use has been made of these provisions. R. C. Brooks, *Government and Politics of Switzerland* (1918), p. 136.

[2] *Law of the Constitution*, p. 23.

[3] Since the Charter provided no means of making amendments, Parliament had asserted the power of a legal sovereign; and so, in the range of its authority, it resembled the British Parliament.

and to transform the constitution through Parliament. In a word, he complied with legal forms. But, if the legal sovereign was still obeyed, it was obeyed because the commands that it issued came from Mussolini and because they were enforced by him as the Fascist leader. The legal sovereign did what it was told to do. When the prime minister, who was in fact dictator, informed the legislators that he might have made the gray walls of Parliament a bivouac for his Black Shirts, they probably recalled what Cromwell had done to the Long Parliament. It was not necessary to drive them out. They became, in Mussolini's phrase, "a nice little Parliament" and followed his every suggestion. A somewhat different situation developed in Russia. Revolution overthrew the old legal sovereign; the biennial Congress of the U.S.S.R. took its place. But every one knows that the resolutions of the Union Congress depended upon the will of Stalin. He and Mussolini, with the forces behind them, occupy similar positions. Each controls the legal sovereign; each may be regarded as the actual or *de facto* sovereign, or, to use Bryce's term, the practical sovereign.[1]

This separation of legal and actual sovereignty is often encountered. It is a normal outcome of a shift in the distribution of political power. Outside of the established legal structure, some new agency of control develops—perhaps an ambitious individual, a military leader or demagogue, who has put himself at the head of disaffected elements in the community; perhaps an army or an organized economic group. This new agency is bent upon supplanting the old régime. It may do so suddenly and dramatically. But there is danger in such a violent breach with the past; it invites an equally violent reaction; and a shrewd leader, appreciating the value of tradition, especially the tradition of obedience, allows the old familiar façade (the legal sovereign) to stand untouched. The substance of power is enough, without the form. In this way, for generations, the Carolingians contented themselves with the formal position of mayor of the palace, parading the long-haired Merovingian kings, the Childerics and Chilperics, for the people to gaze at and revere. So, too, Augustus ruled at Rome for forty years. He was not emperor; what he held, besides the acquiescence of the people, was what they had conferred upon him—the tribunician, the consular, and the proconsular power for life. The republic, though dead in fact, persisted legally. The "sovereign" assembly still passed statutes (when told to do so) and elected the regular magistrates—behaved, indeed, very much like Mussolini's parliament.

[1] *Op. cit.*, vol. II, p. 512.

Cosimo dei Medici was still more subtle. As a private citizen, he got control of the republican government of Florence, without changing its outward form, and became an absolute ruler *de facto*. Even his grandson, Lorenzo the Magnificent, preserved the name of republic and the old republican institutions. Yet Lorenzo was virtually a tyrant. It may be that Pericles fell short of being a *de facto* sovereign. But he dominated Athens for the last thirty years of his life; and subsequent history suggests that his exercise of power was symptomatic of the decay in Athenian democracy. He has been called "a glorified boss." [1]

So far, we have discovered two kinds of sovereignty, legal or *de jure* and actual or *de facto*, the latter being the strongest active force in the State and capable of making its will prevail. The two should coincide. Otherwise there is danger of a conflict between them; for, although the actual sovereign would normally control, and act through, the legal sovereign, it might show little respect for the laws, as in the early days of Fascismo, and dispose the citizens generally to do likewise. Fortunately the two tend to coalesce.[2] The *de facto* sovereign may modify or displace the *de jure* sovereign. In one way or another, it will seek to acquire a legal title (Louis Napoleon did so by making use of the plebiscite), chiefly because such a title will carry with it a moral claim to obedience. Slow modification will succeed better than sudden supersession, the mass of the people being influenced by habit and being more likely to respond to a familiar voice of command. In England, Parliament did not supersede the king, as his original *de facto* sovereignty passed from him. The king was retained as part of the legal sovereign—the king-in-Parliament; and to-day, although he has lost the actual power to reject a bill, no act of Parliament will be recognized by the courts unless the royal consent has been formally given.

But processes of politics are not always easy to detect. Transformation takes place, as a rule, in such a gradual, unspectacular fashion that it escapes the eye of the most discerning contemporary observer.

[1] The American boss, though operating in a limited sphere, resembles a *de facto* sovereign. Consider Elihu Root's address before the constitutional convention of New York in 1915 (*Addresses on Government and Citizenship*, 1916, pp. 201-202): "What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no; not half the time, not half way.... From the days of Fenton, and Conkling, and Arthur, and Cornell, and Platt, from the days of David B. Hill, down to the present time, the government of the state has presented two different lines of activity," that of the constitution and that of the party bosses.

[2] Bryce, *op. cit.*, vol. II, p. 516.

The old sovereign continues to issue commands, and apparently to will them, long after some rival, perhaps by hidden and devious means, has become the real source of authority. It is only when the latter feels secure enough to reveal himself frankly in public, or when an open conflict occurs between the two, that the actual center of gravity can be ascertained, even approximately. At last we find out: we have been prostrating ourselves before a mere legal shell; as the foundations of the new *de facto* sovereignty settle, that shell will crack and collapse, giving place to a superstructure designed by architects of the new régime. But, although the truth may sometimes be disclosed, normally we are far from sure whether or not the legal and actual powers belong to the same body; or where the actual power lies when the legal sovereign has obviously lost it.[1]

ELECTORAL SOVEREIGNTY

It must be admitted that the conception of one indivisible sovereign, uniting legal and actual supremacy, is untenable when put to concrete tests. How can it be reconciled with the situation at Rome in the time of Augustus, or at Florence in the time of Cosimo dei Medici? How can it be applied in Soviet Russia or in Fascist Italy? Our analysis of government would be inadequate if we looked only for the legal sovereign or only for the seat of actual compulsive authority. Indeed, these two sovereigns, *de jure* and *de facto*, will not suffice for a true understanding of the distribution of power. We encounter a third form of sovereignty. Here it will be called *electoral sovereignty*. The other names that have been applied to it are open to various objections.[2]

[1] This difficulty is discussed by Arthur Feiler, in *The Russian Experiment* (1930), p. 193. "Who rules under this token of revolution; what power is covered, sanctioned, and symbolized by the red flag?" he asks. "This is the old question asked of every rulership and every State, and never, nowhere, completely answered. Nowhere does the written constitution supply more than a formal answer to his question, either [*sic*] in the United States nor in Germany, France, or England, any more than in the Soviet Union. From all sides confirmation is forthcoming of Lassalle's penetrating remark: 'The real constitution is the actual relationships of power.' These actual relationships of power, however, are at all times and in all places, even while the written constitution remains unaltered in its clauses and forms, undergoing a continuous, often impenetrable, but not on that account less profound, transformation. The relationship of intellectual and material forces is constantly changing, as is the relationship of groups, of sections, of classes, and the relationship of leaders and led; their mutual relationship changes as does the relationship of all these separate forces and powers to the State, whose real constitution at any time is only to be inferred from these perpetually changing actual relationships of power."

[2] Dicey, its discoverer (*op. cit.*, pp. 68-73), used the term "political sovereign." But some writers, while borrowing the term, make it mean sometimes the electorate, sometimes public opinion (Gilchrist, *op. cit.*, pp. 97-98; Garner, *op. cit.*

The need of recognizing a third kind of supremacy besides the legal and the actual is indicated by the embarrassment of John Austin when he sought to locate sovereignty in Great Britain. "I commonly suppose," he says,[1] "that the present parliament, or the parliament for the time being, is possessed of sovereignty; or I commonly suppose that the King and the Lords, with the members of the Commons' house, form a tripartite body which is sovereign or supreme." But here Austin meets with an obstacle. When Parliament has been dissolved, the voters proceed to elect a new House of Commons. The House, therefore, is dependent upon the electorate. How can sovereignty belong to a dependent body, a body whose members may be punished at the next election for failure to obey the will of the electorate? Austin, therefore, shifts his ground. He acknowledges that, "accurately speaking, the members of the Commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons." But Austin's ingenuity did not enable him to escape from the dilemma. It still remains true that the electorate can have no share in the exercise of legal sovereignty.[2] On the one hand, the courts take no notice of its will unless that will is embodied in a statute; and, on the other hand, they would not question the validity of a statute which extended the duration of Parliament indefinitely or which limited or abolished the electorate. Yet, in practice, the electorate does impose limitations upon the legal sovereign; every few years it creates a new House of Commons and, in doing so, largely pre-determines the nature of parliamentary commands. For that reason it deserves the title of electoral sovereign.

In certain states and at certain times we may find that the electoral sovereign does not exist. It did not exist in the democracies of Greece and Rome, where the enfranchised citizens, instead of choosing repre-

pp. 160-161), which occasions confusion. Again, the term political sovereignty is sometimes used for *de facto* sovereignty (F. W. Coker, *Recent Political Thought*, 1935, p. 507; Bryce, *op. cit.*, vol. II, p. 523); or it may be used for legal sovereignty (MacIver, *op. cit.*, p. 487). MacIver uses the term "ultimate sovereignty" (*ibid.*, p. 12), although it is not ultimate at all, but dependent upon another form of sovereignty in MacIver's hierarchy, the general will (p. 9).

[1] *Lectures on Jurisprudence* (4th ed.), vol. I, p. 253.

[2] Sir George Cornewall Lewis (*op. cit.*, p. 47) maintains that "the right of voting for the election of one who is to possess a share of the sovereignty is itself no more a share in the sovereignty, than the right of publishing a political treatise or a political newspaper." So, too, Bryce (*op. cit.*, vol. II, p. 510): "The fact that the House of Commons, a part of the legal sovereign of England, is chosen by the people ... does not affect the Sovereignty of Parliament," because the voters do not have the right of issuing directions that are legally binding.

sentatives, held sovereignty in their own hands; or in monarchies where the king succeeded to the throne by hereditary right, not election. If it does exist, it may include a mere fraction of the adult males—as was the case in England before 1832, and, indeed, for a generation afterwards; or substantially the whole adult population. The extent to which the suffrage has been conceded in any State should be made clear; and the practice of looking about for the electoral sovereign will make it so. We must be on our guard, however, against impostures. Is there an electoral sovereign in Russia or Italy? It exists on paper. But in both countries there appears to have been a great deal of intimidation, especially while the system of *viva voce* voting prevailed in Russia. The Italian electorate is limited to the approval or rejection of a list of candidates whom it has had no part in nominating. In both countries the actual sovereign controls both the electoral sovereign and the legal sovereign.

PLURALISM

Three kinds of sovereignty have been recognized here—legal, actual, and electoral. In a well-ordered State, of course, the first two are likely to be identical; for their separation occurs almost always in unsettled and abnormal periods of transition from one center of political gravity to another. Whenever they are separated, each is supreme in its own field: the legal sovereign still gives commands that have the force of law, even though the commands originate with the actual sovereign; the latter cannot give legal commands directly. Likewise the electorate is supreme in discharging its appropriate function. In one sense, the co-existence of two or three sovereigns might be described as pluralism, but not in the technical meaning of that term as employed in the discussions of political theorists. Pluralism involves a peculiar attitude towards organized groups or associations, even to the point of attributing to them a quasi-sovereignty. It has a concrete background.

Pluralists have been impressed by the portentous growth of organized groups in this industrial age. They contend that, as in the Middle Ages, the individual is being institutionalized, submerged in economic and social, political and religious associations, some of them of vast dimensions. Believing that these associations will dictate the future structure of society, they denounce coercive government and dispute its right, and even its power, to compel obedience on the part of the groups. Theory is used as a weapon of attack: the State, being

only one association among many, has no rightful claim to pre-eminence; if it is sovereign, so are the other associations. Thus, special pleaders for the church or for the trade unions bring all their philosophical resources to the support of group-autonomy, providing a speculative basis for a practical propaganda. Professor Laski is the philosophical propagandist for the interests of organized labor in Great Britain.

Pluralists do not deny, at present, that the State (through its government) possesses legal sovereignty. "It issues orders to all men and all associations within the area," says Laski; [1] "it receives orders from none of them." But this, he adds, is only a postulate of law. It does not carry with it any ethical justification. According to Professor W. J. Shepard, "the rights by which associations of individuals, such as churches, exist and pursue their ends are not derived from the state; and we recognize the wrongfulness of state encroachment upon their proper spheres of activity." [2] (Who is to determine "their proper spheres of activity" we are not told.) The possession of legal right appears to be ethically wrong; at least the exercise of it is wrong. Therefore, the whole conception of sovereignty should be abandoned. But the question remains: if the sovereign tries to coerce the associations, can it enforce its commands? This is a question of fact, not of ethics (which pluralists so often confuse with fact). It is a vital question. If in a clear-cut test of strength, organized labor (say) proved itself superior to the legal sovereign, we should have to recognize it as *de facto* sovereign. On the other hand, if a considerable number of associations successfully asserted their independence, there would be a condition of anarchy.

Now, it is easy to recall many occasions on which the sovereign has apparently given way before group pressure. Sometimes a command has been issued and then, in the face of resistance, recalled; or the effort to enforce it has been abandoned. Thus, the Fifteenth Amendment to the Constitution of the United States, safeguarding Negro suffrage, became, soon after its adoption, a dead letter in the Solid South; and the Eighteenth (prohibition) Amendment, after a dozen years of effort and failure to enforce it, was repealed. When Ulster resolutely opposed union with the rest of Ireland and made ready for civil war, Parliament dropped the original home-rule project. At other times,

[1] *A Grammar of Politics* (1925), p. 44. So, too, in *The State in Theory and Practice* (1935), p. 9, Laski admits that a coercive authority binds all individuals and associations to a certain way of life.

[2] *The History and Prospects of the Social Sciences* (Barnes editor, 1925), p. 43.

threats or overt acts of violence have preceded, and perhaps brought about, the conversion of the sovereign to a positive line of action. Instances are found in the special privileges which the British Parliament has conferred upon trade unions, whose numbers and tactics may well cause concern, and in the extension of the suffrage to women after the prolonged and stormy agitation of the Pankhursts.

Behavior of this kind may be difficult to reconcile with sovereignty. It looks like abdication; and abdication it would be if the sovereign repeatedly gave way before the same intransigeant group. The latter would then be *de facto* sovereign. But, when various groups are concerned, occasional surrenders may be interpreted in a different way. The possession of power does not necessitate its perpetual exercise. When the sovereign's commands are opposed, common sense and good judgment may suggest that at times a rigorous insistence upon the letter of the law would be inadvisable. Perhaps the cost would be too great—disproportionate to the satisfaction of vindicating the law. Would the wounds of civil war ever have healed if, by military force, Negro suffrage had been imposed permanently upon the Solid South? What would have been the consequences, at a critical juncture of the late war, if, when the Welsh miners defied the Munitions Act and went on strike, the British government had flung a challenge in the face of all organized labor? Would it have been wiser to meet the Indian *swaraj* and Egyptian nationalism with military repression instead of granting a large measure of self-government in the one case and qualified independence in the other? The sovereign may well hesitate, and at last, if its very existence is not imperiled, decide against taking drastic action. But force will be employed whenever the issue is really fateful. The English civil war of the seventeenth century and the American civil war of the nineteenth century may serve as illustrations. Many other illustrations could be given, such as the crushing of the British general strike of 1926 and the rigorous prohibition of any similar flouting of the sovereign in the future.[1]

The pluralists have not killed sovereignty by their arguments. At the moment when they had got the coffin ready and were preparing to sing requiems over the corpse, sovereignty suddenly began—in Russia and Italy and Germany—to fill the coffin with the carcasses of organized groups. Are the Russian labor unions and coöperatives anything more

[1] Consider, along with this, the situation in 1920, when labor set up the famous Council of Action and declared that any movement towards war with Soviet Russia would be followed by a general strike. Sait and Barrows, *British Politics in Transition* (1925), pp. 138-141.

than ghosts? Even Ogpu, which may have aspired to play the rôle of the pretorian guard or of the Turkish janissaries, has been swept from the path of the dictator. Instead of pluralistic chaos, we get despotism.

No doubt the behavior of the legal sovereign can be explained more adequately, as a rule, by its dependence upon the electoral sovereign. If the latter has not been reduced to impotence as the mere tool of a dictator, it hangs over the head of the legal sovereign like a sword of Damocles. It hangs by a hair; for, in the language of Professor MacIver, "all governments depend simply upon a margin of strength, represented by the balance of opinion in their favor" and "an act which reduces the margin weakens its authority entirely out of proportion to the turnover of opinion."[1] A new situation has developed, let us suppose,—one unforeseen at the time of the last election. Will the electoral majority hold together in supporting a policy of repression and perhaps of bloodshed? Is the risk worth taking? To flout opinion would be merely quixotic, because in the long run, when the voters finally act, they will entrust legal sovereignty to a different set of men and so reverse the unpopular policy. It was in deference to the electoral sovereign that the Fifteenth Amendment ceased to operate in the American South and that the prohibition amendment was repealed. There can be no question that the British electorate would have recoiled from the coercion of Ulster, even though it acquiesced in giving Dominion status to the rest of Ireland.

FUNCTION OF THE MASSES

Now, the electorate in Great Britain and in the United States includes most of the adult population. Its opinion is very much the same as the opinion of the whole community. But, when the suffrage is narrowly restricted, as it was in the reign of George III or of Louis XVIII, the two may be quite different; and under an absolute monarchy there is no electoral sovereign at all. It is a mistake to confuse the mass of the population with the electorate, not only because of the variable relative size of the latter, but also because its size may depend upon the extent of political consciousness—that is, active political interest—in the community, and finally because the electorate has been established by law and given a specific governmental function. Yet the mass of the population, without being associated with the government, exerts upon it a tremendous pressure.

That pressure is mainly negative, the outcome of inertia. The mass

[1] *Op. cit.*, p. 292.

sets limits to the will of the sovereign on account of its bigness and its weight. It moves slowly, as it makes successive minor adjustments or responses to the environment. Drugged by propaganda or intimidated by ruthless severity, it may be driven momentarily in a direction not of its own choosing and at greater than its accustomed pace. But too sudden a breach with habit and too rapid a shift from the familiar environment, always cause discomfort or pain. The invariable result is a resistance which mounts in proportion to the sense of maladjustment and which in the end carries the mass back towards its old habits and old haunts. The course of every revolution will substantiate this thesis, and none better than the Russian. The Russian family, for example, has survived persistent attempts to destroy it; and to-day soviet authorities, in a complete reversal of policy, instill filial piety and respect for elders. *Pravda* proclaims that love is the basis of the socialist family; according to *Izvestia*, mixed nude bathing is offensive to the dignity of soviet citizens. The collective farm has been remolded to satisfy the peasant's craving for family life and private property.[1] Indeed, well-rooted custom is too hardy a growth to be stamped out by legislation. The most autocratic monarch, in order to rule, must be the guardian and servant of custom; he must respect and even bow to the general sentiments of his subjects. "From some acts," says Bryce,[2] "even a Sultan Hakim of Egypt or a Gian Galeazzo Visconti of Milan recoils,

[1] The collective farm is now far different from the projected type of 1929: the peasant has his own home and a garden of at least one and a quarter acres and sometimes twice that area; he can keep one cow and three calves, two sows and their litters, fifteen sheep or goats, any number of poultry and rabbits; and, when he wishes to till part of his garden, the collective must lend him horses. The collective gets title to its land. All this is very different from the plan of barrack-life, institutionalized children, common meals, and even clothing as property of the commune. There is great disparity of wages throughout Russia now, because of the need of attracting able men to positions of responsibility. Huge internal loans are creating a new bourgeoisie. The most significant aspect of the Russian situation is this: propaganda, once regarded as a chief instrument of social control, has now lost its efficacy; and, since the people pay little attention to it, the dictatorship uses it less and less frequently.

[2] *Op. cit.*, vol. II, p. 523. Of Runjeet Singh, absolute despot of the Punjab, Sir Henry Maine remarks (*Early History of Institutions*, p. 381): "He could have commanded anything; the smallest disobedience to his commands would have been followed by death or mutilation, and this was perfectly well known to the majority of his subjects.... But he never made a law. The rules which regulated the life of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village-communities...." The despot was, in fact, the servant of custom. See, too, Woodrow Wilson's observations on the inability of the Russian Czar to override popular habit (*The State*, p. 600); and R. M. MacIver's (*The Modern State*, p. 160). According to Sidgwick (*The Elements of Politics*, p. 24), the power of government "is limited not only by its own morality ..., but by the prevailing moral opinion of the community, especially by opinions, resting on custom and habit, as to the proper nature and limits of governmental coercion."

because he feels that they might provoke an insurrection or bring about his own assassination."

May we regard this mass veto as an exercise of sovereignty? In Professor MacIver's scheme, which presents sovereignty in three successive forms or stages, it takes a position of preëminence under the name of the "General Will," not to be confused in any way with that of Rousseau.[1] Sidgwick insists that there is "a certain sense in which the mass of the people in any country may be said to be the ultimate depository of political power." [2] One frequently hears the vague phrase "sovereignty of the people" used to express the moral control and influence which the community at large exercises over the government.[3] The view taken here, however, is that the people are simply the material upon which the sovereign works, though the very nature of the material sets bounds to what the sovereign can do with it. The will of the people—apart from that of the electorate, which may or may not exist—is unformulated, unorganized (except in a multitude of associations), and, as MacIver says, "half-buried in the unreflective life of everyday." It is associated with the legal apparatus of government, not as ruling, but as being ruled. With the growth of political consciousness, however, changes occur in the character of that legal apparatus. First a small section of the people, and finally all the adults, or all the adult males, are conceded a share in the government. The people acquire a form of sovereignty through admission to the electorate. They may even be endowed with legal sovereignty, with ultimate control of all the political machinery, through the operation of initiative and referendum.

CONCLUSION

We recognize, first, a legal sovereign, which has *de jure*—that is, from the standpoint of law—the final word of command. There may be

[1] MacIver, *op. cit.*, p. 11. Rousseau represents the general will as continuously and directly engaged in legislation.

[2] *Op. cit.*, p. 630. The student should familiarize himself with the judicious discussion that follows. Sidgwick is never narrow and didactic; he always considers various possible situations.

[3] "Sometimes the phrase, *sovereignty of the people,* means the admission of all members of the community, or all the free adult males, to the election of representatives or magistrates. In this sense it appears to be applied to the United States of America: but this usage is not less improper and figurative than the other mentioned [moral influence]; as to the right of voting for the election of one who is to possess a share in the sovereignty it is itself no more a share in the sovereignty than the right of publishing a political treatise or a political newspaper." Sir George C. Lewis, *Remarks on the Use and Abuse of Some Political Terms* (1832), p. 47.

no other sovereign. With the establishment of the representative system, however, a second sovereign makes its appearance—the electoral sovereign. It may acquire a share in the legal sovereignty, ratifying constitutional amendments that the legislature has proposed; or even all the legal sovereignty, so that it acts without the legislature by means of the initiative. In most cases, however, constitutional amendments are made, under special rules of procedure, by the legislature. Then the electoral sovereign is both superior and inferior to the legal: superior in the fact that it creates and destroys the legislators; inferior in the fact that the representatives, in their sovereign capacity, may modify or even abolish the electorate. In a period of political transition, some person or group in the community may become the center of real, effective power—the actual or *de facto* sovereign. This sovereign may either (illegally) destroy the other sovereigns or else, preserving them, bind them to its will. If it demonstrates its stability over a considerable length of time, its *de facto* supremacy will be merged in *de jure* supremacy. But, although we use the term sovereign, we do it with reservations: no autocrat, be he Ranjeet Singh or Galeazzo Visconti, can compel an unwilling people to change their deep-rooted habits and customs; he is always confronted with the risk of revolution.

CHAPTER IX

LAW

WE speak of the State as sovereign—and in so doing mean that it exercises sovereignty through its government. Similarly, we speak of the State as law-giver. The sovereign gives commands; that is, the government makes laws. But we shall find, as suggested at the end of the last chapter, that the kind of commands which can be given and enforced depends upon the willingness of the mass of people to receive them. In a large measure the servant dictates to the master, or the master defers to the servant; for any attempt to set up rules of conduct that conflict with the habitual practice of the masses will provoke at first wide-spread passive resistance and ultimately, if such a course be not abandoned, revolution. The substance of the law-maker's power falls far short of its imposing form.

Before going farther with this consideration it may be well to ask what is meant by law. Some of the most eminent jurists have been reluctant to answer this question, among them Sir Frederick Pollock. The definiteness of legal ideas, he says,[1] varies with their generality; it is easy enough to define an estate in fee simple, but impossible to give a complete answer to the question, What is law? The answers that have been given show great variations. Any student will be amply repaid if he collects thirty or forty definitions of law, beginning with Hobbes or, indeed, with Aristotle,[2] and subjects them to analysis. He will be likely to agree that some of them are "absolutely meaningless"

[1] *A First Book of Jurisprudence* (2nd ed., 1904), p. 4. In *The Story of Law* (1927), p. 1, J. M. Zane says: "No jurist has yet achieved a definition of law that does not require the use of the idea of law, either implied or expressed, as a part of the definition." Zane shows "how we move around a circle," and "get back to the place whence we started" when we ask the meaning of some of the terms used in the definition. C. K. Allen (*Law in the Making*, 2nd ed., 1930, p. 23), dismisses one of Austin's definitions, framed over 100 years ago, on account of its "fallacious simplicity," but has to admit that Professor François Gény's twentieth-century definition, which is very long and involved, is no more successful than Austin's: it loses in clarity what it seeks to gain in comprehensiveness.

[2] Law is, according to Hobbes, "the speech of him who by right commands something to be done or omitted"; and according to Aristotle, "whatsoever the ruling part of the state shall enact."

and that "in others a spark of truth is distorted by a mist of rhetoric." [1] But, having thrown out the definitions that are essentially of little value, he will find that the remainder will not fit into any single category.

There has been a sharp cleavage between two contending schools of jurisprudence. One school—the analytical—lays emphasis upon state sovereignty and compulsion. Thus, according to Sir T. E. Holland, "a law is a general rule of external human action enforced by a sovereign political authority." [2] Woodrow Wilson takes a similar view: [3] "Law is the will of a State concerning the civic conduct of those under its authority. This will may be more or less formally expressed; it may speak either in custom or in specific enactment.... Law is that portion of the established thought and habit which has found a distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government." The other school—the historical—regards the people themselves as law-makers through the formation of habit and custom. Carter has this in mind when he defines law briefly as "a body of rules for the regulation of human conduct" and when he quotes with approval the definition of the German jurist Dernberg—law is "that ordering of the relations of life which is upheld by the general will." [4] Likewise, Professor W. J. Shepard regards law as a rule of conduct "originating in and sanctioned by the general sense of right of the society." [5] The jurists of both schools are mainly preoccupied with the sources of law—the one discovering them in the commands of the government; the other, in the customary behavior of the masses. But the controversy can at least be evaded, if a distinction is made between law and the sources of law.[6] Thus, a third point of view centers upon the judicial process: law is the aggregate of rules which are "enforced by the courts" or "recognized and acted on" by them.[7] It is not law because the judges recognize it; the judges recognize it because it is law. The test of law is judicial recognition, irrespective of its source, no matter whether that source be popular custom or statute.

That this theory of judicial recognition is open to criticism will soon appear. But, aside from such problems, there is nothing gained by a

[1] J. C. Gray, *The Nature and Sources of the Law* (2nd ed., 1921), p. 85.
[2] *Elements of Jurisprudence* (11th ed.), p. 13.
[3] *The State* (rev. ed., 1898), p. 587.
[4] J. C. Carter, *Law: Its Origin, Growth, and Function* (1907), pp. 14 and 8.
[5] *The History and Prospects of the Social Sciences* (H. E. Barnes, ed., 1925), p. 439.
[6] J. C. Gray, *The Nature and Sources of the Law* (2nd ed., 1921), pp. 84 and 93.
[7] A. V. Dicey, *Introduction to the Study of the Law and the Constitution* (8th ed., 1915), p. 23; Sir Paul Vinogradoff, *Common-sense in Law* (1913), p. 31.

momentary evasion of the cleavage between the analytical and historical schools. That cleavage cannot be ignored; it touches the essential character of law. The layman would make little progress towards a real penetration of the subject if he were satisfied with the knowledge that jurists quarreled over it and if he did not try to find out what they were quarreling about.

ANALYTICAL SCHOOL OF JURISPRUDENCE

John Austin may be regarded as the founder of the analytical school.[1] To him the characteristic form of law is that of a command given by a superior to an inferior and enforced by material sanctions. Every positive law is the creature of a sovereign power, which either established it directly or authorized some subordinate person or body to establish it; and penalties are incurred by disobedience to it. This conception of law has the attraction of simplicity and consistency. It seems to accord with the citizen's experience. Under authority of the Constitution, Congress establishes an income tax and provides that disobedience to its commands shall be punished by fine or imprisonment or both. Under the authority of its charter, a city prohibits the parking of cars in certain congested areas and fixes the punishment for violation of the ordinance. Everything in these two cases answers to the Austinian formula.

But the income-tax law is a particular kind of law, statute law, which marks a mature stage of social progress.[2] Custom preceded statute. Critics naturally ask how custom, which slowly takes shape out of public opinion, can be reconciled with the theory of command; and where we can find a supreme law-giver in primitive society. Before the establishment of courts or any other enforcing authority, they contend, custom was binding and obligatory in the sense that disobedience to it was regarded as a breach of positive duty. Is such a

[1] In the seventeenth century Hobbes maintained that law was a command of the sovereign. But he was less interested in developing a new theory of law than in justifying the exercise of the royal prerogative by Stuart kings. Nor was Jeremy Bentham, in the eighteenth century, bent upon a scientific inquiry into the nature of law; the theory suited his particular purposes as a reformer. Austin, though a disciple of Bentham, did not take such a mechanical view of the law as to suppose that written codes could be formulated without regard to a people's stage of civilization or its past.

[2] "The notion of law as a *statute*, a thing passed by a legislature, a thing enacted, made new by representative assembly, is perfectly modern, and yet it has so thoroughly taken possession of our minds ... that statutes have assumed in our minds the main bulk of the concept of law as we formulate it ourselves.... There were no statutes within the present meaning of the word more than a few centuries ago." Frederic Jesup Stimson, *Popular Law-Making* (1910), p. 2.

custom to be denied the quality of law simply because no sovereign has recognized it? It is constantly followed and obeyed; and the fact of obedience seems to be a better criterion than the fact of command.[1] This argument does not, in reality, affect the validity of Austin's position. Primitive society lies outside his domain. He is solely concerned with communities which have achieved statehood and which live, therefore, under an authoritative government. To pre-state custom he gives the name of positive morality. If others insist upon calling it law, it does not thereby become the same thing that goes by that name in the modern State. The distinction between law in a stateless community and law in the State, being based on realities, must still be recognized. We might say that the former, like international law, is imperfect law.[2]

Austin has more difficulty in fitting into his system the common law of England and other English-speaking countries, this being (some say) merely ancient custom which the judges have recognized and applied. He contends that it is judge-made law and that the judges are agents of the sovereign power acting in its name and subject to any restraints it may care to impose. What the sovereign power does not forbid, it accepts; what it accepts, it commands. This method of assimilating the common law to a command is dismissed by Maine as "a mere artifice of speech" and "a mere straining of language"; [3] and by Gray as a "forced expression." [4] But it is a fact and not a figure of speech that the judges acted for the king in Norman and Plantagenet times and that their decisions were effective only as he enforced them.

More than a century has passed since Austin wrote his *Lectures on Jurisprudence*. Although his doctrine has been subjected to unsparing attacks, its vitality is far from being exhausted. Criticism has often been academic. Thus the sanction which Austin associates with the commands of the sovereign has been attacked on theoretical rather than practical grounds. Sir Paul Vinogradoff holds "that the element of direct coercion, though commonly present, is not absolutely necessary to constitute a legal rule; and that while we may look upon it as the most convenient means of enforcing law, we cannot regard it as the essence

[1] C. K. Allen, *Law in the Making* (2nd ed., 1930), pp. 28-29. "This conclusion [that custom is not law] certainly follows when it has once been assumed that all law must be a political command; but it does not seem to occur to Austin that the very rules which he so summarily dismisses challenge the initial assumption itself. Nor is the exposition improved by dubbing custom 'positive morality.'" Austin fails to explain why such rules lack the character of law.

[2] W. E. Hall, *A Treatise on International Law* (6th ed., 1909), pp. 13-14.

[3] *Early History of Institutions*, pp. 364-365.

[4] *Op. cit.*, p. 85.

of legal relations." [1] Sooner or later, he says, a point is reached when material compulsion ceases to be the reason for obeying the law; and in its stead we have reasonable acceptance, instinctive conformity, or habit.[2] C. K. Allen does not deny the necessity of sanctions in the modern State, but maintains that they have developed, like the law itself, in a natural process of growth and as the product of social forces. The sanctioning power, instead of creating legal rules, has been created by them.[3] We may ask whether it is "reasonable acceptance" or fear of the penalty that constrains men to make accurate income-tax returns and whether the sanction is unnecessary if four-fifths of our taxable population obey the law instinctively. We may ask what difference it makes to Austin's theory if the sanctions, though existing and necessary, are held to be the product of social forces.

Much criticism of Austin has been based on a misapprehension of his position. He is speaking as a lawyer; his theory is a legal theory. He discovers in the state a person or body which at last resort has the right, *de jure,* to issue commands. But he does not claim that legal right is tantamount to actual power, that form and substance are the same. He is quite aware of the dynamic rôle of the electorate, when one exists.[4] In fact, he points out that in any State, even when the government is autocratic, the sovereign is restrained by the opinions of the people and must defer to "the principles and maxims" held by the bulk of them or by the most influential portion.[5] Perhaps he erred in thinking of the influence of the masses as negative rather than positive. On the other hand, the historical school may have erred in the opposite direction by reducing the element of command to a metaphor; that is, by insisting that the rulers adjust their wills to the wills of the ruled and command only what the people desire.

HISTORICAL SCHOOL OF JURISPRUDENCE

The historical school originated in Germany at the beginning of the nineteenth century. Though not its founder,[6] Frederick von Savigny was its most famous apostle; he was succeeded by men of equal eminence and less extravagant doctrine, like Sir Henry Maine in England and J. C. Carter in the United States. When Savigny wrote his

[1] *Common-sense in Law* (1913), p. 42. What the state is bound to do, he says (p. 44) is to see that the wills of the members of the community do not clash.
[2] *Ibid.,* p. 52.
[3] *Law in the Making* (2nd ed., 1930), p. 25.
[4] See Chapter VIII, p. 150.
[5] F. W. Coker, *Recent Political Thought* (1935), p. 503.
[6] Gustav Hugo (1764-1844) was the founder. Savigny lived from 1779 to 1861.

Vom Beruf Unserer Zeit (1814), he was chiefly concerned with combating the project of legal codification, so dear to the hearts of French jurists in the eighteenth century and to the English reformer, Jeremy Bentham. But incidentally he pictured law as a living thing which could not be created artificially at the caprice of jurist or legislator. Law comes to life, he asserted, in the *Volksgeist*, the common consciousness of the people, and, assuming the form of custom, is as indigenous as the flora and fauna of the country. It springs from the deep soil of human relationships. Law is valid, therefore, only when it takes its rise from popular conviction—only when it embodies the inherent legal instincts of the community. Any attempt to manufacture it, unless in accordance with the *Volksgeist*, is bound to result in failure, the people refusing to be guided by it.[1]

"It is directly contrary to the truth," according to a contemporary American jurist,[2] "that law is something imposed by the legislative body upon the people. Acceptance has always been the theory and the fact. No rule of law was ever successful or ever endured unless it received practical general acceptance among the whole body of the people, for the simple reason that universal human experience has demonstrated that a rule of law not accepted by any considerable portion of the people can never be enforced.... Whatever the means by which law is recognized, whether it be by legislative enactments, by decisions of courts, by rescripts of rulers, law is in fact law only when it is cheerfully accepted and gladly obeyed by the great mass of the social body. Acceptance by the community is needed to breathe life into the edict of the harshest despot. As the Roman Emperors recognized, the government is the creation of law. No government ever made law in the sense of creating substantive legal rights and correlative legal duties. Government may superficially appear to make law as Hobbes and Austin mistakenly supposed, but it is the acceptance of the rules by society that makes laws and government." [3]

Such being the case, the nature of law can best be appreciated by looking at primitive society. There conduct is governed by customary

[1] C. K. Allen, *op. cit.*, pp. 44 *et seq.* and 105; J. C. Gray, *op. cit.*, p. 89; W. J. Shepard, *op. cit.*, p. 438.

[2] J. M. Zane, *The Story of Law* (1927), p. 271.

[3] "Law we have found to be based upon and to be dependent upon Custom, and therefore we cannot materially change law without changing Custom, and to change Custom is, as we have found, a thing beyond our power—that is, beyond our direct and immediate power. Society cannot, at will, change its customs, indeed it cannot will to change them." J. C. Carter, *Law: Its Origin, Growth, and Function* (1907), p. 320.

rules, which Austin styles "positive morality," but which, as the historical school views them, are followed as law notwithstanding the absence of any sovereign injunction. They have taken the shape of social habit from the frequent repetition of *de facto* behavior.[1] The processes of law could not wait for the appearance of an Austinian sovereign and a theory of command and sanctions. Custom has sufficient sanction of its own in the general inclination to conform—to do as others do—and the equally general disinclination to suffer as a non-conformist.

But is custom less effective to-day than it was in primitive times? "What has governed the conduct of men from the beginning of time," says Carter,[2] "will continue to govern it to the end of time. Human nature is not likely to undergo a radical change, and, therefore, that to which we give the name of Law always has been, still is, and will forever continue to be Custom.... Legal writers have at all times allowed much weight to custom, viewing it as one, but only one, of the sources of law, as if there were some governmental power standing above custom, the functioning of which was to pronounce judgment on the wisdom of custom, and select from it the rules it would enforce and reject the rest. Ancient customs they have indeed regarded as having the force of law,[3] but this quality they impute, not to the custom, *qua* custom, but to its antiquity. Whereas the conclusion at which I arrive erects present existing custom as the standard of law." [4]

To Carter and to the school which he so ably represented law is self-created and self-executed. It is the form which human conduct assumes

[1] According to Carter (*op. cit.*, p. 122) custom is "the uniformity of conduct of all persons under like circumstances"; according to Sir Frederick Pollock (*A First Book of Jurisprudence*, 2nd ed., 1904, p. 10) it "seems to have no primary meaning beyond that of a rule or habit of action which is in fact used or observed (we may perhaps add, consciously used or observed) by some body or class of persons, or even by one person."

[2] *Op. cit.*, pp. 120-121.

[3] English courts recognize custom as law when it is known to be certain, continuous, reasonable (from the standpoint of the particular case), and existent from immemorial time. The period of legal memory (according to judicial interpretation of the Statute of Westminster, 1275) is supposed to run from the accession of Richard I in 1189. But in practice it is by no means necessary to prove the continuous existence of the custom from that time. The court held in *Dalton v. Angus* (1881) that, if proof were carried back as far as living memory would go, there would be a presumption that the right claimed had extended from the time of legal memory (1189).—Vinogradoff, *op. cit.*, p. 154.

[4] Carter puts forward the same contentions on p. 71, maintaining that present custom is as effective as if it reached back so far that its beginning was not known. See also C. K. Allen, *op. cit.*, p. 26: "Our 'highly-developed,' 'civilized' societies in the modern world are just as replete with social customs as the 'primitive' societies of the past or the 'backward' societies of to-day. These customs are doubtless more intelligent and for the most part less superstitious than once they were; but they are just as numerous and just as powerful."

under the operation of those forces which govern conduct. "It is the fruit," says Carter, "of the myriads of concurring judgments of all members of society pronounced after a study of the consequences of conduct touching what conduct should be followed and what should be avoided." [1] But, since conduct is necessarily controlled by previous thought, and since such thought is produced by the interaction of character (biological heritage) and environment, the only way to control conduct is by controlling character and environment—something that no legislative action can accomplish. "Conduct consists in some physical movement of the body, and it is of such movements only that the law takes direct notice, although in some exceptional cases, where the nature of the act is qualified by the intention which prompts it, it may inquire as to that intention. Man has thoughts or feelings moved by the action of the external world upon his physical constitution which necessarily impel him to action, and inasmuch as the constitutions of men are similar, and the environments, in the same society, similar, the actions of men in the same society are similar, and conduct is consequently necessarily exhibited in the form of habits and customs." [2]

Carter sets severe limits to the efficacy of statute law. He goes so

[1] *Op cit.*, p. 130. Walter Lippmann writes in *A Preface to Morals* (1929), pp. 274-275: "The essential point is that as the machine technology makes social relations complex, it dissolves the habits of obedience and dependence; it disintegrates the centralization of power and of leadership; it diffuses the experience of responsible decision throughout the population, compelling each man to acquire the habit of making judgments instead of looking for orders, of adjusting his will to the wills of others instead of trusting to custom and organic loyalties. The real law under which modern society is administered is neither the accumulated precedents of tradition or a set of commands originating on high which are imposed like orders in an army upon the rank and file below. The real law in the modern state is the multitude of decisions made daily by millions of men.... The crucial difference between modern politics and that to which mankind has been accustomed is that the power to act and to compel obedience is almost never sufficiently centralized nowadays to be exercised by one will. The power is distributed and qualified so that power is exerted not by command but by interaction." Without realizing it Lippmann has been describing the normal process of custom-making—"adjusting his will to the will of others," "the multitude of little decisions made daily," "interaction." Such a process is not peculiar to the present time; it has always been going on, like Carter's "myriads of concurring judgments."

[2] Carter, *op. cit.*, p. 167. C. K. Allen, while criticizing some doctrines of the historical school, is something of a behaviorist. He says (*Law in the Making*, p. 26): "All creatures are creatures of habit. In the lower forms of life, habit is automatic and apparently uncontrollable; we call it instinct, and beyond knowing that it exists and produces extraordinary phenomena, we are unable to explain it. In man, habit is not entirely automatic, though in the more primitive forms of social grouping it is very nearly so. There is not a very vast difference between the automatism of an ant and the tribal habits of an Australian aboriginal; the ant, indeed, in many respects has the better of the comparison. But civilized man possesses a certain degree of individual liberty; choice in the adoption of habits and customs. No more than the ant, however, can he entirely

far as to say that, being preoccupied mainly with problems of political organization, it may be ignored for any general purposes such as an inquiry concerning the main factor in our substantive law. It has been correctly described, he says, as a mere fringe upon the body of the common law.[1] Legislation can be effective only when reinforcing custom, supplementing and clarifying it, encouraging conformity to it by means of rewards or punishments. It cannot make or change or abrogate customary law. To prove his point, he gives instances in which statutes have come into collision with deep-seated custom and, as a consequence, have utterly failed of enforcement. Similarly, custom prevails over the courts. "Society will, if the matter be one of grave importance, pursue its own course, regardless of the decision. It will follow the fundamental law which governs conduct, namely, that custom is the controlling power." Human conduct follows its own inherited laws.[2]

RECONCILIATION OF THE TWO VIEWS

As they are sometimes presented, the tenets of the two schools, analytical and historical, seem hard to reconcile. How can law be at once the command of a sovereign and an emanation from the masses? In one sense—when formulated without qualification and looked upon as mutually exclusive—both doctrines are wrong. In another sense—when stripped of extravagant claims and looked upon as two complementary points of view—both are right, both necessary to an understanding of the nature of law. It would be wrong to say that the sovereign can command and enforce anything, however repugnant to the will of the community; or to say that the sovereign can command and enforce nothing, apart from the dictates of the *Volksgeist*. Austin's theory represents well enough the external form that law assumes in the State; the government, possessing *de jure* sovereignty, has the right to make and enforce the law.[3] But Austin himself acknowledges the

rid himself of customary influences. The mere existence of a society, the mere plurality of individuals, gives rise to customs from which no single member of the totality can completely divorce himself."

[1] Carter observes (*op. cit.*, p. 182): "Inasmuch as in the view I have taken substantially the whole private law which governs much the larger part of human conduct has arisen from and still stands upon custom, and is the necessary product of the life of society, and therefore incapable of being made at all, the opposition between this view and the theory of Austin is irreconcilable."

[2] Carter, *op. cit.*, pp. 83, 120, 130, 203, 205.

[3] Carter himself admits (*op. cit.*, p. 182) that Austin's theory properly defines statute law. Why should he refuse to admit that the judicially-determined custom which constitutes the common law takes on the quality of a command when the sovereign enforces it?

existence of *de facto* limitations:[1] no government, despotic or otherwise, can ignore the settled inclinations of the bulk of the people or of an influential and resolute minority. The real question before us is the extent to which the will of the masses does in fact prevail over the will of the sovereign. Disciples of the historical school take varying views. Zane simply insists that, to be effective, a command must be "cheerfully accepted and gladly obeyed by the great mass." According to Carter, law originates in popular conviction or the common consciousness and is self-created, self-executed. Before reaching any conclusion, we must examine some aspects first of customary law and then of legislation.

Custom arises, as Carter explains, through the interplay of men and their environment, through the accumulation of day-by-day minor adjustments, responses to stimuli. If similar situations recur frequently enough, more or less automatic responses result in the formation of habit. But does such a process of habit-formation justify what Vinogradoff calls "mystic talk about popular conviction"? Customs are rather the outgrowth of experience; and the only kind of conviction that lies behind them is a conviction of their convenience or necessity. They are based on concrete fact, not abstract idea; on practical example, not some deliberate reasoning process. Often enough an obligatory mode of conduct proceeds from some more or less casual choice between indifferent alternatives, between two equally expedient courses. Is there any question of wisdom involved in going to the right instead of to the left, or in requiring two witnesses instead of three to make a will?

The customary rule takes shape under pressure of some sort—in most cases, perhaps, economic pressure. Property everywhere has been the chief preoccupation of the law; and the possessors of property have generally managed to see that their interests are adequately secured, even when they have dispossessed another class by spoliation. It is often said by theorists that the foundation of law is social justice; but no realistic view of legal history can substantiate such a contention,—however flattering it may be to the struggling soul of the race,—

[1] Sir Henry Maine, though himself an adherent of the historical school, acknowledges that the great analytical jurists do not hold that the sovereign "actually wields this stored-up force of society by an uncontrolled exercise of will.... [That] is certainly never in accordance with fact. A despot with a disturbed brain is the sole conceivable example of such sovereignty. The vast mass of influences, which we may call, for shortness, moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by its Sovereign." *Early History of Institutions,* pp. 358-359.

unless we say, not social justice, but justice as conceived by the powerful.[1] Besides the clash of man with his environment, there is a clash of man with man, of class with class, of one material interest with another; for within a given community all the people do not share the same biological heritage, social heritage, and physical environment. There are Eloï and Morlocks in *The Time Machine.* That custom may be imposed by a dominant class seems to be established by cases in which most of the population has been held, with customary legal sanction, in an economic dependence that may amount to serfdom. Only by saying that the masses acquiesce in their degradation can we find any room here for Savigny's *Volksgeist,* or popular conviction of right. It does not appear in those international customs, such as the Law Merchant or *Consolato del Mare,* which grow out of commercial contacts and affect only a special group in each country. In most cases, perhaps, custom affects a special locality; it is local rather than national in scope. Medieval France, for example, presents a bewildering variety of rules applying to province, municipality, manor, occupation, and so forth. Some approach to unity could be achieved only through the nationalizing influence of the royal courts and legislation.

JUDGES AS LAW-MAKERS

Now, the historical school maintains that judges, instead of making law, simply find it as it already exists in popular custom and statutes. The judges search for the appropriate rule, which is then applied to the facts of the case before them. Carter confronts Austin with this "hard fact": not one of the long line of illustrious English judges ever supposed that he was making law, either by virtue of delegated authority or otherwise.[2] True, judges give conflicting statements of what

[1] "Laws, we are told by ancient sages,
Have been like cobwebs in all ages.
Cobwebs for little flies are spread,
And laws for little folk are made.

"But if some insect of renown,
Hornet or beetle, wasp or drone,
Be caught in quest of sport or plunder,
The flimsy fetters fall asunder."

Or consider Wordsworth's lines:

"Because the good old rule
Sufficeth us,—the simple plan,
That they should take who have the power
And they should keep who can."

[2] *Law: Its Origin, Growth, and Function* (1907), p. 183. On the other hand, take this pasage from Ernest Barker, *National Character* (1927), p. 160: "Originally it was the judges who made the law, or induced the king to issue in the

law is. When substantially the same facts come before them again, they correct an erroneous decision. In the earlier decision—according to Carter's argument—they had classified incorrectly the transactions being adjudicated upon and had held them inconsistent with social custom, when, in fact and upon a just view, they were in accordance with it. If the rule first laid down has failed to control conduct, then the courts change the rule so as to make it harmonize with actual custom. "If they see that conduct which they once pronounced wrong continues to be repeated, not in exceptional instances merely, but generally, they see that such conduct is one of the ways of society; that the business of life could not be conducted except upon the assumption that such conduct is right; in other words, that it is actually in accordance with custom, and that their previous classification of it as otherwise was erroneous. We have here a further proof that a judicial precedent is nothing but a supposed custom authenticated by the public official stamp.... And it is well to keep constantly in mind that this law, being tantamount to the customs enforced by society, is an *existing* fact, or body of facts, and that the courts do not make it, or pretend to make it, but *find* and *ascertain* it, acting upon the true assumption that it already exists." [1]

Austin took a very different view. The judges made the law which they declared; and they did so rightfully, by virtue of an authority delegated by the sovereign—not, as Bentham insisted, by usurpation. Austin referred with contempt to "the childish fiction" that common law is a "miraculous something made by nobody, existing, I suppose, from eternity, and declared from time to time by the judges." An overwhelming weight of juristic opinion supports him to-day. The theory that the judges are automatic finders of the law is absurd, according to Gray; for they are constantly making *ex post facto* law.[2]

form of 'assizes' the rules of action which they had framed. Even in the thirteenth century the judges continued to change and frame the law. 'Do not gloss the statute,' said the chief justice in 1305 to counsel; 'we understand it better than you do, for we made it.' By 1300, however, a Parliament had come into existence, and that Parliament ... was a 'High Court,' capable of judicial decision which, because it was *the* High Court, must necessarily be regarded as final. It is impossible, in dealing with the history of the Middle Ages, ... to draw any clear line of distinction between judicial decisions and legislative enactments, or between judgment-giving and law-making bodies."

[1] Carter, *op. cit.*, pp. 83 and 85.

[2] *The Nature and Sources of the Law* (2nd ed., 1921), pp. 98-99. Why, he asks, have courts and jurists so struggled to maintain the preëxistence of law? The reason is the "unwillingness to recognize the fact that the courts, with the consent of the state, have been constantly in the practice of applying in the decision of controversies rules which were not in existence and were, therefore,

It is a fiction, according to Roscoe Pound; and the fiction should be discarded. "A process of judicial law-making," he says, "has always gone on and still goes on in all systems of law, no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical." [1] According to C. K. Allen, common law is neither an agglomeration of spontaneous customary rules nor the artificial creation of expert minds.[2] The relation between the judge and indigenous custom is one of action and reaction. On the one hand, the customary practices with which the judge had to deal in medieval England were not mere inventions—they rested on the basis of preexisting popular observance; on the other hand, the judge, in "finding the law," left upon them the impress of his own personality and his own thought. There is "overwhelming evidence" that the judge is far from being "a mechanical impersonal instrument for the application of self-sufficient customary law." What goes by the name of custom is in fact largely judge-made.[3] The custom of the realm is the custom of the royal courts. It was the great merit of the medieval judges that they established "approximate uniformity in the essentials as against the bewildering diversity of local custom"; and they have carried on, ever since, a perpetual process of conciliation and harmonization, so that local divergences, though always respected and often jealously safeguarded, do not impair the symmetry of the main fabric.

But what shall be said of the position of the judge when confronted by the codes of continental Europe that made their appearance in the eighteenth century and enjoyed such a vogue in the nineteenth? [4] These codes are perfect and complete. They are supposed to cover every aspect of the law and provide for any possible contingency. The judge is deprived of all discretion, reduced to the automatic function of finding the law where it is stated plainly enough for an ordinary peasant to understand it and of assessing penalties that are precisely indicated. He

not knowable by the parties when the causes of controversy occurred. It is the unwillingness to face the certain fact that courts are constantly making *ex post facto* law."

[1] *The Spirit of the Common Law* (1921), p. 172.

[2] C. K. Allen, *Law in the Making* (2nd ed., 1930), pp. 30-34, 82-86, 106-108.

[3] Allen shows (p. 82) that almost all the examples of custom given in the sixteenth century book, *Doctor and Student,* arose out of judicial practice or else (like trial by jury) were imported from abroad. Primogeniture, he says (p. 84), was "established as a general custom of the realm by deliberate encouragement of the Judges. It certainly did not occupy the position of a general custom at the end of the twelfth century, but seems to have been regarded as peculiarly appropriate to military tenures. Yet after the lapse of another century, it has become the general rule of descent. The persuasive learning of the Judge is not difficult to detect behind this development."

[4] Roscoe Pound, *The Spirit of the Common Law* (1921), pp. 176-183.

is forbidden, except in the German civil code of 1896, to pay any attention to previous decisions. There can be no judicial precedents, no case law, as a guide to the meaning of the code. Thus the fifth article of the French civil code declares: "Judges are forbidden ... to lay down general rules of conduct or decide a case by holding that it is governed by a previous decision." Professor Pound's comments are enlightening.[1] Within fifty years, the lower courts were required by statute to follow the decisions of the highest court; and, within a century, French jurists were conceding that the fifth article of the code had proved ineffective. To-day law-students are taught that judicial decisions are a form of law; and, like an English or American statute, the code is becoming encrusted with a multitude of precedents, even though the name is not used or the practice formally permitted. "All over the continent the new school is clamoring for free judicial finding of the law. It is agreed that the path of deliverance from stagnation is a judicial empiricism, working upon the materials supplied by jurist and legislator." After all, the doctrine that law consists of legislative enactment and authentic interpretation by the sovereign is Byzantine rather than Roman.

Under the disguise of interpretation, even if somewhat surreptitiously, judges, or magistrates like the Roman praetor, make law.[2] Indeed, when the foundations of a legal system are being laid, they are its artificers. They take hold of the chaotic mass of custom and remold it in the light of experience, evolving by trial and error a settled technique of procedure and imparting to customary rules not only a reasonable precision, but also the symmetrical harmony of a system. Judicial empiricism leaves the way open to future growth, since rules and principles, instead of being stereotyped once for all, are, in the words of Professor Pound,[3] "discovered gradually by a process of inclusion and exclusion as cases arise which bring out their practical workings and prove how far they may be made to do justice in their actual operation." The achievement of the courts, in shaping a legal system before legislation assumes a predominant rôle, deserves the

[1] *Ibid.*, p. 181.

[2] "It seems to me impossible to frame a theory of this subject which shall be in harmony with all the facts, unless recognizing in the courts, in judicial practice, a means by which the law-making power of a people is to some extent exercised. It is clear that the English people exercised such a power through the judges in the instance just given [entailed estates]; and that the Roman people exercised such powers through the praetor...." J. Hadley, *Introduction to Roman Law* (1872), p. 101. A question arises here: Is it the law-making power of the people or of the sovereign that the judge exercises?

[3] *Op. cit.*, p. 182.

greatest emphasis. Senator Borah shows a strange ignorance of legal history when he maintains that there should be no World Court until a code of law is provided for its guidance. Historically, the interpreter precedes the legislator.[1] But interpretation does not stop where statutes begin. The legislature cannot foresee all future eventualities.[2] When it makes a statute, it has in mind some specific circumstances that require attention; and the effort to include all situations of a similar kind either fails because they cannot be imagined in advance, or else it results in vague and abstract language. In either case, the courts will be in a position to read new meanings into the statute by drawing upon the traditional law, which they themselves have formulated, and upon the principles which they have derived from it. In the end, the enacted element of the law is frequently swallowed up and incorporated in the body of tradition.[3] American courts have given to the phrases "due process of law" and "equal protection of the law" meanings that were by no means contemplated by the framers of the Fourteenth Amendment.

ENACTED LAW

Customary law, as molded by the judges, gives way at a later stage of legal history to statute law. The enacted element tends to supplant the traditional. Such is particularly the case in the present age. Owing to the rapid modification of environment through the applications of science, the habitual way of doing things becomes out-moded overnight. We hardly become familiar with one means of transportation or of lighting the house when another thrusts it aside. New custom cannot take root. Old customary law cannot be forced quickly enough into new molds by the ingenuity of the judges. So legislation is produced with feverish haste. We may take it for granted that the situation is a temporary one. By entailing rapid, and hence painful, readjustments, it

[1] So-called international law consists mainly of custom which even in its most firmly-established branches has defied the efforts of codifiers and is waiting for judicial empiricism to give it greater precision. Before setting up an international legislature, we should give the court compulsory jurisdiction and means of enforcing its decisions. No doubt, progress of that kind lies far in the future. But in the meantime the slow growth of judicial precedents, according with the development of international opinion, can accomplish something.

[2] It is relatively simple to provide against the theft of physical and tangible property. But consider the intricate and abstruse issues involved when a modern company director steals indirectly by authorizing the use of certain words in a prospectus. Legislatures did not foresee the development of complicated methods of financing modern industries and the necessity of enforcing standards of exactitude in the certificates issued by accountants Sir Arthur Salter in *The Modern State* (Mary Adams ed., 1933), pp. 253-254.

[3] Pound, *op. cit.*, p. 174.

does damage to the human nervous system. Eventually reaction will set in, material progress slowing down from its high tempo and permitting the return of a more comfortable stability. But in the meantime laws are being manufactured like French *assignats* or German paper marks, the people seeming to have an exaggerated belief in their efficacy. Jurists denounce the practice. "This constant flood of legislation," says Zane,[1] "is the worst feature of our polity. Laws that regulate minutely the affairs of the citizen are bad enough, but when they are constantly changing the evil is vastly multiplied. Plato may have had a fantastic idea when he said that children's games ought to be regulated so that they could not be changed, but his reason was this, that when these children were grown up they would not as citizens be constantly changing the laws. His idea was the direct result of the baleful legislative fecundity of Athens."[2] Tacitus felt as Plato did: the worse the state, the more the laws. One of the evil effects of over-legislation is that citizens cannot know the law, because of its extent, or become attached to it, because of its mutability. A surplus of law breeds lawbreakers.

We have seen that the judges, who act for the sovereign power in the State and depend upon it for the enforcement of their decisions, do much more than "find" the law. The custom which they deal with, though originating in social habits, is greatly modified by them. Through the medium of the courts, therefore, the sovereign does transform the emanation from the masses. But transformation can proceed only as far as the people are willing to let it go, as evidenced by general acceptance. Constraint is limited by consent. It is further true that changes in popular custom must be followed by appropriate changes in law, whether the sovereign makes them indirectly or directly—by judicial reinterpretation or by statute. In all cases the degree of pressure exerted by the masses will depend upon the degree to which their interests are involved. There are some popular institutions and ways of behavior that could not be touched without provoking revolution.

[1] *The Story of Law* (1927), p. 405.

[2] W. E. H. Lecky, *Liberty and Democracy*, vol. I, p. 148, observes: "There is some weight in the contention of Bagehot, that one great advantage of government by debate is, that much talking prevents much action, and if it does little to enlighten the subject, it at least greatly checks the progress of hasty and revolutionary legislation. There are worse things than a wasted session, and... the restraint of loquacity is not to be despised." According to Burke, repeal is more blessed than enactment. And Burke witnessed only the dawn of the Industrial Revolution! While it is the rule in most countries that statutes can be abrogated only by express or implied repeal (Gray, *op. cit.*, pp. 193-197), a vast number actually fall into desuetude through non-observance.

Statute law, when it trenches upon custom, is similarly limited. It provokes resistance. When, in 1751, the British Parliament introduced the Gregorian calendar, mobs paraded the streets and cried, "Give us back our eleven days!" They acquiesced only when it appeared that in reality nothing would be lost by abandoning the old custom and that modification of the calendar did not affect their interests prejudicially. On the other hand, interference with family relationships, personal liberty, and religious practices has, on countless occasions, failed.[1] That is why constitutions sometimes take fundamental rights out of the domain of ordinary legislatures and permit action upon them only when opinion approaches unanimity.[2] Even under such a restriction, disobedience may nullify the law. In the United States, the Fifteenth Amendment has become obsolete because it cannot be enforced; and the Eighteenth, after being defied for a dozen years, had to be repealed.

Enacted law comes into being as a command, as the creature of the legislator's thought and will. But, when once put into operation, it takes on a life of its own. It passes down through the courts as custom passes up through them. The judges act upon it and harmonize it with the popular will or the will of the most influential and articulate section of the people. The statute may be so twisted and distorted that its originators—the sovereign—could not recognize it. If its language is too precise for such manipulation, then it must meet the test of popular obedience. Doubtless, the bulk of legislation, dealing with indifferent matters or merely filling up gaps in custom, suffers no damage at the hands of judges and people.

Statutes are commands, but the sovereign does not exercise an unhampered will in issuing them. Here we must distinguish between a democracy at one extreme and a despotic monarchy at the other. When the suffrage has been given to all adults or all adult males, the legislature reflects the will of the people; the command of the legal sov-

[1] "A small minority cannot nullify a law, but when a statute is considered tyrannical and unjust it always meets with protest. If protest is so great as to interfere with its enforcement by ordinary methods, it is plain that it has no place in the law of the land. Since men began making laws, the favorite form of repeal is by non-observance." Clarence Darrow, *The Story of My Life* (1932), p. 296. He notes the saying of Emerson that a good citizen should not be too obedient to the law. A different philosophy is conveyed by the Roman saying: *Dura lex, sed lex.* So, too, Lincoln said: "Bad laws, if they exist, should be repealed as soon as possible; still, when they continue in force, for the sake of example, they should be religiously observed."

[2] E. M. Sait, *American Parties and Elections* (1927), p. 87. Rousseau's opinion is quoted in a footnote.

ereign is dictated, in large measure, by the electoral sovereign; and conformity with mass desires may be presumed. Why is it, then, that so much legislation is ignored or derided or flouted? Partly because it proceeds from a bare majority, and an evanescent majority at that. Partly because opinion is capricious. Like children, the masses are always craving for new toys and always tiring of them. They imagine that the new will be better than the old. Experience teaches them differently. Many short-lived reforms have collapsed when it has been found that they entailed a pain that was not anticipated, the pain that is always incurred in breaking a habit.

In a monarchy much will depend upon the spread of political consciousness among the people. Generally, despotism prevails where the habit of obedience is firmly established and reinforced by superstition. The monarch is then much less restrained than in the kind of tyranny or dictatorship which immediately precedes or follows democracy and which has to contend with a large body of active opinion. Perhaps he relies upon the support of an aristocracy or military class; as long as he keeps it satisfied and well-disposed, he has little to fear from the unorganized and helpless peasants. But, unless he takes care to cultivate popularity and by that means set up an alternative basis for the régime, he runs the danger of becoming the mere puppet of his supporters. In most cases he is as attentive to any wide-spread and deep-rooted popular sentiment as a democratic legislature would be. He runs the risk of deposition, while all that happens in a democratic government is a temporary change in party control.

CHAPTER X

ROMAN LAW

SOME aspects of law will become clearer if we have before us, even in sketchy outline, the evolution of the two great legal systems of the West, the Roman and the English. In their scientific maturity, their completeness and symmetry, these two systems are incomparably superior to any others that the world has known. Along with other elements of Western culture they have spread far and wide. Outside their domain lie Japan, China, and Siam; [1] the Mohammedan areas of Asia and North Africa; and some European dependencies, chiefly in Africa, where the natives are allowed to keep their own law. They dominate all European countries, all countries settled by Europeans, and some dependencies, like the Dutch East Indies, which are largely inhabited by natives races.[2]

How has this enormous empire been divided between the two systems? English law has generally followed the English flag. It has done so to some extent even in India, through admixture with Islamic and Hindu law, although the British constitute less than four hundredths of one per cent of the population.[3] But in certain areas that were once possessed by France or Spain or the Netherlands Roman law, at least in civil matters, has persisted; South Africa, Louisiana, and Quebec show the tenacity with which people adhere to legal practices when once these have become a familiar part of their way of life.[4] Roman law is most firmly established in those continental European countries which lie within the boundaries of the ancient and medieval Roman

[1] Even in these countries the Roman and English systems have been influential in recent times.

[2] James Bryce, *Studies in History and Jurisprudence* (2 vols., 1901), vol. I, Essay II, "The Extension of Roman and English Law throughout the World;" Sir Paul Vinogradoff, *Roman Law in Mediaeval Europe* (2nd ed., 1929).

[3] Islamic law, which is primarily religious and based on the Koran, has not been much developed by custom or interpretation. A. Rahim, *The Principles of Mohammedan Jurisprudence* (1911). Hindu law, as administered in the courts, is largely derived from the great Brahminical commentaries, although the Code of Manu says that "immemorial law is transcendent law"; and it has consequently shown capacity for growth by means of interpretation.

[4] So, too, the Philippines, Ceylon, Mauritius, British Guiana, and some of the West Indies.

empires, and in their present and former colonies. Only the leading principles of Roman jurisprudence have found their way into Hungary, Scandinavia, Poland, and Russia; [1] and the Bolshevist régime in Russia has done away with most of these.[2] The peculiar case of Scotland must be explained by her political antagonism to England in the sixteenth century and her attraction to France. The introduction of Roman law began when James V, in 1532, established the Court of Sessions on the model of the Parlement of Paris; and Scotland was permitted to keep her own legal apparatus at the time of union with England, a century and three-quarters later.

GREEK INFLUENCE

Rome gave unity to the world, or at least to the western world, through her empire, her language, her law, and the religion which she adopted officially in the fourth century and which, while adopting, she impregnated with Roman characteristics. The empire is gone. The language lives only in the vernaculars of France, Spain, Portugal, and Italy, showing even there the diverse effects of Germanic infusions. The law has proved quite as enduring as the religion. It bears the peculiar Roman stamp. Subtly and surely its development reveals the genius of the people. It developed through a period of a thousand years, reflecting, not the conscious purpose and creative will of some great law-giver or succession of law-givers, but day-by-day adjustments in the light of experience, cautious and tentative steps forward, and the satisfaction of immediate concrete needs. Like the English after them, the Romans distrusted generalizations and abstractions; they moved from one established position to another, diverging from a settled course only under the pressure of new circumstances. They were quite unlike the Greeks, who indulged in speculations—sometimes highly abstract and metaphysical—about the legal superstructure, but who overlooked the preliminary stage of laying a foundation.

[1] Russian law was originally Slavonic custom, somewhat modified by borrowings from the Eastern Empire, from which she took her Christianity and her first literary impulse. "In its present shape, while retaining in many points a genuinely Slavonic character, and of course far less distinctly Roman than is the law of France, it has drawn so much, especially as regards the principles of property rights and contracts, from the Code Napoléon and to a less degree from Germany, that it may be described as being Roman 'at the second remove,' and reckoned as an outlying and half-assimilated province, so to speak, of the legal realm of Rome." Bryce, *op. cit.*, p. 93. Poland, being nearer to Germany and also Catholic, and, so, influenced by Canon Law, absorbed more Roman doctrine than Russia.

[2] It appears to be the intention of the Nazi régime in Germany to purify the law by discarding the numerous and fundamental Roman elements.

The foundation of a legal system is procedure. The method of applying the law becomes a method of creating new law, so that the evolution of a legal system depends largely upon the character of bench and bar—of magistrates and lawyers—and upon the rôle assigned to, or assumed by, them. There lay the deficiency of the Greeks. They failed to produce "either an adequate tribunal for assuring a rule of law or a body of jurists who could create a general classification of the principles of law and of its particular rules. Nor did they have an order of advocates or practicing lawyers, who by the representation of clients in the courts could do something toward a correct application of the law to actual controversies."[1] The vicious tendencies of the Athenian judicial system have frequently been pointed out.[2] Justice was contaminated by politics. Unlike decisions were given in like cases, the jurors being bound by oath to disregard all precedents. Responsibility could hardly exist in jury courts composed of several hundred, and sometimes of several thousand, dicasts (the minimum number was 201; the maximum, 6,000). Speeches were delivered, not by paid advocates, but by the litigants and their friends, after being composed by orators. They appealed to passion and prejudice, perhaps making out that the father of the defendant was a scoundrel or his mother a vegetable eater, and, with such a jury, trials may well have resulted in travesties of justice.[3]

It is true that the Romans borrowed a great deal from the Greeks. They borrowed art and literature, architecture and philosophy, as might be expected in the natural course of cultural diffusion—mostly things that added a decorative veneer to the substance of life. Perhaps they did little to expand and improve what they received. Professor Calhoun, doubtless overrating the value of rhetoric and philosophy, holds that the Romans "were virtually destitute of native originality and incapable of giving to the world a new idea." Yet, he continues, we are asked to believe that "they were miraculously endowed—possibly by way of compensation for their general poverty of genius—with a subtle power of analyzing and criticizing legal concepts; minds which followed dully and slavishly in other disciplines leapt to the fore when the realm of law was reached. . . ."[4] The sarcasm is strangely mis-

[1] J. M. Zane, *The Story of Law* (1927), p. 164. See also p. 197.
[2] For example, by Professor W. S. Ferguson *s. v.* "Greek Law," *Encyclopaedia Britannica* (14th ed., 1929).
[3] R. M. MacIver, *The Modern State* (1926), p. 104; W. S. Ferguson, *op. cit.*
[4] G. M. Calhoun, "Greek Law and Modern Jurisprudence," *California Law Review*, vol. XI (1923), pp. 296-297.

placed; it might equally well have been applied to those great law-givers, the English, who are not inclined to "leap" anywhere, but proceed by slow, measured steps. The Romans were great law-givers because of their pedestrian qualities: their conservatism, their practical sense, their comparative indifference to the abstract, and their characteristic preoccupation with the prosaic question of what to do under a given set of circumstances.[1] To such qualities must be added an innate sense of justice and a fear of arbitrary power. Law is not made by philosophers and idealists, though it may be vitiated by them.

What has happened to Greek law and jurisprudence, which at one time was spread over a vast territory by the conquests of Alexander the Great? Why has it disappeared? Some of its defects have already been indicated. Professor Declareuil gives further reasons for the failure of the Greeks to produce a true monument of jurisprudence. They were too fond of making an art out of every form of intellectual activity and of proceeding with reference to an idea; and their law "remained an appendage of rhetoric and ethics, even civil law forming no separate branch of study."[2] It was not the sort of law that would attract the Romans. They did not adopt it. According to Livy, it is true, Greek laws were examined by the Decemvirs before they published the famous Twelve Tables in the middle of the fifth century B.C.; and for this reason some writers have assumed that the Roman code was derived partly from Greek sources.[3] But even if Livy deserves a higher reputation for veracity than Macaulay gave him and if a commission was dispatched to Athens and Sparta, little or no borrowing took place. Declareuil maintains that "the whole legislation of the Decemvirs on all essential matters contained only what might be and indeed must have been conceived in a Latin environment."[4] Nor was there any direct incorporation of foreign legal practice when, more than two centuries later, the Praetor Peregrinus began to construct the *jus gentium*. But the writers who emphasize Greek influence point chiefly to

[1] A. R. Bellinger in the preface (pp. v-vi) to J. Hadley's *Introduction to Roman Law* (1873; reprinted, 1931).

[2] J. Declareuil, *Rome the Law-giver* (1926), p. 9.

[3] For example, MacIver, *op. cit.*, p. 105, and Zane, *op. cit.*, p. 170. Zane argues that, whether Livy is right or wrong, the Romans were familiar with Greek law through contact with the Greek cities of southern Italy. "The parallels are too close to be the result of accident." Imitation is marked in institutions and laws, as well as in other cultural matters.

[4] *Rome the Law-giver* (1926), p. 13. Professor W. W. Buckland (*The Main Institutions of Roman Private Law*, 1931, p. 20), says that "it is generally agreed that the Tables are essentially a compilation of Latin and Sabine custom.... The XII Tables in fact state a system of law at a much earlier stage than that which Athens had already reached."

a later period, when Roman law had already acquired its distinctive quality; and they attribute the influence to philosophy, not to law. The great jurists, we are told, studied Stoic philosophy; through that medium they became interested in the law of nature; and they proceeded to recast legal rules in conformity with substantial rather than technical justice. Discussion of this point must be deferred to a more appropriate time. It may be said, for the moment, that equity characterized the *jus gentium* from the first, long before the jurists are supposed to have been imbued with Stoic philosophy, and that the *jus gentium,* instead of being made to fit the natural-law pattern, took shape under the impulse of special circumstances and then was discovered to be the embodiment of the law of nature.

EARLY ROMAN LAW

The early law of Rome was customary law. Indeed, statutes were few in number during the whole period of the Republic.[1] In five centuries only some 800 statutes are recorded; and most of these dealt with public law—with the organization and functions of government and its relation to citizens.[2] Not more than twenty or thirty had any real importance in the domain of private law, that is, in regulating the relations of individuals. As in all infant civilizations, law was hardly to be distinguished from religion; and both of them were closely related to the interests of the patrician *gentes*, the original Roman stock. Religion itself bore a somewhat legalistic quality, involving definite services that must be scrupulously performed, very much as in the observance of a contract. Within its purview lay such seemingly secular matters as marriage, adoption, testamentary succession, and the calendar, the last having a significance (which is now hard to understand), because many acts were valid only when performed at fixed times.

It is not surprising that the pontiffs or priests should have been the custodians and interpreters of the law. Originally the pontiffs, then three in number, had advised the king in religious matters. Under the Republic, the *Pontifex Maximus,* having succeeded to the king's preeminent authority in religion, enjoyed enormous prestige, as seen by the fact that, at a late period, Julius Caesar held the office for his last twenty years, and that it came to be inseparable from the person of

[1] What we call a statute was, in Republican times, a *lex* passed by one of the popular assemblies.

[2] W. W. Buckland, *The Main Institutions of Roman Private Law* (1931), p. 1.

the emperor.[1] The members of the College of Pontiffs were chosen for life, at first by coöptation, and then, towards the end of the third century B.C., by popular election.[2] The college was a patrician stronghold for the first two centuries of the Republic. The plebeians accused the patrician pontiffs of guarding the law as a professional secret and of administering it to the advantage of their own order. They insisted that the law should be set down in writing, so that every one might know it. The outcome of the conflict between the two orders was the publication of the Twelve Tables in the middle of the fifth century B.C.

This code—formulated by a commission, the Decemvirs, and given statutory form—was inscribed on copper tablets and permanently exposed to public view in the Forum. It was a concise statement of existing law, which was taken to be immemorial custom and scarcely susceptible to any change. The work of the Decemvirs, having been a solemn settlement of a grave political crisis, was popularly held to be inviolable and beyond the competence of the law-making assembly. For 250 years, no statutory change was made in its provisions.[3] Cicero says that in his youth boys were accustomed to memorize the language of the venerable tablets. But by that time its original meaning had been obscured by centuries of reinterpretation. While the rigid letter of the law remained, the substance had been transformed by subtle exposition, by the employment of fictions, and by the introduction of new remedies and defenses that superseded, without repealing, the old. There had been a great improvement in procedure; and procedure is the chief means of bringing order and clarity into the administration of justice.

RITUALISTIC PROCEDURE

Under the Twelve Tables, procedure took the form of a ritual called *legis actio*. There were five varieties of the *legis actio;* and an exact knowledge of these, or at least of the one appropriate to the litigant's particular situation, was necessary in any application to the magistrate (praetor). Sometimes the Twelve Tables would be a sufficient guide; at other times, because of the brevity of the code or because of new forms introduced by the pontiffs, application to some member of the pontifical college for advice became necessary. The most curious aspect of the *legis actio,* recalling the intimate association of early law with

[1] Augustus became *Pontifex Maximus* after the death of Lepidus in 12 A.D.

[2] The size of the college was gradually increased, until it had, in the time of Sulla (82 B.C.), fifteen members.

[3] As to legislation under the Principate and Empire, see Max Radin, *Handbook of Roman Law* (1927), pp. 63-67.

religion, was its rigid formalism and concrete symbolism. To certain words and gestures an arbitrary meaning was attached, a meaning which, for the purposes of the law, could be expressed in no other way. The slightest deviation from the required ritual was fatal to the litigant. For example, a grape-grower, whose vines had been cut down, sued for damages under a provision of the Twelve Tables concerning the destruction of trees. He used the language of the Twelve Tables except that he substituted vines (*vites*) for trees (*arbores*). He lost his case. He might have won it—at any rate the trial would have proceeded, if he had used the correct word, trees; for *arbores* would have been interpreted as a generic term including grapevines.[1]

On of the five *legis actiones* was known as the *sacramentum.* The question there turned upon the truth or falsity of conflicting claims. Perjury was an offense against the gods, likely to bring down divine vengeance upon the community. It was necessary, therefore, to discover the guilty party and impose on him an expiatory sacrifice consisting of cattle. At this later time each litigant had to deposit a considerable sum of money, losing it if the case went against him. Procedure before the magistrate was in the manner of a pantomime. Each party, armed with a rod, seized the object in dispute or something that symbolized it and, asserting ownership, tried to wrest it away from the other. If the ownership of a piece of land were involved, the magistrate either conducted the parties on a sham journey to the spot or else provided a clod of earth to represent the property. The litigants struggled over it. At last, for the sake of the public peace, the magistrate intervened and asked for an explanation. From that point the case proceeded with meticulous regard to correct words and gestures.[2] This adherence to ritual seems to us absurd. The Romans themselves abandoned it by degrees. But it must have suited them at a particular stage of civilization. It gave authenticity to legal transactions and made the parties aware of the gravity and binding force of their own acts.[3] It had the advantage of precision and of preventing subsequent disputes over the same matter. The litigants were compelled to make up their minds and come to a specific issue.[4]

After the enactment of the Twelve Tables, the pontiffs continued to

[1] Max Radin, *op. cit.*, p. 31.
[2] J. Declareuil, *Rome the Law-giver* (1926), pp. 64-65. For a more complete account of a suit to recover land and of the words used, see J. Hadley, *Introduction to Roman Law* (1873; reprinted, 1931), pp. 83-85.
[3] J. Hadley, *Introduction to Roman Law* (1873; reprinted, 1931), p. 89.
[4] J. Declareuil, *op. cit.*, p. 18.

be interpreters of the law. The written law, being abridged, required exposition. The pontiffs advised applicants, explaining and elaborating the complicated ritual of litigation. They supplemented the written law by formulating the precise words in which certain claims and defenses were to be made. By ingenious methods of interpretation they modified existing practice so as to accommodate it to changing conditions. Whether or not the work was done adequately and impartially, the plebeians determined to wrest from the patricians what remained of their monopoly of the law. The situation was eased somewhat in 304 B.C., when Cnaeus Flavius, a clerk of Appius Claudius Caecus, perhaps with the connivance of his master, published a work known afterwards as the *Jus Flavianum*. That work bared all the esoteric knowledge of the pontiffs, including the exact words for all *legis actiones* and the list of *dies fasti* when the praetor could always be found in the Forum. Still more importance attaches to a law of 300 B.C. which required that half the pontiffs should be plebeians. The patrician edifice quite collapsed when, in 252 B.C., the first plebeian *Pontifex Maximus* began to give public advice and instruction. For half a century a new class of men had been coming to the front, rising to prominence as the pontiffs declined. These were the jurists (lawyers), called also jurisconsults (legal consultants) and jurisprudentes (men learned in the law). They were destined to play a great part in liberalizing and systematizing Roman law. But attention must first be given to the praetors and their edicts.

The function of presiding over a judicial process and pronouncing the law belonged originally to the king. When the Republic was established (509 B.C.), it passed to the consuls. In 367 B.C., however, the administration of justice was detached from the consulship and entrusted to a new elective magistrate, the praetor.[1] His freedom of action increased as the power and prestige of the pontiffs declined. Within the next century Rome made herself mistress of Italy, and then she began the conquest of the whole Mediterranean world. This expansion of a small city state entailed an elaboration of the machinery of government. A great influx of aliens or peregrines, for example, complicated judicial administration in the city; for the law of the Twelve

[1] The name praetor, which had earlier been borne by the consuls, indicated leadership (*prae-ire*, to go before). Like the consuls the praetor possessed the *imperium*, and, with it, a lesser military competence. The *imperium*, resembling the royal prerogative in England, was the sovereignty which the government exercised over individuals. When the monarchy was abolished, the *imperium* was preserved. It was entrusted to the higher Republican magistrates, varying in degree with the importance of the office.

Tables, *jus civile* or the civil law, belonged exclusively to citizens, who were not disposed to let outsiders share in it, and had formalistic peculiarities which aliens would, in any case, have found distasteful, especially when accustomed, like Greek merchants, to a more advanced type of law. A second praetorship was established, therefore, in 242 B.C. Indeed, the number of praetors was gradually increased until there were eight in the time of Sulla and eventually sixteen, all elected for a single year. The first praetor, known as *Praetor Urbanus,* had jurisdiction over disputes between citizens; the second, the *Praetor Peregrinus,* between aliens and between citizens and aliens. The others were assigned to minor judicial functions or to provincial governorships.[1] After their election it was determined by lot who among the whole group should take the two chief places.

The praetor does not correspond exactly to any modern official. He was a middle-aged politician, making his way through the fixed course of political advancement (*decursus honorum*) and being now at a rung on the ladder between the quaestorship and the consulship. His political career left little time for the study of law; and so he offers a marked contrast to the judges of to-day, who are professional lawyers and who usually hold office for life.[2] In fact, the praetor was not a judge, although his functions were judicial. He settled the preliminary stages of litigation, framing the precise issue between the parties and stating the law that must govern the decision. How could he discharge such duties without a legal training? The truth appears to be that he leaned heavily upon the experts—the pontiffs at first and then the jurists—and constantly sought their advice. The experts saved the praetor from erratic behavior in his fleeting tenure of office; he, as an amateur, could see beyond the technicalities of legal procedure. His relation to the jurists was not unlike the relation of an English cabinet minister

[1] In 82 B.C. it was provided that all praetors should have judicial functions for one year and then, for a second year, become provincial governors with the title of pro-praetor.

[2] Most writers believe that the praetor was not, as a rule, trained in the law: for example, J. Hadley, *op. cit.,* p. 60; J. C. Carter, *Law: Its Origin, Growth, and Function* (1907), p. 29; W. W. Buckland, *The Main Institutions of Roman Private Law* (2nd ed., 1931), p. 354. But, according to Sir Henry Maine (*Ancient Law,* p. 64), "the praetor was a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he should fill or control the great judicial magistracy. In the interval, his tastes, feelings, prejudices, and degree of enlightenment were those of his own order, and the qualifications which he ultimately brought to the office were those which he had acquired in the practice and study of his profession. An English Chancellor goes through precisely the same training, and carries to the woolsack the same qualifications."

to the permanent civil service. It was this close association which enabled him to accomplish so much in the recasting of the early Roman law.

Although the praetor gave the law to the *judex* or judge, that ended his connection with the case. The *judex,* sitting alone, not only determined the facts—like a modern jury—but also delivered judgment. Thus, praetor and *judex* were somewhat like our judge and jury, the main differences being that they sat apart and that the latter gave the decision, though taking the law from the former. For each separate case the *judex* was chosen by lot from a panel that included the three wealthiest classes.[1] He was a private citizen, who might or might not have studied law. Since his duties required a considerable amount of legal knowledge and since he was liable in tort for an erroneous judgment, he often sought the assistance of a trained lawyer. He also profited, as American and English judges do, from the arguments of advocates,[2] and also from the opinions of jurisconsults, which the parties to the suit had obtained. Did the *judices* tend to follow prior decisions as precedents (*stare decisis*)? Probably not. The traditions of a permanent bench were lacking; the instructions of the praetor left little discretion to the judge; and the oral decisions were not systematically recorded. But a change came under Diocletian, towards the end of the third century, when permanent professional judges and copious court records displaced the old arrangements. Apparently the courts began to rely upon judicial precedents; at least Justinian, in the sixth century, forbade the practice. He did so, no doubt, to vindicate the sovereignty of the emperor, who alone should be able to make binding decisions.[3] Wherever Roman law now prevails in the form of an enacted code, there is usually a similar prohibition, in defense of the sovereignty of the legislature; but latterly the courts have shown a disposition to fall in line with Anglo-American practice and create judicial precedents.

[1] Declareuil, *op. cit.*, p. 62; Radin, op. cit., pp. 30 and 48. According to an earlier method of choice, the plaintiff proposed names from the list of senators until the defendant accepted one of them. When the lot was introduced, each party was allowed a certain number of challenges.

[2] Even the advocates (known as orators) called upon the jurists to supply their deficiency in legal knowledge. Wherever we look, the jurists seem to permeate the administration of justice.

[3] C. K. Allen, *Law in the Making* (2nd ed., 1930), pp. 116-118. The prohibition of Justinian reads: "Decisions should be based on laws, not on precedents. The rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind. Our will is that all our judges adhere to the true meaning of laws and follow the path of justice."

THE PRAETOR'S EDICT

The books on Roman law too often speak of "the praetor" doing this or that, when in fact the urban praetor or the peregrine praetor did it. The one acted upon the *jus civile,* the law of the Twelve Tables, which regulated the conduct of citizens; the latter devised new legal rules for cases in which foreigners (or peregrines) were concerned. Two legal systems developed side by side in Rome. The peregrine praetor, while borrowing a good deal from the *jus civile,* simplified what he borrowed, divesting it of archaic ritual and rigid formalism, and supplemented this with rules which appeared to have more or less universal significance because they found a place in the usage of neighboring peoples. His system came to be known as the *jus gentium* (the law of nations). Meanwhile, the urban praetor slowly modified the *jus civile.* Although he had no power to change the law, he actually did so by indirect methods—by a process of evasion, by inventing fictions, by recognizing new remedies and new defenses of litigants as an alternative to old ones which seemed inadequate in the face of new conditions. Unlike the Greek sophists, he showed no revolutionary spirit. Caution and conservatism mark the manner in which he undermined and transformed the old system without making any direct attack upon it. He was concerned with concrete cases which revealed the inadequacy of existing law and suggested practical adjustments. In course of time he was influenced chiefly by the *jus gentium,* as it took shape under the hand of the peregrine praetor and manifested to the jurists its superiority. By slow degrees and with the advice of the jurists, he incorporated the rules of the *jus gentium* in the *jus civile.*[1] He brought about a partial fusion of the two systems.[2] The instrument which the praetor used was the edict.

All the higher magistrates at Rome and in the provinces had the right of issuing an edict or proclamation when they assumed office.[3] The edict stated publicly the manner in which the official intended to administer his department for the year. At the hands of the praetor it acquired a special character. It became the agency by which the

[1] W. W. Buckland, *A Manual of Roman Private Law* (1925), p. 9; Maine, *Ancient Law* (5th ed., 1874), p. 61.

[2] In the time of the jurist Q. Mucius Scaevola, early in the first century B.C., the *jus gentium* was getting to be the predominant element; and by the close of the Republican period the original law of the Twelve Tables was much in the condition of the King of England, sovereign by title and almost powerless in reality. J. Hadley, *Introduction to Roman Law,* p. 93.

[3] The right was called *jus edicendi.* Occasional edicts, issued in the course of the year, bore the name of *edicta repentina.*

peregrine praetor built up his system of *jus gentium* and by which the urban praetor liberalized and recast the *jus civile*. But, while the former was openly engaged in creating new law for resident aliens, the latter was bound by the law of the Twelve Tables, having power neither to abrogate nor to alter it. He had to move with circumspection and disguise his activity as a reformer. From the first he resorted to fictions, and he continued to make use of them even when, in the last century of the Republic, the people had grown accustomed to a bolder course. Fictions always play a large part in the development of law by the courts. A remarkable English instance is the collusive procedure of a common recovery, by which the judges nullified a statute which Parliament had refused to repeal.

How did the praetor evade or undermine the law of the Twelve Tables by the use of fictions? Wills afford an example. Their validity depended not only upon proper authentication, but also upon the performance of a precise and elaborate ritual. It was desirable to get rid of the latter as an antiquated survival. The edict said: "If by a will that has been made without any formalities, but sealed by seven competent witnesses, a person is appointed heir, I will give him possession of the estate after the death of the testator, and will allow him to sue and to be sued *as if he were the heir.*" The praetor does not say that the document is a valid will or that the beneficiary is heir or owner. He recognizes the beneficiary as holder of the property; that is, as possessing the rights of an heir without the name.[1] Again, the praetor takes advantage of the provision of the Twelve Tables that a defective title can be cured by *usucapion*—by taking and using property for a year. In the edict he says that, if a house be bought without observance of the prescribed ceremony and if the seller attempts to recover it before the lapse of a year, the buyer will be treated *as if he had become owner by usucapion.* There is no formal contradiction of the law. The praetor does not say that the purchaser has acquired ownership, but that he may exercise rights which would belong to him if he were the owner. The edict might assume the fulfilment of a condition which in fact had not been fulfilled; or assume, for a particular purpose, that an alien was a citizen.[2]

[1] J. Hadley, *Introduction to Roman Law*, p. 94.

[2] Declareuil, *Rome the Law-giver* (1926), pp. 161 and 287-291. For other examples, see Radin, *op. cit.*, pp. 52-54. The law allowed an action when a direct attack, *vi et armis*, had been made upon a person or his chattel. The praetor undertook to include under this rule an indirect trespass, where an animal had been frightened over a precipice by shouts.

The discretion of the urban praetor seems to have been greatly extended by the *lex Aebutia,* adopted about the middle of the second century B.C. The provisions of that statute are not definitely known. It authorized the use of the elastic *formula,* originated by the peregrine praetor,[1] in place of the rigid *legis actio;* and the new procedure, gradually supplanting the old, opened the way to further modifications of the *jus civile.*[2] What else the statute provided can only be conjectured. Certainly, from that time the praetor grew much more bold in his evasion of the law. Perhaps the *lex Aebutia* gave him further authority; perhaps he was guilty of aggressions, which met with acquiescence because they were useful.[3] Through the edict, he admitted wholly new actions or added materially to old ones, modifying and in the end superseding many of them. He recognized defenses, as in the case of fraud, where the Twelve Tables were silent. He refused actions that the civil law allowed; and, by declining to enforce them, set aside transactions that had hitherto been valid. He provided better means of enforcing rights.[4] Many of his improvements in the law were taken over from the *jus gentium.*

Stated like this, his activities may well be misunderstood. It was not by one praetor or at one time that these things were done. The edict grew, by insensible degrees, through the centuries. The change made by any one praetor during his year of office was inconsiderable. In many cases a new rule was introduced only when some notorious incident had predisposed opinion, and especially the conservative opinion of jurists, in its favor. The evolution of law by means of the edict was characterized by gradualness and empiricism. A new rule or the modification of an old one stood only for a year; for the edict, though called perpetual, was perpetual only in the sense that, during his year of office, it bound the praetor who issued it.[5] It did not bind his successors. When a new praetor drew up his edict, he would adopt that of his predecessor so far as it had commended itself in practice and introduce new features upon the advice of jurisconsults. From year to year, by small accretions, the perpetual edict grew in length, always embodying the practical lessons of experience. It was the handiwork of hundreds

[1] Declareuil, *op. cit.,* p. 71; Radin, *op. cit.,* p. 71.

[2] *Formulae* and *legis actiones* existed side by side until, by the *lex Julia* of 17 B.C., the latter were, with few exceptions, abolished.

[3] Buckland, *Main Institutions of Roman Private Law,* p. 5; *Manual,* p. 7.

[4] Buckland, *Manual,* p. 8; Bryce, *Studies in History and Jurisprudence* (2 vols., 1901), vol. II, p. 693.

[5] By *lex Cornelia* of 67 B.C. he was forbidden to deviate from it, whether or not he had ever done so previously.

of praetors, who responded to momentary needs and changing circumstances. It resembled the judge-made case-law of England. The differences, although significant enough to deserve mention, have been exaggerated.[1] While the English judge decides particular cases, he gradually derives from them principles which will be the source of future decisions; and, while the praetor laid down a rule which would apply to a large class of future cases, the need for the rule emerged from past litigation.

In time, the perpetual edict became a miscellaneous document, immensely long and disorderly in texture. It was badly in need of revision. Moreover, the initiative of the praetor had steadily diminished after the fall of the republic, hardly being compatible with the pretensions of the Emperor. In the middle of Hadrian's reign, perhaps in 129 A.D., the edict of the urban praetor—and indeed the edicts of all magistrates—was revised and given permanent form by the celebrated jurist and praetor, Salvius Julianus. The senate enacted this code of praetorian law as a statute. The praetor's law-making function, which had been most active in the century and a half before the Christian era, vanished. But the law still continued to change. The edict itself was continually amplified and transformed in the process of application to cases, although its language remained the same. The rescripts and decrees of the Emperor contributed to the growth of the law. Far more important was the work of the jurists during the next two centuries.[2]

No doubt, the urban praetor would have succeeded, with the help of the jurists, in liberalizing the law of the Twelve Tables and in divesting it of its antiquated ceremonial. He did, however, borrow a great deal from his colleague, the peregrine praetor. He adopted the elastic formulary procedure and took over a great part of the *jus gentium*. Under the new system of procedure, the praetor inscribed in his edict the actions that he would entertain and model *formulae* for different kinds of claims.[3] When a suit was commenced, the parties put in an appearance for the purpose of a preliminary examination. This was designed, not to ascertain the merits of the case, but to find out the precise points of controversy. Plaintiff and defendant, represented by

[1] Bryce, *op. cit.*, pp. 698-699.
[2] Radin, *op. cit.*, pp. 74-77.
[3] On the formulary procedure, see W. W. Buckland, *The Main Institutions of Roman Private Law* (2nd ed., 1931), pp. 353-396, and *A Manual of Roman Private Law* (1925), pp. 378-418; Declareuil, *op. cit.*, pp. 70-90; Radin, *op. cit.*, pp. 44-54

advocates,[1] presented their arguments.[2] A long discussion might ensue. It was a delicate task to take the appropriate model *formula* and hammer out a version of it that would suit the exact issue. This was less the work of the praetor than of his counsel and the advocates. An actual *formula* runs like this: "Let N be the judge. Whereas A-B has sold a slave to C-D, if it appears that C-D ought to pay A-B 10,000 sesterces, condemn C-D, judge, to pay the 10,000 sesterces to A-B. If it does not so appear, acquit him." This example, though much simpler than the average, contains all the really essential elements of the *formula:* the nomination of the judge; the *intentio,* which sets forth the plaintiff's claim as a question to be decided by the judge; and the *condemnatio,* which gives the judge authority to convict, if he finds the *intentio* true, and, otherwise, to acquit. Notwithstanding the ingenuity of lawyers, it was not always possible to apply any one of the model *formulae* to the facts of a particular case or of a series of similar cases. For the moment the litigants would suffer. But if this amounted to a serious denial of justice, the next occupant of the praetorship could provide in the edict for future cases. Before the judge, proceedings were public and oral. He listened to the pleadings of the advocates and the testimony of witnesses, weighed the evidence, and pronounced judgment in conformity with the *formula.*

JUS GENTIUM AND EQUITY

The peregrine praetor not only originated the formulary procedure, which Declareuil regards as "one of the most original discoveries of Roman legal genius," [3] but also built up gradually the system of *jus gentium.* The urban praetor borrowed both. In the middle of the second century B.C., as noted above, the *formula* began to supplant the antiquated *legis actio.* From that time, also, the *jus civile,* based on the Twelve Tables, received progressively larger infusions from the *jus gentium,* transference taking place by means of the edict. The fusion of the two systems had gone far when Salvius Julianus brought the praetor's activity to an end (129 A.D.).[4] It was carried farther

[1] *Oratores,* who were themselves advised by jurisconsults in the background.

[2] The case might be settled then and there by agreement of the parties. The praetor might dismiss the case on a variety of grounds, such as the incapacity of one of the parties or his failure to comply with certain conditions or the improbability of the plaintiff's claims or the absence from the edict of any *formula* corresponding to them.

[3] *Rome the Law-giver* (1926), p. 77.

[4] Declareuil, *op. cit.,* p. 29; Maine, *op. cit.,* p. 67; H. E. Jollowiez, *s.v.* "Roman Law," *En. Brit.* (14th ed., 1929).

still by the jurists during the next two hundred years, and completed by Justinian in the sixth century. *Jus gentium* was not international law, although the term has been applied to that subject; [1] we find the germs of international law in the Roman *jus fetiale* or law of heralds, which regulated communications between States. *Jus gentium* meant to the Romans a body of law recognized and used by other nations as well as the Romans.[2] How was the *jus gentium* built up?

The Law of the Twelve Tables was the cherished and exclusive possession of Roman citizens. As men flocked to Rome from the conquered areas of Italy, actuated in the main by commercial motives, they found themselves outside the pale of the law. They could not sue or be sued, sell or buy a horse, execute a will or take an inheritance. Such was the anomalous situation which the peregrine praetor was required to meet. Without any law to guide him, he had to deal with all controversies in which an alien was concerned [3]—cases between aliens and between aliens and citizens. As a law-maker he had one great advantage over his urban colleague: he was limited by no existing body of law. He could follow the dictates of his own conscience (and the advice of jurisconsults), creating whatever rules seemed appropriate and compelling obedience to them by means of his *imperium*. The rules that he evolved were primary rules of equity; they were suggested, says Vinogradoff, by the praetor's common sense, his desire to be fair, his knowledge of the world, and some slight acquaintance with foreign law.[4]

[1] For example, by Puffendorf in 1672 and by Wolff in 1749. Beginning with Vattel in 1758, a number of French writers used the term *droit des gens*. In the fifteenth century Victoria invented the term *jus inter gentes;* in the seventeenth it was used by Zouche in the title of his treatise. Bentham coined the term "international law" in 1789.

[2] According to the *Institutes* by Justinian, "All nations who are ruled by laws and customs are governed partly by their own particular laws and partly by those laws which are common to all mankind. The law which a people enacts is called the civil law of that people, but that which natural reason appoints for all mankind is called the law of nations, because all nations use it." Maine, *op. cit.*, p. 46.

[3] A peregrine might be a foreigner or a subject of Rome who was not at the same time a citizen. As Roman conquests extended over the whole basin of the Mediterranean, the term peregrine came to be attached normally to non-citizen subjects.

[4] *Common-sense in Law* (1913), p. 213. On the equitable basis of the *jus gentium* see especially Radin, *op. cit.*, pp. 37-39. Equity made great headway in the civil law at a later time, so much so as to cause frequent complaint. Consider the language of the advocate Quintilian, who lived in the first century. "Nowadays," he says, "there is a tribe of ingenious pleaders who would have us 'interpret' this statute. It does not, they claim, mean what it says. I greatly admire the shrewdness of these gentlemen; they are much more acute than our ancestors . . . : they must be more acute or they would not attempt to show that these ancestors of ours lacked both speech and sense. Now, before I deal with the purpose of this particular statute, I have just this one remark to make to the court. that this kind of so-called interpretation is thoroughly mischievous. For if

From the first he tried to dispense substantial justice, justice free from disfigurement by technicalities.

He summoned the parties before him, listened to their pleas and tried to find out what the understanding of the parties was when the sale or contract was made—what they might fairly be assumed to have expected from each other.[1] Then he set to work, with the help of the jurisconsults, and framed a *formula* that would fit the specific issue. He had at first no law to guide him. He could not very well apply to both parties a rule of law to which only one of them was accustomed. How could he find a legal rule? He looked for common elements in the different systems of law, preserving these and discarding the unique features of each system. It soon appeared that, stripped of local peculiarities, the laws of Rome and of neighboring peoples showed a surprising correspondence in fundamentals. "Jus Gentium was, in fact, the sum of all the common ingredients in the customs of the old Italian tribes," says Sir Henry Maine,[2] "for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a number of separate races in common, it was set down as a part of the law common to all Nations, or Jus Gentium. Thus, although the conveyance of property was certainly accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial in all of them.... Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance..., was set down as an institution Juris Gentium, or rule of the Law common to all Nations." A rule of *jus gentium* was not always, however, derived from a comparative observation of laws. It might originate in the praetor's equity, in what he held to be reasonable and fitting as a solution of concrete disputes.

the court is always to be spending its time turning statutes inside out to discover what is just, and what is equitable, and what is expedient: well, then, there might as well be no statutes at all." Quoted by C. K. Allen, *Law in the Making* (2nd ed., 1930), p. 222.

[1] Carter, *op. cit.*, p. 176.

[2] *Op. cit.*, pp. 49-50. Views differ little as to the law drawn upon to form *jus gentium*. According to Buckland (*Manual*, p. 9) two opinions are held, one indicating the simpler part of Roman law, not bound up with typically Roman notions; the other indicating the customs observed by the trading peoples of Central Italy in their intercourse. Professor H. F. Jollowiez ("Roman Law," *En. Brit.*, 14th ed.) says that the magistrate took over the already existing "law merchant" of the Mediterranean peoples and added a strong Roman element purged of its formalism. Radin (*op. cit.*, p. 42) believes that the law was taken from Italian and Greek neighbors as well as from Rome itself.

Roman equity, then, had its first vigorous growth while the peregrine praetor was building a new system of law for aliens. It found its way gradually into the edict of the urban praetor. Whenever the latter took over an equitable rule or devised one himself, he applied it alongside or in place of the old rule of the civil law. Both equity and law, while the two remained distinct, were administered by the same tribunal. It is probable that the jurisconsults, in their advisory rôle, were even then the ultimate source of equity. Later on, under the Empire, as the discretion of the praetor diminished and at last came to an end, they became the direct source through their *responsa* or written opinions and their treatises. Their creative influence lasted to the middle of the third century. We may say that their mission as liberalizers of the law had then been accomplished. From the reign of Alexander Severus,[1] at any rate, equity ceased to expand. It became rigid in Rome, as it did also at the end of the eighteenth century in England.

JURISTS AND LAW REFORM

In the third century B.C. the jurists began to invade the field that had formerly been monopolized by the college of pontiffs. The study of law attracted men of rank and wealth hardly less than a political career; and we may say of the late republic and early empire that the bar enjoyed a higher reputation and commanded greater talent than in any other society or era. Young men received their legal training through association with some prominent jurist, after the manner of articled clerks in the United States or England. They attended consultations between the jurist and his clients and discussed with him afterwards the problems that had arisen. Ranging beyond the actual case, discussion extended to hypothetical situations, which could be multiplied at pleasure and which must have proved useful in testing the validity of general rules.[2] His service in training the new generation of lawyers enhanced the reputation of a jurist and also helped to build up a continuous tradition in the profession. But this was only an incidental activity.

The jurist also gave—without charge—expert advice. The praetors, judges, and advocates (*oratores*) were amateurs, whose knowledge of the law frequently resembled Ben Jonson's "little Latin and less Greek."

[1] 222-235 A.D.

[2] Maine emphasizes the value of fictitious cases in the development of the law. *Ancient Law*, p. 39. For a different view, see J. C. Gray, *The Nature and Sources of the Law* (2nd ed., 1921), pp. 275-276.

Cicero, the most famous of advocates, repeatedly admits his deficiencies in legal training, but explains that not much was required in court practice and that he could at any time get from a jurisconsult whatever more was needed.[1] The experts can always be discerned somewhere in the background, just where they ought to be—on tap, not on top. In framing his edict, modifying and adding to that of his predecessor, the praetor must have listened attentively to authoritative opinion. The model *formulae* in the edict were drafted by the jurists, it is said.[2] When the plaintiff found that none of them would cover his case, he would then get a jurist to submit a new *formula;* and the praetor would decide whether the issue as now framed should go on trial.

It was one of the most important functions of the jurist to give written opinions on doubtful points of law. These opinions were called *responsa prudentium,* answers of the learned. They were sought by the *judex* and by parties to a suit and, since the *judex* was seldom a trained lawyer, carried greater weight than modern "opinions of counsel." They became a great instrument of legal reform; for, while the jurist professed sedulous respect for the letter of the *jus civile,* he did in practice modify it by interpretation, extending, limiting, and overruling it as he proceeded to adjust it to the facts. During the republic the authority of *responsa* depended altogether upon the reputation of the author; and the opinion of the most eminent jurisconsult did not bind any one until the praetor had made it his own. But Augustus introduced a practice which lasted for three centuries, down to the time of Diocletian. He gave a privileged position to certain prominent jurisconsults, who became known as patented jurists. Their *responsa,* when properly authenticated and brought before the *judex,* now had the full force of law. Unless they contradicted each other, they bound the *judex* absolutely. It is a matter of uncertainty whether, at the outset, their force extended beyond the particular case which evoked them.[3] At any rate, the *responsa* were for centuries a powerful influence in the liberalization of the *jus civile.* It could even be said by Pomponius, a contemporary of Cicero, that the true civil law consisted wholly of interpretation by the jurists.[4]

[1] Hadley, *op. cit.,* p. 59.

[2] C. K. Allen, *Law in the Making* (2nd ed., 1930), pp. 113-116.

[3] Buckland (*Manual,* p. 17) says that it probably did not; Gray (*The Nature and Sources of the Law,* pp. 201-202) says that it probably did. Eventually it did, we may be sure: Bryce, *op. cit.,* vol. II, p. 679; Vinogradoff, *Common-sense in Law,* p. 200; H. G. Jollowiez, "Roman Law," *En. Brit.* (14th ed., 1929).

[4] Zane, *The Story of Law* (1927), p. 179. Jurists collected and published their *responsa* in books.

The jurists wrote commentaries on the edict and treatises on all departments of the law. At first their productions were fragmentary. Systematic scientific literature begins with Quintus Mucius Scaevola, the tutor of Cicero, and the earliest jurist who finds a place in Justinian's Digest. The "classical age" of Roman jurisprudence lasted from his time to the death of the Emperor Alexander Severus (235). The most distinguished authorities of this period are Gaius (c. 110-c. 180); Papinian and Paul, both born shortly after the middle of the second century; and Ulpian (170-228), who provides a third of the extracts in the Digest. The last of the masters is Modestinus, a pupil of Ulpian. He is generally ranked below the other four. With him the race dies out, partly because of the increasing absolutism of the Emperor, but chiefly because of political disorder and the collapse of the *Pax Romana*. The authority which attached to the *responsa* of the patented jurists was, in course of time, but without legal warrant, attributed to their other writings, much as if Judge Story's treatises were to be given the same weight as his judgments. Among a large number of jurists there was certain to be a considerable divergence of opinion. The confusion which resulted was met by the enactment of the Law of Citations in 426. From this time all the writings of Gaius, Papinian, Paul, Ulpian, and Modestinus might be cited in court, and also passages from other jurists which any one of the five had approved. If the authorities disagreed, the *judex* must follow the majority; if they were equally divided, he must follow Papinian; and if, in such a case, Papinian were silent, he could then decide for himself.

In collaboration with the jurists, the praetor had made the edict a legislative agency. When his initiative lapsed, in the early days of the empire, the jurists continued the task by themselves. Their *responsa*, based mainly upon actual litigation, formed a vast body of case-law, law made by the bar, not by the bench. Their treatises were concerned more with the edict than with any other legal documents. The edict took the form of a mass of precedents, somewhat defective and disharmonious even after codification. It was necessary to work round and over each summary statement of the praetor, bring out more fully all that it involved, trace principles to their consequences, and make clear the practical applications.[1] Inconsistencies were harmonized, interstices filled: and all this was done under the guise of commentary and exposition. In harmonizing and perfecting the law, the jurists performed a service like that of the itinerant justices in England, who

[1] Bryce, *op. cit.*, vol. II, pp. 699-700.

constructed rules of national scope—a common law—out of the chaos of local customs. The jurist-made law of Rome has much in common with the judge-made law of England. It is informed by a spirit of realism and practicality; it is based upon individual cases and methods of common sense, analysis, and comparison.[1] Experience is always the dominant note. The jurists reflect the Roman distrust of abstractions, the Roman awareness of the difference between the absolute and the relative, and the Roman conviction that law belongs to the sphere of contingency.[2] They had, says Zane,[3] no more use for metaphysics than a modern English lawyer and were not muddled by any conception of a natural law of reason; but they "saw that they must strive to make the law conform as nearly as possible to the developed ideas of right and justice among all classes of men growing more and more civilized."

Besides harmonizing and perfecting the law, the jurists of the classical age brought it more and more into correspondence with current conceptions of right and justice. They carried on the work that had been done to some extent by pontiffs and praetors. As moral standards changed, with the advance of civilization, it was only to be expected that, by some instrument, the law would be revamped to suit these standards. A people like the Romans, endowed with a remarkably keen sense of justice, could certainly accomplish this task without foreign assistance. Yet some writers give much of the credit to Greek philosophy. Sir Henry Maine takes this position.[4] After the conquest of Greece, Stoicism enjoyed an immense vogue among the Roman aristocracy, most of all among the lawyers. It fascinated them, not by its detailed features, some of which were ridiculous and even repulsive, but by the central assumption that men should live according to nature, follow her higher commands, and practise self-denial. Natural law ruled the minds of the jurists and gave them a new moral outlook —a sense of universality in law, a conception of universal justice, of equity. The new morality was infused into Roman law. The natural law of the Stoics became the creative factor in amelioration.

[1] Declareuil, *op. cit.*, p. 377.
[2] *Ibid.*, p. 25.
[3] *The Story of Law* (1927), p. 177.
[4] See especially *Ancient Law* (5th ed., 1874), pp. 53-61. For a general survey of the law of nature see Sir Paul Vinogradoff, *Common-sense in Law* (1913), chapter IX.

STOIC PHILOSOPHY

Maine's contention seems to rest on the fact that the jurists who reformed the law had acquired, in their youthful education, a smattering of Stoic philosophy. Such a coincidence is not in the nature of proof. Occasional references to natural law in the treatise of a jurist mean no more than the classical quotations with which Oxford graduates were once in the habit of adorning their speeches in the House of Commons. Maine offers no tangible evidence. Apparently there is very little that can be offered. C. K. Allen, an English writer of recent date, lists six principles which may have had a Greek origin and which profoundly influenced Roman law; [1] but the shorter list of Declareuil, a French writer, recognizes only two of the six as "probably" Greek.[2] Neither Allen nor Declareuil show any connection between these principles and Stoic Philosophy. The truth seems to be that the lawyers, far from being adepts in Greek philosophy, had only a most rudimentary acquaintance with it and that the topics which reveal that acquaintance are "not either practical or important." Moreover, what the Romans took from Stoicism was "so akin to the 'old Roman mind' that it may be doubted whether the Stoicism did more than strengthen a way of thinking that already existed." The jurist's veneer of philosophy can, at the most, have done no more than hasten an inevitable process of legal reform.[3]

The weight which Maine accords to Greek philosophy can hardly be reconciled with the known temper of the Roman people or with the known methods of Roman jurists. That temper was antagonistic to theory. Those methods rested upon the analysis of concrete cases and the working out of principles by comparison and analogy. The scientific treatises of the classical period have a practical cast. They are in no sense, says Radin, an application of general or philosophical or ethical or legal theory. They embody case-law, the cases being "stated, classified, reconciled, and systematized." To the jurists, working over a mass of annotated precedents—an articulated and systematic body of accepted rules, equity was simply that which "if generally and frequently applied, would produce the maximum of advantage." [4]

[1] *Law in the Making* (2nd ed., 1930), pp. 218-220.

[2] *Rome the Law-giver* (1926), p. 13. W. W. Buckland, *Main Institutions of Roman Private Law* (2nd ed., 1931), p. 20, says that the traces of Greek law may have been interpolated when the Digest was composed at Constantinople.

[3] W. W. Buckland, *Main Institutions*, pp. 20-22.

[4] *Handbook of Roman Law* (1927), pp. 71-74 and 86. "We can see," says Declareuil (*op. cit.*, p. 26), "that they did something which has never been done

Little room was left for vague notions of natural law. "It is easy and unwise," as Allen observes, to exaggerate Greek influence.[1] Maine himself acknowledges that the expressions *jus gentium* and *jus naturale* "were practically convertible." [2] But the former is regarded as a genuinely Roman product.[3] It was not natural law that made *jus gentium.* After it had been made, men came to think of it as an expression of the law of nature.[4]

CODIFICATION

The succession of great jurisconsults came to an end with the chronic disorder and administrative corruption that followed the reign of Alexander Severus (222-235). In the fifth century, the barbarians overran the Western Empire; civilization collapsed. It seemed that the matchless achievement of the Roman praetors and jurists would be lost irretrievably. At Constantinople, however, imperial power revived under the Emperor Justinian (527-565). We are less interested in his military conquests and administrative reforms, which endured only for the moment, than in his codification of the law,[5] really inspired and accomplished through the energy of his chief counselor, Tribonian. The whole Body of the Civil Law—*Corpus Juris Civilis*—was put into the form of systematic codes and then preserved as a priceless heritage for the modern world. The compilations included: (1) the *Codex* or Code (first published in 529 and given final shape in 534), in which the

elsewhere, namely, organized and classified the means by which any legal problem could be brought to a solution which should at the same time satisfy the mind and the sense of equity, without ever ignoring what was demanded or rejected by their 'garnered experience.' "

[1] *Law in the Making* (2nd ed., 1930), p. 216.

[2] *Ancient Law,* p. 71. Again (p. 52): "The Jus Naturale, or Law of Nature, is simply the Jus Gentium, or Law of Nations, seen in the light of a peculiar theory."

[3] Buckland (*Main Institutions,* p. 9) says that "it seems the better view that there is nothing imported about it."

[4] Maine himself says (p. 71) that "the Roman jurisconsults, *in order to account for the improvement in their jurisprudence,* borrowed from Greece the doctrine of a natural state of man." (My italics.) Cf. Buckland, *Main Institutions,* p. 9: "Jus gentium came to be thought of as universal, and therefore, by some at least, as implanted in man by nature, which brings it into touch with *jus naturale.*"

[5] Already the edicts had been codified in 129. Meanwhile an unmanageable mass of imperial statutes had accumulated, creating serious difficulties for lawyers and officials. At the close of the third century these were brought together in the *Gregorian Code,* which was supplemented, about 320, by the *Hermogenian Code* and again, in 438, by the *Theodosian Code.* Now, when the barbarian conquerors set up kingdoms in the West, law became personal; that is, a man was judged according to the law of his own people. Each Germanic tribe had its own law; so did the Roman population. But what was the Roman law? In the sixth century a number of codes were enacted by barbarian kings; and these were derived mainly from the Theodosian code.

statutory law of the Empire appeared in revised and consolidated form; (2) the *Digest* or *Pandects* (533), or compendium of the scientific literature, which supplanted for the future the original works of the jurists; (3) the *Institutes* (533), an elementary text-book for students and magistrates, which was little more than a revision of the *Institutes* of Gaius, written in the second century; [1] and (4) the *Novellae* (Novels), statutes which Justinian enacted after 534 to fill gaps and cure inconsistencies discovered in the previous compilations.

The Digest is, beyond any comparison, the most important part of the *Corpus Juris Civilis*. It has been described as "the soul of the Corpus, which, without it, would seem almost a cadaver, the corpse or skeleton of itself." The Digest gives us "definitions, maxims, principles, applications, distinctions, illustrations—all in endless abundance and variety." [2] It covers the whole domain of private law, whereas the Code is mostly confined to public law—institutions, officials, and the functions of officials. The alternative title, Pandects ("all-receiving"), indicates the magnitude of this survey of juristic literature. The commission drew upon all the most illustrious authors of the classical period, searching through some 2,000 books and taking from them 9,000 extracts, many of them very short and others long enough to fill several printed pages. Ulpian and Paul alone supplied half of the quoted passages. The subsequent disappearance of most of the original texts vastly enhances the value of the Digest, which is often our sole source of information, but makes it difficult for modern scholars to appraise the work of the compilers. The latter, having been instructed to bring the juristic literature up to date and correct it when necessary, may have made substantial alterations.[3]

[1] According to David Nasmith, *Outline of Roman History* (1890), p. 81, the compilers merely brought Gaius down to date, without being candid enough to admit it; and their deviations from the original are of "no small disadvantage" to law students. W. W. Buckland (*Manual*, p. 24) holds that a good deal of new matter was taken from the Code and the Digest.

[2] Hadley, *op. cit.*, p. 11. He continues (p. 12): "It is as if one should make a compendium of English law by selecting the most judicious and accurate statements from treatises like those of Blackstone and Kent, and the most pithy, pointed, luminous utterances from the decisions of judges like Mansfield, Scott, Marshall, and Story; and placing them together in an arrangement which, if not altogether scientific, should be, at least, practically convenient, natural, and easily comprehended."

[3] Opinions differ. Thus Declareuil holds (*op. cit.*, p. 26) that the quoted fragments have been "mixed with interpretations and distortions of Byzantine compilers." He makes similar observations, pp. 15 and 32-34. On the other hand Zane (*op. cit.*, p. 191) holds that the insertion of a word for the sake of clarity or the recasting of a sentence without altering its sense is "of no importance whatever." Radin (*op. cit.*, p. 95) takes a similar position. For the cautious opinion of Buckland see *Main Institutions*, pp. 15-16, and *Manual*, p. 24.

Roman law has come down to the modern world through the compilations of Justinian. Its survival seems all the more astonishing when we note the short life of the Digest and Code in the place of their birth. In such a decadent community, Justinian's system soon languished and fell into desuetude, giving way to paraphrases, abridgements, and new codes. Apparently the jurists had been resuscitated for the moment only to perish from universal neglect; and it might be supposed that a body of law which had been devised to meet certain historical conditions could rouse no more than antiquarian interest when those conditions had been transformed. But five hundred years after Justinian the jurists came to life again in southern France and northern Italy. Spreading from these centers, this splendid edifice of law gradually conquered regions far larger than the Roman Empire of Hadrian or Septimius Severus. Those who wish to follow this "ghost story," as Sir Paul Vinogradoff calls it, should read his narrative of *Roman Law in Mediæval Europe*.[1]

[1] First published in 1892, second ed. by F. de Zulueta, 1929.

CHAPTER XI

ENGLISH LAW: (1) FOUNDATIONS[1]

AMONG the world's various legal systems two possess incontestable superiority. Roman law and the Common Law of England stand apart because of their maturity and perfection, their consonance with the needs of the highest civilization. They must be counted among the most notable of all human achievements. Alongside of them, no doubt, International Law will some day take a place of honor. But that day is still far distant: International Law has not passed beyond a primitive stage; it remains fragmentary and vague; it lacks the sanctions of a central power which could give precision to its rules and do away with self-help.

English Law took shape very much as did the Roman. It developed by the method of trial and error. Its rules were evolved through innumerable minor adjustments which, in the course of centuries, brought about their correspondence with the concrete needs of the community. There was no surrender to abstractions; the process was empirical. The law-makers "advanced along the old Roman road which leads from experiment to experiment."[2] Remarkable analogies appear in the growth of the two systems of law. Thus, English procedure, which before the twelfth century resembled, in its ceremonial and ritualistic character, the Roman *legis actiones,* passed under the dominance of writs, these in turn resembling the praetorian *formulae.* The system of writs was so similar to the Roman formulary system that it might well seem to be the result of conscious imitation.[3] As a matter of fact medieval students of Roman law were little interested in its history; they knew nothing about the formulary system except that it had been abolished by imperial wisdom. The writs were, according to Pollock

[1] At appropriate places reference will be made to the books that should be consulted for further reading. The most complete work, which deals with all phases of the subject, is Sir William S. Holdsworth's *A History of English Law* (9 vols., 2nd ed., 1922-1926).

[2] Sir F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols., 1895; revised, 1898), vol. II, p. 557.

[3] It is held to be such by J. M. Zane, *The Story of Law* (1927), p. 247.

and Maitland, "the most distinctively English trait of our medieval law."[1] England was, entirely unknown to herself, reproducing the history of Rome.

Here we have a striking justification of the theory of convergence. While the parallel development of English and Roman procedure suggests diffusion, the facts disprove it: the nature of *legis actio* and *formula,* like the supersession of the one by the other, were not known in twelfth-century England. There is no possibility of imitation. It cannot be assumed, therefore, as a matter of course, that borrowing occurred wherever English legal rules resemble the Roman. Borrowing did take place. Some attempt to estimate the extent of it will be made later on.

While the same method of trial and error was employed in building Roman and English law, the instruments were not the same. Roman law was fashioned first through the praetor's edict; then through the *responsa* and commentaries of the jurists. The latter not only worked over the great mass of recorded cases, with the purpose of harmonizing and liberalizing the law, but also advised praetors, judges, and advocates. With some truth, therefore, it has been said that Roman law was made by the Bar. Similarly, it has been said that the common law of England was made by the Bench. The English judge dealt with the facts brought before him in each case and declared the law by deciding the particular issue raised in litigation between individuals. The decision in one case served as a precedent for subsequent cases in which a similar situation arose. Judicial precedents thus made for certainty in the meaning of the law.

Both systems of law were developed through the accumulation of precedent. Both were based upon the decision of concrete cases. The law grew and changed in the course of its application to the varying facts which the cases involved; but it changed so slowly, by such minor adjustments, that it was always deemed to be the same immutable law—a law existing from time immemorial, which was to be found and declared, not made.[2] Law was custom. In Rome, as we have seen, statutes rarely ventured into the field of private law during the Republic. In England legislation is said to begin with Magna Carta (1215)

[1] *Op. cit.,* vol. II, pp. 558 and 556.

[2] According to James I and Bacon, in the seventeenth century, it was the function of the judge to declare the law, not make it—*jus dicere,* not *jus dare.* Chief Justice Coke distinguished between "law" and statutes, the former being custom and fundamental. He defined *mala in se* as breaches of the common law and *mala prohibita* as breaches of statutes. C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910), pp. 110 and 299.

or the Statute of Merton (1236).[1] Yet all the enactments of the next four centuries would not fill three quarto volumes in the common edition of the Statutes at Large. It was only after the civil war, when the sovereignty of Parliament was fully recognized, that legislative activity grew apace. The statutes of the next two centuries (1660-1868) would fill 43 such volumes.[2]

But the Roman law that medieval Europe inherited was the systematized and enacted law of Justinian. Gone were the incongruities and disorderliness which, as in the world of nature, the manner of its growth had entailed. Like the landscape gardeners of eighteenth-century France, Tribonian had improved on nature! He had produced something that struck the eye as symmetrical, harmonious, and elegant. By contrast, the English common law, which could be found only by wandering through a vast maze of decided cases, might well seem "an ungodly jumble." It was clumsy and cumbrous, perhaps.[3] But it was tough—"one of the toughest things ever made."[4] All efforts to crush or supplant it failed. Other European countries "received" the Roman law during the Renaissance, but not England.

ANGLO-SAXON AND NORMAN LAW[5]

The first great forward steps in the formation of the common law were taken in the reign of Henry II (1154-1189). But it is necessary to have some understanding of the administration of justice before his time and of the situation that confronted him.

Geographically, as Maitland has said, England was destined to be a land of one law. Her rivers were narrow, her hills low; she was encompassed by her moat, the sea. Before the Norman Conquest, however, she seemed to be disintegrating politically and breaking up into a number of semi-independent lordships. The central government had

[1] The ordinances or assizes of Henry II were not regarded as new laws, but as mere temporary restrictions which might easily be altered. They soon became embedded in the mass of common law, indistinguishable from the unenacted rules developed by the courts. F. W. Maitland and F. C. Montague, *A Sketch of English Legal History* (1915), p. 77.

[2] Edward Jenks, *A Short History of English Law* (4th ed., 1928), p. 186.

[3] Slighting and even contemptuous remarks are sometimes made. So J. M. Zane (*op. cit.*, p. 280) condemns the builders of the common law as slow, ponderous, and inept. But in its formative period, Roman law had very much the same qualities.

[4] Maitland and Montague, *op. cit.*, p. 113.

[5] See on this subject D. J. Medley, *A Student's Manual of English Constitutional History* (6th ed., 1925); W. F. Walsh, *Outlines of English and American Law* (1924); Edward Jenks, *A Short History of English Law* (4th ed., 1928); G. B. Adams, *A Constitutional History of England* (1921).

little power. There was no legal uniformity. Not only was custom different in Mercia and Wessex and in the old Danelaw; it varied from shire to shire, even from village to village. It was, says Jenks, almost literally parochial.[1] Indeed, more than a century after the Conquest Glanvill says in his treatise that he declines to state the customs because they are so numerous. But everywhere law was becoming a matter of public rather than private concern. The individual, with the help of his kindred, could no longer take the law into his own hands and exact vengeance. He could no longer demand an eye for an eye, a tooth for a tooth. Crime had become "bot-worthy." It must now be expiated by money-payments, varying with the gravity of the offense.

Freemen held moot or court in township, hundred, and shire for the punishment of crime and the settlement of civil controversies. They themselves acted as judges. Procedure bore some analogy to that of early Rome. There was the same close attention to the formalities of speech and actions which had marked the *legis actio*. The plaintiff made his charge in set phrases, knowing that any slight deviation from the prescribed language, a mistake or omission, would cause him to lose his suit. When he had stated his case (foreoath) and the defendant had taken oath in rebuttal, the court pronounced a *doom*, which specified the penalties for the alleged offense and imposed on one of the parties (generally the defendant), the onus of proof. The trial consisted of an attempt to fulfil the form of proof.

The form of proof seems to us nowadays exceedingly crude. It required either the production of oath-helpers (compurgators) or submission to the ordeal. According to the first method the litigant came to the moot on the appointed day with a certain number of oath-helpers —a number which may have depended upon his social rank or which may have been, including himself, twelve.[2] If they swore that they believed his oath to be true, he won. According to our modern view, the ease of securing oath-helpers reduced this form of proof to a farce.[3] But it may be that in those days, when oaths were taken more seriously and when the fear of divine punishment acted as a restraint, a man of bad repute would have difficulty in getting even his kindred to perjure themselves. At any rate, under the new name of wager of law, compurgation persisted long after the Norman Conquest. Eng-

[1] *The Book of English Law* (1929), pp. 14-15.
[2] Medley, *op. cit.*, p. 374.
[3] Jenks, *op. cit.*, p. 46; Adams, *op. cit.*, p. 30.

lishmen had no liking for the Norman practice of trial by battle (*duellum,* judicial combat), which, though not formally abolished till 1819, actually disappeared with the full establishment of jury trial. It should be noted that, in property disputes, witnesses were sometimes made use of. They swore to the facts instead of merely supporting the oath of their principal. But they differed from modern witnesses because they were not subject to any kind of cross-examination.

An alternative form of proof, which seems to us still more absurd, was the ordeal. This was a solemn appeal to divine judgment and the invocation of a miracle. It was much more commonly applied in criminal than in civil cases, and in particular when the circumstances pointed to guilt; [1] but it was sometimes allowed as a second test when compurgation had failed or when the court had good reason to suspect the oath-helpers. The accused person must walk barefoot over red-hot plowshares or carry one of them in his hands or plunge his arm into boiling water. A few days later his bandages were removed; and, if he bore no scars, his innocence was established.[2] Compurgation appears absurd, because compliance was so easy; the ordeal, because only a miracle or else collusion of some kind could save an innocent man. As the ordeal had a religious character and involved ecclesiastical cooperation, it disappeared when the Fourth Lateran Council condemned it in 1215.

The effects of the Norman Conquest (1066) upon English legal institutions have been, in turn, exaggerated and slighted.[3] The immediate effects were small. The Normans, although credited with being a legal-minded people (who even now furnish Paris with lawsuits and barristers), had no written law; nor had they much in the way of unwritten custom that invited substitution for English practice. They did establish feudalism, towards which the country had been drifting for some time; and from feudalism English law derived one of its chief alien elements—the land law. They also brought with them trial by battle

[1] For example, when the accused had been taken in the act or when stolen funds were found upon him.

[2] Or, having been bound hand and foot and thrown into the water, he was deemed innocent if he sank out of sight.

[3] "At one time it was the fashion to assume that the victory of William of Normandy at Senlac in 1066 was the beginning of English legal history. That assumption is so grossly inconsistent with facts, that the reaction against it has been excessive; and there is now a tendency to assume that the Norman Conquest was an unimportant incident in the development of English law. That assumption is, if possible, more unfounded than its predecessor." Jenks, *The Book of English Law* (1929), pp. 17-18.

(judicial combat), a sort of bilateral ordeal; and, far more significant, the inquest, progenitor of the modern jury. Trial by battle was employed both in civil and criminal cases: [1] in the latter only for felonies.[2] In a criminal case the appellant offered to prove the truth of his charges by his own body; in a civil case the demandant (as he was called) offered battle by the body of a champion, who was in theory a witness to the seisin of the land in dispute. Late in the twelfth century judicial combat was widely employed in the king's court. Yet the English, clinging to their old modes of proof, showed a distinct aversion to it. Perhaps that aversion influenced Henry II in making his great reforms. At any rate, trial by battle gave way before the universal adoption of trial by jury.

The inquest, germ of the jury, originated in the later Roman Empire as a means of establishing imperial fiscal claims. A group of responsible residents of the neighborhood, officially selected and put under oath, were required to answer questions as to the ownership of land, its extent, value, etc. Frankish kings inherited the institution.[3] From them the Normans borrowed it. The Conqueror brought it to England with him; and by its means he compiled Domesday Book. That famous fiscal record rests upon the verdict of jurors whose inquisitorial methods alarmed the people and created a most unfavorable impression. The essence of the jury is found in the inquest: a body of neighbors, summoned by an official, put under oath, and required to make true answer to certain questions. The sworn group might be asked to describe the customs of the district, or to list the rights of the king, or to name all proprietors and state their landed possessions.

[1] Medley, *op. cit.*, pp. 375-377.

[2] At the outset felony consisted in a breach of the feudal bond which involved the escheat of the felon's land to his lord. It was, therefore, to the interest of the magnates to extend the range of felony. By the thirteenth century seven or more specific crimes came under that head; and a felony now denoted any crime that could be prosecuted by appeal (wager of battle) and which involved escheat of the land to the lord, loss of goods to the wronged man, and forfeiture of life or limb. Medley, *op. cit.*, pp. 375-377. Jenks (*A Short History of English Law*, p. 151) gives a list of treasons and felonies and a list of trespasses (punishable by fine or imprisonment; now called misdemeanors) at the end of the sixteenth century. The first list includes seventeen crimes (for example, rebellion, false coining, murder, arson, burglary, rape, maiming, suicide).

[3] Jenks, *A Short History of English Law* (4th ed., 1928), p. 47. The Frankish king "assumes to himself the privilege of ascertaining and maintaining his own rights by means of an inquest. He orders that a group of men, the best and most trustworthy men of a district, be sworn to declare what lands, what rights he has or ought to have in their district. He uses this procedure for many different purposes; he uses it in his litigation." He also grants the procedure as a favor to others. Sir F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols., 1895; 2nd ed., 1898), vol. I, p. 120.

Or the question might be of a different order: "What persons do you suspect of murder, arson, rape? Did Roger murder Ralph? Did Henry disseise William of his free tenement at Dale?" [1] While the inquest was at first used by the Norman kings of England chiefly for fiscal purposes, it was occasionally used for judicial purposes, in disputes between tenants-in-chief of the crown.[2] Zane cites a case between the Bishop of Rochester and the Sheriff, heard before the justiciar, Odo of Bayeux, about 1075. "Here," he comments,[3] "is the first jury of twelve men ever assembled in England to make a conclusive statement of the facts upon which the judge of the court is to act in making his judgment."

The Conquest affected the subsequent growth of the common law, however, not because of new and immediate legal contributions, but because of its very nature. It arrested the process of disintegration, substituted administrative unity for the partial reversion to heptarchic separation. The monarchy was so strong that it could feudalize the country without imperiling its own supremacy. There could be no contemptuous vassal who, like a Duke of Normandy doing homage to the French king, would, by way of a rough joke, affect to kneel, seize the king's legs, and tip him over in a backwards somersault. Ingeniously the Conqueror balanced English against feudal institutions. He and his son Henry promised to respect the pre-conquest law. They revived and perpetuated the popular courts of hundred and county (the Norman name for shire), although both seemed to be perishing through the establishment of private jurisdictions in feudal or monastic manors and in chartered boroughs—that is, through the loss of a great part of their suitors and judicial business.

NATIONALIZATION OF JUSTICE

But the preservation of these moribund courts gave little promise for the ultimate future. It seemed to interpose no more than a pause in the development of local feudal customs such as fragmented France down to the Revolution. What actually happened only the power of the Norman and Angevin monarchy made possible. Experimentally in the reign of Henry I and systematically in the reign of Henry II, his grandson (1154-1189), a momentous change was introduced. The king brought his own judicial administration to the people. From his central

[1] Pollock and Maitland, *op. cit.*, vol. I, pp. 117-118.
[2] Jenks, *A Short History of English Law*, p. 48, refers to cases in 1101 and 1122.
[3] *The Story of Law* (1927), p. 241.

court, the *Curia Regis*,[1] he sent through the counties itinerant justices and under their authority extended the privilege of jury trial to the purchasers of royal writs. Over the length and breadth of the land he spread the new machinery, which, by nature of its superiority, was destined to absorb all competing jurisdictions. Within a century the county courts had been deprived of all important business; and what was left passed eventually into the hands of the justices of the peace.

The superiority of royal justice was incontestable. Its chief merit was bound up with the power of the king, which stood behind the itinerant justices, behind the writs, behind the verdicts of the juries. Great landowners might flout the popular courts, take the law into their own hands, harry and oppress their neighbors, steal land, indulge in pillage and rapine; other freeholders either dared not bring charges against great offenders in the county court or did so unavailingly. But it was to the interest of the king to crush lawlessness and within his power to do so. The judgments of the king's court were enforced; and the fact of their enforcement at this early time bred in Englishmen respect for law and law courts. "Unity and equality, in and before the law," says Ernest Barker,[2] "are great things; but they are only sounding brass and a tinkling cymbal unless the law is actually enforced. It was the merit of the judges of the common law that they actually enforced its rules, and so burned law-abidingness into the substance of the nation, that a suspicion of the breach of the law can become a momentous force in the very throes of a national dispute." [3]

One of the chief attractions of royal justice was, therefore, its readiness to proceed against great offenders and the certainty that its decisions would be enforced. Another attraction was the jury. A jury ver-

[1] As to the character of the *curia regis*, see Pollock and Maitland, *op. cit.*, vol. I, pp. 86-87; and Medley, *op. cit.*, p. 103. Medley says: "There is no question of a definite Council established on principle of tenure in chief or any other. The king consulted whom he would, when he would and where he would: those individuals were his councillors and that meeting was his Council. Moreover, there was no distinction between the different powers of the government.... Thus the king might do anything through his Council. But it was not an office: it was his court.... The Council became a purely consultative body entrusting its decisions to the appropriate office or court."

[2] *National Character* (1927), p. 156.

[3] Barker continues: "Many mediaeval statutes were indeed unavailing; and they rather attest to evils which they sought to combat than the remedies which they failed to achieve. But the decisions of the courts were regularly enforced; and on that basis, when the State recovered, under the Tudors, from the weakness of the later Middle Ages, it was possible to proceed to the effective enforcement of statutes. It became a tradition that a law once made will be honoured in the observance; that a law made by one Parliament will not be altered by the next; that a tax imposed by law will be duly and certainly collected."

dict was not accidental, like the outcome of the ordeal or trial by battle, or even compurgation. When the king extended to his people the privilege of using the jury,—a prerogative institution, belonging solely to the king and used in establishing his own rights,—the people soon came to regard it as a great boon. This confidence seems to have been justified. Why was it that, when they set up popular institutions in the nineteenth century, so many countries borrowed the jury from England? The jury has on countless occasions, in England and elsewhere, proved to be a great champion of liberty. Bells rang in England when a jury acquitted the seven bishops of 1688; and similar occasions of rejoicing can easily be recalled. Whatever the defects of the jury,—and nowadays critics seem to be in the ascendancy,—it has a glorious record in the service of liberty.[1]

What prompted the king to nationalize the administration of justice? He did not start with an intention of doing so. He did not entertain any plan of giving the country a common law. He was preoccupied with the immediate needs of his situation: power, administrative control, revenue. The writers agree that the chief motive was fiscal, the same motive that led kings at a later time to summon representative knights and burgesses and then to establish, without planning it at all, the House of Commons. Now, legal business has always been profitable—to those who have conducted it; for it touches men's passions deeply and thus makes them willing to pay well.[2] The fines and amercements that now went to local courts—popular, feudal, municipal, clerical—and the prospect of increasing these by improving the standards of justice might well arouse royal cupidity. The king, needing new revenues, saw here a means of getting them—and, at the same time, of vastly strengthening the central administration.

It is also true that in his situation, with extensive French dominions, the king was made constantly aware of the disruptive tendencies of feudalism. The maintenance of public order—as an alternative to

[1] For example, the cases of Miller (1770), Hardy and Horne Tooke (1794), and Hone (1817). Medley (*op. cit.*, p. 492) calls the jury "the surest guarantee for individual liberty." Of the situation under Charles II he says (p. 491): "Charles II attempted to secure the condemnation of his political opponents through juries manipulated by sheriffs in the royal interest. He did indeed so obtain the execution of Lord Russell and of Algernon Sidney, while it was only by a timely flight that the leader of the opposition, Shaftesbury, saved himself from a similar fate. But all the intimidation exercised by the judges was ineffectual to force the jury to subservience. Despite the careful selection of the jury, the seven bishops were acquitted. Indeed, after the Revolution the judges discovered that their only avenue to complete control over a prisoner's fate lay in a perverse misreading of the law."

[2] Edward Jenks, *A Short History of English Law* (4th ed., 1928), p. 40.

chronic local warfare—and of his own sovereignty—as an alternative to the humiliating caricature of kingship on the continent—required him first of all to check any growth of feudal independence. He must have means of enforcing royal rights against his vassals. More than that, he must try to weaken potential rivals; and he could do so effectively by starving the courts of feudatories.[1] The decline of feudalism in England, so much earlier and more rapid than on the Continent, was due in some measure to the transference of manorial jurisdiction, with its political authority and pecuniary profits, to the king's court. The king reached out first of all to obtain a monopoly in the repression of crime; but, after a while, civil suits, which were generally connected with the land, began to preponderate in the volume of business before the court of the king.

As the manorial courts lost strength, so too did the popular courts of hundred and shire. In the latter instance the loss was disguised, however. The itinerant justices operated in shire and hundred; it was the sheriff, chief official of the county court, who received the royal writ, summoned the assembly to meet the justices, and arranged for the selection of jurors. But, speaking legally, it was not the county court over which the justices presided; it was the king's court, the same court that met in his presence, wherever he happened to be, the same court that soon came to have branches sitting permanently at Westminster.[2] In fact, when the king's court was held in a county, its composition differed from that of the regular county court. Private jurisdictions could not be pleaded as an excuse for non-attendance. And, therefore, at the very time when the popular court seemed to be reviving, it was actually being reduced to a shadow by the royal court that utilized it as a base of operations.

ITINERANT JUSTICES AND CENTRAL COURTS

The energy of Norman and Angevin kings rapidly increased the scope of royal administration. Business became not only greater in volume, but more technical. It exposed the need of a highly trained

[1] Jenks, *The Book of English Law* (1929), p. 19; Maitland and Montague, *op. cit.*, p. 36.

[2] "We speak of *the* Curia Regis without remembering that the definite article is not in our documents. Any court held in the King's name by the King's delegates is a Curia Regis." Pollock and Maitland, *op. cit.*, vol. I, p. 132. Of the itinerant justices, Ernest Barker says (*National Character*, p. 154): "Wherever they appeared, they carried the person of the King, and took precedence of all others; they were the 'Court of the King,' vindicating 'the King's peace' and asserting his rights to the profits of justice at the expense of all other courts, and especially of the feudal and ecclesiastical courts. They, and they alone, could use a jury."

and permanent service, with continuity and tradition, in the place of the indefinite and fluctuating personnel of the Curia Regis. The amœba stage was passing; one organ would no longer suffice. The time had come for specialization of function, for the discharge of this or that specific activity through the development of appropriate agencies. Amateur councilors formed committees, and then secured the assistance of expert clerks; the experts, devising the methods of routine, ousted their more dignified colleagues and set up an administrative office.[1] This evolution first took place in the field of finance, when the Exchequer assumed the double form of a bureau of book-keepers and accountants and of a court to decide fiscal disputes. It manifested itself, soon afterwards, in the field of justice.

From the very outset the Curia Regis had a great deal of judicial business to settle. It acted in all questions affecting the royal rights—the pleas of the Crown, as contrasted with common pleas or questions between subject and subject; and in disputes between tenants-in-chief, the king's immediate vassals. Exceptionally, it decided cases in which one of the parties was fortunate enough to get the ear of the king or in which the local courts—perhaps intimidated by a powerful magnate—could provide no remedy. In the latter part of the twelfth century the king was deliberately invading the province of the local courts, taking away their business and their revenues. This progressive enlargement of royal jurisdiction explains the rise of professional judges and permanent courts. By way of releasing his amateur councillors and securing greater efficiency, Henry II, in 1178, empowered a group of five judges to hear cases of all sorts, subject to the final jurisdiction of the Curia Regis.[2] But these judges, like the Curia Regis itself, followed the king all over his dominions. So, too, the unfortunate litigants must follow the king in his wanderings from shire to shire, from manor to manor in England, and from England to Normandy or Poitou. For five years Richard d'Anesly kept traveling in the king's wake.[3] The estate that he claimed was awarded to him at last, when its value had almost been devoured by lawyer's fees and expenses, not to speak of presents hopefully given to the king, the queen, and influential courtiers. This peripatetic court entailed a ruinous expenditure of time and money. Some small proprietor, harassed by the sheriff or by some powerful neighbor and denied satisfaction in

[1] Medley, *op. cit.*, p. 113.
[2] Pollock and Maitland, *op. cit.*, vol. I, p. 133; Medley, *op. cit.*, p. 392.
[3] H. W. C. Davis, *England Under the Normans and Angevins* (1905), p. 279.

the county court, might get access to royal justice. But even when he had won this access, there began endless delay, weary wandering, heavy expense. The litigant's resources might be quite exhausted before he had won a decision in some remote Angevin territory in France.

Such abuses, becoming notorious, demanded a remedy. Magna Carta provided that common pleas (real and personal actions between subjects) should not follow the king, but be held in a fixed place. Practice varied in the thirteenth century; but towards its close a Court of Common Pleas, with its own chief justice, was permanently established at Westminster.[1] Alongside of it soon appeared two other courts: the Exchequer, which was concerned with fiscal questions; and the King's Bench, which heard all other pleas of the Crown. In course of time, by the employment of fictions—which play so considerable a part in the growth of English, as of Roman, law—these two courts came to share the business of the Court of Common Pleas.[2] The latter had no effective means of compelling obedience to a writ of summons; its ultimate recourse against a defendant was the expensive and time-consuming process of outlawry. The former, because they were enforcing the king's claims, could require the sheriff to arrest the defendant at once.[3] Now, the King's Bench had jurisdiction in all cases of trespass, trespass technically involving a breach of the king's peace. If, therefore, a plaintiff wished to collect a debt, the court would issue a writ alleging that the defendant had committed a trespass; and, since there had been in fact no such trespass, it would permit the plaintiff to add (*ac etiam*), to his fictitious claim, a claim in debt as his real demand. The defendant could be arrested, because the action was nominally one of trespass; but, when proceedings began before the court, the nominal ground of action was quietly dropped. The Exchequer acquired jurisdiction by means of an equally ingenious device. It resorted to the fiction that the plaintiff owed money to the king and that he could not pay it until he had recovered from the defendant. The writ of *quominus*, alleging that a royal claim was involved, required the immediate arrest of the defendant. Thereafter, nothing more was heard of any money due to

[1] Actions might be started at Westminster or taken there from the courts which the itinerant justices, sent out by the king, held in the counties. By virtue of certain writs (such as *pone, false judgment,* and *error*) the Court of Common Pleas could transfer cases from manorial and other courts or reverse decisions given there. By writ of *prohibition* it could restrain inferior courts from going beyond their proper jurisdiction.

[2] Jenks, *A Short History of English Law* (4th ed., 1928), pp. 170-172.

[3] By issuing the writ of *capias ad respondendum.*

the king. By such methods as these, the King's Bench and the Exchequer enlarged their jurisdiction and, gradually, along with the Common Pleas, began to be known among Englishmen as the "common law" courts.

These permanent courts at Westminster not only expedited and cheapened the administration of justice, but also played a notable part in creating uniformity out of the chaos of local customs. Still more important, and originating before them, were the itinerant justices. They held sessions of the king's court in all the counties of England. They brought the king's court to the people, brought it to the place where litigation arose and where the facts could most easily be ascertained. They built up that intimate connection between central and local government which had hitherto been wanting; and they did it in large measure through the employment of local residents on juries. "They, and they alone, could use a jury," says Barker,[1] "for the use of a jury was a prerogative of the king, and a jury could only be empanelled in the king's court; but by granting the use of a jury to settle the cases of subjects which came before the king's court, they made the prerogative of the king into the privilege of the people. By the majesty with which they were clothed and the attraction of the special processes which only they could employ, by their regular circuits and their pervasive presence, they made the court of the king a court of general resort and universal competence; and the law of that court became the common law of England."

This momentous change did not proceed according to some original plan. It took place gradually, as one step led to another. For the purpose of ascertaining and enforcing fiscal rights, the Norman kings occasionally sent central officials into the various counties. Under Henry I these officials took over a certain amount of judicial business, although their main activity continued to be financial. Under Henry II itinerant justices, officials whose activity was mainly judicial, visited the counties regularly and frequently. In the middle of his reign the counties were grouped in six circuits and served by eighteen itinerant justices. Magna Carta provided that the king's judges must visit each shire or county at least once a year. By degrees, as the judicial aspects of these visits became far more significant than the financial, the practice of borrowing officials from the Exchequer and associating them with local knights of the shire gave way before the development of a trained personnel. There appeared a professional bench, backed by a profes-

[1] *Op. cit.*, pp. 154-155.

sional bar. The new, professional judges spent part of their time on circuit, and part of their time as members of the common-law courts at Westminster.[1]

It was the primary duty of the royal judges to enforce the king's peace. A breach of the public order, which in the Anglo-Saxon period had been punishable locally in any private jurisdiction, began to assume a new character after the Conquest. Felonies came to be regarded as breaches of the king's peace, and for that reason, as cognizable by his courts. In such turbulent times it was not easy to discover criminals and bring them to justice. The itinerant justices were, however, provided with a new and effective instrument for the suppression of crime. The jury, which the Normans had brought with them and which they had used extensively in fiscal matters, was applied by Henry II, systematically, to criminal procedure.[2] We have here the jury of presentment, forerunner of the grand jury of to-day. The process of indictment involved some complication, two successive stages, one before the sheriff, the other before the justices. Four men of each township presented suspects to twelve men of the hundred (a subdivision of the county); and, if this jury of the hundred "avowed" the presentments, adopting them as its own, it laid them before the sheriff. He held the accused for appearance at the next meeting of the king's court. When the itinerant justices arrived, the jury of twelve laid its presentments before them, these being supported in each case by the oaths of four men from the four townships nearest to the scene of the crime. Jurors oscillated between acting on the vaguest rumors and keeping silent when there was the slightest room for doubt.[3] On the one hand, townships were liable to a heavy fine for the failure to produce criminals; [4] on the other hand, because of the

[1] The itinerant judges acted under various commissions for particular purposes: commission of the *Peace* which was at first the most important, but which, as public order improved, passed into the hands of the Justices of the Peace; commission of *Oyer and Terminer*, for the purpose of hearing criminal cases; and commission of the *Assize*, for the purpose of hearing civil actions. A distinction was made between justices in eyre, who were empowered to try all sorts of cases, criminal and civil, pleas of the Crown and common pleas, and justices of assize, who were at first confined to cases involving seisin (possession) of freehold. The eyres ended in the reign of Edward III. The justices of assize took over all civil and criminal work. Under the commission of *Nisi prius* (Medley, *op. cit.*, p. 393) "two justices, with the aid of one or two knights of the shire, were to take all assizes thrice a year at Westminster *unless, before* the day fixed for trial by the judges there, the itinerant justices had come into the county."

[2] Medley, *op. cit.*, pp. 386-389; Pollock and Maitland, *op. cit.*, vol. I, pp. 131 *et seq.*; Jenks, *A Short History of English Law*, pp. 39-43.

[3] Davis, *op. cit.*, p. 494.

[4] Sir W. S. Holdsworth, *A History of English Law*, vol. I (1922), pp. 265-273.

judges' zeal in filling the royal coffers by fines and forfeitures, a reckless presentment might doom an innocent man.

The jury's presentment was a *prima facie* proof of guilt. The accused had but one chance of escape: the ordeal. But early in the thirteenth century the ordeal was condemned by the Fourth Lateran Council and, as a consequence, discarded as a part of criminal procedure.[1] The law then hardly knew what to do. It urged the accused to "put himself on the country,"—to accept jury trial. He might well refuse to do so, as the jury of presentment would be the trial jury and naturally disposed to maintain its original view of his guilt.[2] The judges tried various expedients as a means of compelling submission. A statute of 1275 prescribed rigorous imprisonment, the barbarous *peine forte et dure,* which combined slow starvation with the crushing of the body under heavy iron weights. Some prisoners endured this form of death rather than face probable conviction and the confiscation of the family estates. The unfairness of allowing the same group of jurors both to prefer charges and to try the accused led first to a modification, then to a complete change, of practice. At first the jury of presentment was diluted by the addition of other jurors, and for conviction a unanimous verdict was required of a body that might include as many as forty-four members.[3] Later, a complete separation occurred between the grand jury of twenty-three and the petty or trial jury of twelve, both drawn from the whole county. No exact date can be given; but a statute of 1352 recognized the right of the accused to challenge any prospective trial juror who had served on the jury of presentment.[4]

ORIGINAL WRITS

In the early period of the transference of jurisdiction from the local courts to the king's court the suppression of crime by way of enforcing the king's peace played a principal part. But very soon the

[1] The decree of the Lateran Council (1215) took effect almost at once in England because of very close relations with the papacy in the early years of Henry III. The ordeal, being the judgment of God, could not very well be conducted without clerical coöperation.

Some of the old methods of procedure still persisted in the local courts. Compurgation was abolished by statute in 1333; trial by battle, in 1819 after it had been invoked in the famous case of *Ashford v. Thornton;* the *peine forte et dure,* in 1772.

[2] On the other hand, a change of attitude was possible, since the presentment had been made merely on common report or even to avoid fines in case the judges heard of the rumors from other sources.

[3] Medley, *op. cit.,* p. 388.

[4] Holdsworth, *op. cit.,* vol. I, pp. 321-327.

itinerant justices began to take possession of the civil field. They did this by means of a document called a writ, an original or originating writ, which, as we have seen, resembled the Roman *formula*.[1] The royal Chancery, or secretarial bureau, framed a new writ or form of action whenever the king's judges invented, or derived from the multitude of particular customs, a general rule of law; or, if Chancery took the initiative, the judges might either allow or quash the new writ.[2] In this way the forms of action grew rapidly in number. Each had its own name; each was described in its original writ. The litigant must stand or fall by his choice of the writ which seemed to him, or his lawyer, most likely to cover the facts of his case. By purchasing a writ,[3] he won access to the king's court and to its superior processes—a royal summons to make certain the presence of the defendant, a jury to establish the facts, and execution of judgment even against the most powerful magnate in the land. Moreover, the definition of the alleged offense no longer rested with the "doomsmen" of the court, whose memory might be erratic or affected by interest; it appeared in the writ, a clear definition, which applied to all parts of the country. If the facts, as the plaintiff represented them, found substantiation in the verdict of the jury, he obtained relief.

For a hundred years or more Chancery kept doling out new actions. The stream flowed strongly during the long reign of Henry III (1216-1272). The suitor, having regard to the facts alleged in his complaint, must select the appropriate writ and bring the defendant into court by the process therein described. When the case had been decided, it was the duty of the sheriff to return the writ, with the judgment endorsed on it, for registration by the Chancellor's clerks.[4] Thus developed the Register of Writs, an expanding collection of legal remedies, which has been styled the dictionary of the common law.[5] Within that framework the common law grew up. Round the original writs the whole medieval scheme centered, so that a book on royal justice was a book on writs. The treatise attributed to Glanvill, justiciar of Henry II, is

[1] Writs—commands or administrative orders, addressed to a royal officer—were used for many different purposes. They were used to summon the council or the army, or to authorize the levy of taxes. But soon after the Conquest the royal Chancery began to use them in connection with legal proceedings. Jenks, *A Short History of English Law* (4th ed., 1928), pp. 43-44.

[2] Jenks, *ibid.*, p. 45; *The Book of English Law*, p. 39.

[3] Occasionally, a poor man might obtain a writ free of charge. Magna Carta forbade excessive charges for writs issued in common form. The Chancery was called "the writ shop" (*officina brevium*).

[4] Medley, *op. cit.*, p. 377.

[5] Jenks. *Short History*, p. 45.

altogether a commentary on them; and Bracton, who wrote after the middle of the next century, is full of information about them, showing how new writs were devised to meet changing circumstances and naming some of the judges who framed particular writs. But late in the thirteenth century, as we shall see, the stream dried up; the flow of new writs stopped; in the sixteenth and seventeenth centuries many of the older writs dropped out of use. Simpler processes were introduced by the ingenuity of judges and by direct action of the legislature.[1]

The system of writs, which served so well when the foundations were laid, could not accommodate itself to the requirements of the common law in its later stages of growth.[2] It was not sufficiently elastic, sufficiently simple. The center of gravity shifted from the writ to the plaintiff's written "declaration," which specified the details of his claim. By the nineteenth century an original writ was no longer required for the commencement of an action; by recourse to fiction, which the court so frequently employed, its existence was assumed. The plaintiff's declaration determined the form of action. But this shift from writ to declaration took place slowly, as the oral altercation gave way to the exchange of written pleadings between the litigants. It can be discerned clearly in the sixteenth century and may be explained by the fact that paper had come into use as a substitute for costly vellum.[3] Not till the nineteenth century, however, did Parliament make drastic changes in procedure, reducing it to much greater simplicity. To-day an action begins with a writ of summons, which states the nature of the claim and the relief or remedy sought in the action.

The earliest civil actions and their corresponding writs were authorized by Henry II in ordinances, or instruction to his judges, called assizes.[4] These assizes had to do with land, either ownership or possession (seisin).[5] Land was then the prevailing form of property, the

[1] Sir W. S. Holdsworth, *Charles Dickens as a Legal Historian* (1928), p. 119.

[2] See P. H. Winfield, *s.v.* "Writ," *Encyclopædia Britannica* (14th ed., 1929).

[3] J. M. Zane, *The Story of Law* (1927), p. 289. "The revolution in the method of pleading was brought about quietly. No one can tell the time when it was made. The change was exceedingly unfortunate. The system was of iron. The process of stating the case in all possible ways in different courts began."

[4] This word had a great variety of meanings: for example, an ordinance or rule for the conduct of public business; procedure under such a rule; the jury employed under such a procedure; and the court itself.

[5] Seisin means possession. The man in possession of the land was not necessarily the man who ought to be there, the rightful owner. But ownership and possession were not very different. For the law decided, not the final question of ownership, but which of two litigants had the better claim; and the successful litigant might be ousted by a later claimant. From the feudal point of view the important question was that of possession and of liability to the services attached to the land.

cause of endless controversies and abuses. The powerful oppressed the weak, encroaching upon small freeholds and even appropriating them. The manorial courts, which had jurisdiction over most questions affecting the land, did not afford adequate protection, being unable or unwilling to coerce the offenders; and, although the feudal lords naturally objected to the loss of fines and amercements, it was with widespread approval that Henry II allowed litigants to assert their claims to freehold property in his court. He laid down the rule that no man need answer for his free tenement—that a freeholder's tenure should not be called in question—without a royal writ directing an inquiry into his title. No longer, therefore, would the question of ownership arise in the lord's court and be decided by wager of battle. The demandant, as the claimant was called, had two means of action—by *Writ of Right* or by *Writ Praecipe,* the second of which ignored the manorial court altogether. In both cases an "assize" of twelve knights declared the facts in its verdict. But these proprietary actions appear to have involved vexatious delays.[1] In the meantime, who was to hold the land, to whom should the king or other overlord look to do military service and pay feudal dues?

The possessory assizes of Henry II were designed to settle the immediate question of seisin, without prejudice to any ultimate award of title. The assize of *Novel Disseisin* (1166) furnished the plaintiff with an easy means of recovering possession of a freehold of which the defendant (or present holder) had dispossessed him by force since some recent date mentioned in the originating writ. The defendant might, in fact, be the owner; but he must establish ownership, not by forcible methods, but by legal proceedings in the king's court. By the assize of *Mort d'Ancestor* (1176) the heir took possession against any other person, even one asserting a better right, provided the ancestor when he died had held the land by a title which, if good, would descend to his heir. Any assertion of a better right must be vindicated in court.[2] The possessory actions deprived baronial courts of jurisdiction, substituted the sworn verdict of an assize or jury for trial by battle, and did away with self-help. The question of right or title could still be tested by further proceedings in the king's court. But, as a matter of fact, the dispute usually ended when possession had been awarded.

[1] Jenks, *A Short History of English Law,* p. 48; Medley, *op. cit.,* p. 382.

[2] There were two other possessory assizes: The Assize *Utrum,* which settled the preliminary question *whether* a disputed tenement were held by lay or eleemosynary tenure; and *Darrein presentment,* which determined the right of presenting to an ecclesiastical benefice.

This led judges to emphasize the importance of seisin as evidence and presumption of title.[1] Possession, as we now say, is nine points of the law. The popularity of possessory actions depended, in great measure, upon the use of the "assize" or jury, twelve good and lawful men of the vicinage—not necessarily knights, as in proprietary actions. The assize stated the facts as to whether the claimant had been wrongfully disseised of his tenement or whether the ancestor died in possession and the claimant was his next heir.

Beginning with the assizes of Henry II, writs grew rapidly in number, until a case could hardly arise without the existence of an appropriate action for judicial redress.[2] It may be well to show how the desirability of new writs came to be felt. What was the essence of a *novel disseisin?* The disturbance of good order by the person who had forcibly taken possession. This idea, carried a little farther, led to an action that was based on the disturbance of possession as a wrong in itself; and the new *writ of entry,* though at first available only between ejector and ejected, was in time extended to persons deriving title through each of them. By a glaring fiction the lord's court was assumed to have renounced jurisdiction. There was a gradual advance from one point to another. If forcible dispossession was a breach of the king's peace, so was any interference with possession, however slight. On that ground and by the exercise of a little ingenuity, royal officials could bring almost any offense before the king's court. This explains the *writ of trespass,* dating from the latter part of Henry III's reign. "If A gives pledges to prosecute his complaint, then put B by gage and pledge that he (B) be before our justices at Westminster on such a day prepared to show why with force and arms he assaulted A at N (or broke into the close of A at N, or took and carried away the sheep of A) and other enormities to him did, to the grave damage of said A and against our peace." Later, the writ omitted the allegations that the offense was committed "by force of arms" and "against our peace."[3] The writ of trespass eventually covered any wrongful infringement of another's right.

Henry II extended the jurisdiction of his own court at the expense of local courts by no sudden, sweeping reform. He did so bit by bit, now for this class of cases, now for that; and his successors followed the same tentative, empirical method of advance. Personal actions

[1] Jenks, *A Short History of English Law,* p. 50
[2] J. C. Carter, *Law: Its Origin, Growth, and Function* (1907), p. 64.
[3] Jenks, *ibid.,* pp. 50-53.

found a place alongside of actions relating to land. Before the end of the twelfth century the inquest in one form or another—sometimes called an assize, sometimes a jury—had become part of the normal procedure in almost every kind of civil action.[1] Technically an assize differed from a jury—the former was summoned by the original writ when the defendant himself was summoned and before he had made answer to the complaint against him; the latter was summoned only when the litigants, in their pleadings, had reached an issue of fact and had agreed that "the country" should settle it. Thus, the assize had its source in a royal writ; the jury, in the consent of the parties. But, after a time, that consent became more theoretical than actual. The judges compelled agreement by saying to one of the parties, "You must accept your opponent's offer of a jury or you will lose your cause." [2]

JURORS AS WITNESSES

In the language of George Burton Adams, the jury may be called the pivotal or perhaps the causal institution in the growth of the law.[3] Litigants naturally desired to escape from primitive methods of proof, such as the ordeal or trial by battle or compurgation, which were not very likely to reveal the truth; and it was this preference for the jury —along with other factors already noticed—which led to the extended use of writs and itinerant justices. What was the essential feature of jury trial? Disputed facts were established by the sworn testimony of those most likely to know and in the neighborhood where evidence was most likely to be found.

The jurors themselves, in the early days, were supposed to be already familiar with the facts when the trial began and to deliver a verdict based upon their own personal knowledge. They were not chosen then, as to-day, because they were empty-minded or at least open-minded, bound to deliver a verdict based solely upon happenings inside the court-room. Familiarity with the facts, instead of disqualifying a prospective juror, would recommend him for service; as late as 1543, when sworn witnesses had long been giving evidence in open court, a statute required that six of the twelve men of the jury should be

[1] Maitland and Montague, *A Sketch of English Legal History* (1915), p. 54.

[2] Pollock and Maitland, *The History of English Law before the Time of Edward I*, vol. I, p. 128.

[3] *A Constitutional History of England* (1921), pp. 86-87. On the evolution of the jury see particularly Pollock and Maitland, Maitland and Montague, Medley, and Walsh, whose works have already been cited. Zane (pp. 289-293) is particularly interesting.

residents of the hundred where the case arose and thus equipped to give information to the others. But in the early days there were no sworn witnesses. The jurors were themselves the witnesses,[1] as well as judges of fact. They were summoned from the neighborhood where the disseisin or trespass or wrongful taking of goods had occurred; and at a time when the country was sparsely inhabited and everybody had some knowledge of everybody else's affairs, they were likely to be well-informed. They did not reach a verdict simply on what they had seen with their own eyes. It was their duty, as soon as summoned, to make inquiry about the facts, collect all kinds of information, even rumor and gossip, sift it, and in court, three weeks or so later, state the net result. Moreover, although witnesses did not then testify in court, they might appear before the jury for certain purposes at the instance of the litigants; and not only did the judge charge the jury, in order to keep it to the point in rendering the verdict, but both parties argued their cases before it.

The jurors drew their information from various sources, some of them far from trustworthy; and, because of the personal responsibility that went with the verdict, they must have sifted the information with care. In civil cases, by the *writ of attaint,* the verdict might be reviewed by a second jury of twenty-four knights, and reversed. As the jurors were witnesses, reversal was equivalent to conviction of perjury, a very serious offense, which entailed not only imprisonment, but forfeiture of land and goods to the king. The writ of attaint, though not abolished by statute till 1826, fell into abeyance in the sixteenth century, when the jurors lost their character as witnesses.[2] There remained no way to reverse a verdict. However, the Chancellor discovered a remedy. If a

[1] According to Pollock and Maitland (*op. cit.*, vol. II, pp. 619-625), it is not strictly accurate to call the jurors witnesses. Otherwise, the judges would have dealt with them separately, as in the case of modern witnesses, and discussed divergencies in their testimony. Nor could the slow transition by which witness-jurors became judges of fact have taken place if their rôle had been solely that of witnesses. "We may say, if we like, that the old jurors were witnesses; but even in the early years of the thirteenth century they were not, and were hardly expected to be, eye-witnesses." They got information, wherever they could find it, during the fortnight or so that followed the summoning and preceded the trial.

[2] The independence of the jury was secured by the decision of the Court of Common Pleas in the case of Bushell (1670). Maitland and Montague, p. 133; Medley, p. 657. Two quakers (one being William Penn) were acquitted on the charge of preaching in a London street and thus violating a provision of the Clarendon Code. On the ground that they had found against the direction of the court and against full and manifest evidence, the jurors were punished for contempt. It was held in the case of Bushell, who obtained a writ of habeas corpus, that the return on the writ was insufficient. Thenceforward jurors could not be called to account for giving a verdict against the weight of evidence and the direction of the court.

litigant could show that, because of inadvertence on his part or fraud practised upon him, the verdict was wrong, the enforcement of the judgment could be enjoined by decree in equity. This would compel the successful party to accept a new trial. "The Chancery Court went even farther," says Zane,[1] "and held that a good equitable defense, which the law courts would not recognize, was sufficient ground for enjoining a judgment." Equity will be discussed in the next chapter.

The long history of the jury is marked by the decline of the function of the jurors as witnesses and the development of their function as judges of fact. The transition was gradual, so gradual that it cannot be described with detail and exactitude. As population grew more dense and social life more complex, the jury of neighbors no longer had ready access to the facts; it tended to rely upon evidence, which the litigants themselves were in the best position to provide. In the fifteenth century sworn witnesses began to testify in open court, instead of conferring privately with the jurors; [2] and in the next century the practice was generally followed, the witnesses now being subjected to cross-examination. Even so, the jurors continued to rely upon facts which came within their personal knowledge, but which had not been laid before the court in sworn evidence. It was not till 1650 that a court ruling decided that any person professing to have special knowledge should be put on the witness-stand. The transition was now complete; the verdict must be based only upon sworn evidence. The practice of swearing witnesses and the consequent growth of the law of evidence (which so sharply distinguished English from Roman law) revolutionized the conduct of the trial and the position of the jury. The requirement of a unanimous verdict was finally established in the middle of the fourteenth century. For a time there had been hesitation and the possibility of a majority verdict being adopted. But, after all, the jury stood for the whole neighborhood (litigants, in consenting to jury trial, were said to "put themselves on the country"); and the country could have but one will, one voice. In those days men had not yet accepted the dogma that the majority should control; or, rather, they expressed it differently, holding that minorities should give way in order to produce unanimity.[3]

[1] *Op. cit.*, p. 292.

[2] Already, in 1361, it had been decided that documents should not be submitted to the jury privately, but offered as evidence in court.

[3] The French jury (used for the trial of felonies) gives a majority verdict, as does the Scotch. But it has often been remarked that, with the requirement of a unanimous verdict, which is an additional safeguard for the accused, English juries more frequently convict than do the French. Aside from the jury, it is

It was largely by means of the jury and popular confidence in it that the English common law developed. The medieval jury has frequently been lauded. But Zane, in his very interesting, and at times provocative, book, *The Story of Law,* uses disparaging language.[1] The jurors were "venal and cowardly," guilty of "shameless conduct"; and the ascertainment of facts through them was "about as great a stupidity as wager of law" (compurgation). For certain limited purposes —to decide, for example, the facts regarding possession of land— twelve men of the neighborhood might have competent knowledge. For other purposes they were woefully deficient. Yet, instead of using discretion, "the courts kept on making every case a jury case" and after a time excluded writs which did not call for the use of a jury. Now, Sir John Fortescue, who wrote *De Laudibus Legum Angliae* about 1470, greatly preferred jury trial to French practice, where there was no jury and where torture was freely employed.[2] The jurors were men of property, indifferent between parties, acting under oath, and subject to challenge and attaint. On the other hand, when, under Roman law, two witnesses were sufficient, two perjurers would readily come forward. Zane agrees that the rooted distrust of witnesses as hardened swearers was well-founded; the abuses of compurgation (through oath-helpers) had convinced English lawyers and judges of the worthlessness of testimony. "But the fact was and it ought to have been seen, if men are not truthful as witnesses they will not be truthful as witness jurors. The jury was a body finally to pass upon the facts. The names of members could be ascertained. Any one who could get at them could go to them and talk about the case." There was opportunity for influence through bribery and threats.

interesting to observe that the highest court in Great Britain and Northern Ireland, the House of Lords, gives dissenting opinions; and that the highest court for the rest of the Empire, the judicial committee of the Privy Council, does not. One decides by majority; the other, at least in appearance, unanimously.

[1] Pp. 269-278.

[2] Maitland, *The Constitutional History of England* (1908), p. 211.

CHAPTER XII

ENGLISH LAW: (2) LATER DEVELOPMENT

THE common law of England may be said to have existed from the middle of the thirteenth century (the age of Bracton) or at least from the accession of Edward I in 1272. Out of a bewildering diversity of custom royal judges, with their writs and juries, had created a general body of law. It was "common" law because it was uniform throughout the realm and distinguished from everything exceptional and special. We contrast it not only with the *Corpus Juris Civilis* of Justinian and the *Corpus Juris Canonici* of the Church, but with statute law, which was at that time rarely encountered; with equity, which began its impressive march in the fourteenth century; and with local custom, which the common law tolerated under certain conditions.

It may be well to insist once more that statute law had very little to do with the development either of the Roman civil or the English common law. During the long era of the Roman Republic not more than thirty statutes touched the domain of private law. All English statutes enacted before 1660 would not fill four of the current quarto volumes.[1] At the accession of Edward I, lawyers recognized only four statutes, the first being Magna Carta (1215).[2] It is true that statutes had a peculiar authority as emanating from the sovereign; [3] but their absolute authority was not recognized by the law courts until the end of the fifteenth century,[4] or perhaps not until the sovereignty of Parliament was fully established in the seventeenth.[5] "There is every reason to believe," says C. K. Allen,[6] "that in the fourteenth century

[1] Jenks, *A Short History of English Law* (4th ed., 1928), p. 186.
[2] Maitland and Montague, *A Sketch of English Legal History* (1915), p. 77.
[3] In the reign of Edward I the word statute, which later acquired an exact and technical meaning, was used somewhat loosely. It denoted, not simply an act of Parliament, but any regulation, issued by authority of the government and intended to be permanent. Adams, *A Constitutional History of England* (1928), pp. 158-159.
[4] C. K. Allen, *Law in the Making* (2nd ed., 1930), p. 365.
[5] C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910), chapter IV.
[6] Allen, *op. cit.*, p. 263.

the courts recognized a preëminent right in the king in Parliament to introduce 'special law' and 'novel law.' Nevertheless, it is only gradually that the judges feel themselves to be bound strictly by the precise terms of an enactment and compelled to apply them without recourse to their own discretion." Indeed, the idea that law can be made is very modern.[1] The assizes were not "law" to the judges of Henry II; the statutes were not "law" to Coke, chief justice of James I. Even to-day, when the enacted or imperative element of law tends to become the predominant form, the traditional or habitual element is by far the more important. "In the first instance," says Roscoe Pound,[2] "we must rely upon it to meet all new problems, for the legislator acts only after they attract attention. And even after the legislator has acted it is seldom if ever that his foresight extends to all details of his problem or that he is able to do more than to provide a broad if not crude outline. Hence even in the field of the enacted law the traditional element of the legal system plays a chief part."

The common law did not include statutes. It was custom, but custom of a peculiar kind—the custom of the king's court, not of the people; judicial precedents, which were developed through decisions and the use of analogy and which gained strength and precision, as the bench came to be dominated, more and more, by trained lawyers.[3] "The custom of the king's court is the custom of England and becomes the common law."[4] Now, the king's court was a French court, the judges being Frenchmen, who spoke French and commonly understood no English.[5] Its hands were very free; it had a wide range of discre-

[1] McIlwain, *op. cit.*, p. 299.

[2] Roscoe Pound, *The Spirit of the Common Law* (1921), pp. 173-174.

[3] Pollock and Maitland, *The History of English Law before the Time of Edward I* (2 vols., 2nd ed., 1898), vol. I, p. 85; E. Lambert in *Science of Legal Method* (1921), p. 275.

[4] Pollock and Maitland, *ibid.*, p. 163.

[5] *Ibid.*, vol. I, p. 86; Lambert, *op. cit.*, p. 276; Maitland and Montague, *op. cit.*, pp. 31-32. Pollock and Maitland (*op. cit.*, I, 58-59) show that almost all English words which have a definite legal meaning are derived from the French; and they give forty interesting examples. While Latin was used down to 1731 by the clerks who inscribed the formal court records in the plea rolls, only learned persons could speak that language readily. French, therefore, became the language of the king's court and remained such down to the sixteenth century, notwithstanding a statute of 1362, which required the use of English, but which the lawyers calmly disregarded. (Zane, *op. cit.*, p. 278.) From the thirteenth century appear books of instruction for pleading in the manorial courts, all written in French, which indicates that the English-speaking peasant even then employed a French-speaking professional pleader. (P. and M., I, 62). The Year Books, which from 1292 gave the arguments of pleaders and the decisions of judges, were written in French. From Edward I to Richard III French was the language of enacted law. (*Ibid.*, 64).

tion; and, while for various reasons Norman custom could be applied only occasionally, the judges cannot have felt themselves strictly bound by English custom, the diversity of which must have been intolerable to orderly and methodical representatives of a centralizing government. They borrowed freely from many sources—from canon and civil law, royal decrees, maxims of the wise, feudal practice—whatever seemed to have a bearing on the subject under discussion,[1] or else relied on their own sense of right (equity). They fashioned their own rules out of this strange medley. "Any rule that looks authoritative and reasonable is welcome," according to Pollock and Maitland;[2] "one may say that it is law because it ought to be law.... As to local customs the king's justices will in general phrases express their respect for them. We see no signs of any consciously conceived desire to root them out. None the less if they are not being destroyed, their further growth is checked. Especially in all matters of procedure the king's court, which is now obtaining a thorough control over all other courts, is apt to treat its own rules as the only just rules. A heavy burden of proof is cast upon those who would apply other rules."

Now, the position of J. C. Carter, whose doctrine received some attention in Chapter IX, is very different from this. The judges, instead of *making, found* the law, found it in preëxisting custom. As James I and Bacon contended, the function of the judge was rather *jus dicere* than *jus dare*.[3] "What was precedent in the first instance?" asks Carter, when considering the period in which judicial predecents came to be known and regularly followed.[4] "It was simply a judicial declaration of custom, and it was followed, not so much because it was precedent, but because it was satisfactory evidence of custom. A precedent is but authenticated custom." In other words, the early rulings of the king's judges faithfully reflected a preëxisting body of actual customary law. Some of the language used by Pollock and Maitland, learned authorities on this early period, apparently reduce such a doctrine to a mere illusion. Nevertheless, it remains true that the royal judges were at the outset confronted by popular custom which, being a matter of habit and familiar tradition, could not readily be swept aside without certain resentment and possible resistance. It could be modified, slowly transformed, by conscious and persistent purpose. On the one hand, the judges were far from being, as Carter supposes, a mechanical and

[1] Jenks, *A Short History of English Law*, p. 185.
[2] *Op. cit.*, vol. I, pp. 84 and 163.
[3] McIlwain, *op. cit.*, p. 110.
[4] *Law, Its Origin, Growth, and Function* (1907), p. 65.

impersonal agency in the application of a self-sufficient customary law. On the other hand, the materials with which they had to deal were rooted in traditional popular observance and capable of being consolidated or transformed only by a slow process of reconciliation and harmonization.[1] It must further be noted that, in the thirteenth century, there remained a great variety of custom in manors, boroughs, and elsewhere. Even to-day local divergences which do not impair the symmetry of the main fabric are "always respected and often jealously safeguarded." [2]

It is easy to understand how the king's court tended to eradicate diverse local customs. But if, on the basis of their own equity and of borrowed notions, the judges substituted other rules, how shall we explain the symmetry of the common law? Should we not rather expect from individual judges arbitrary and subjective conceptions of what the law ought to be? The truth is that, even in those days, great weight was given to judicial precedent. To-day, of course, the common law is "case law," precedents are absolutely binding; the fundamental principle is *stare decisis,* adherence to past decisions. But that principle did not fully prevail until the nineteenth century. What was the situation in the thirteenth? One point has been greatly emphasized. There was at that time little recorded authority; free access to the records of the court was impossible; the judges of Henry III could not take down law reports from the library shelves. It was not till 1292 that the long series of Year Books began, anonymous reporters making notes of arguments and decisions; and even then, because of the cost, circulation was very limited. Some modern writers have, therefore, assumed that the judges were almost compelled to be original.[3] The judges were as yet unfettered by the weight of previous decisions, says Sir Paul Vinogradoff; [4] they declared and developed the principles of law with a great deal of independence; they expressed contradictory views on different occasions. There was, originally, Gray holds,[5] "no special regard for judicial precedents." These opinions, however, at least convey a wrong impression. We must agree with Maitland, that already the common law showed a strong natural tendency to become the "case law" that it ultimately became; [6] with Adams, that the

[1] On this point see C. K. Allen, *Law in the Making* (2nd ed., 1930), pp. 82-86.
[2] *Ibid.*, p. 83.
[3] Maitland and Montague, *op. cit.*, p. 86.
[4] *Common-sense in Law* (1913), pp. 171-172.
[5] J. C. Gray, *The Nature and Sources of Law* (2nd ed., 1921), p. 212.
[6] "English law," *En. Brit.* (14th ed., 1929).

influence of judicial decision began to be felt almost immediately in the growth of the law; [1] and with C. K. Allen, that "at least as early as the last quarter of the thirteenth century the practice of citations became frequent in the legal profession." [2] Otherwise Bracton's great law book, written in the middle of the thirteenth century, would be impossible to account for. Bracton cites as precedents some five hundred cases, particularly the judgments of Martin Pateshull and William Raleigh, then dead. He shows how precedents were employed: "If any new and unwonted circumstances... shall arise, then if anything analogous has happened before, let the case be adjudged in like manner, since it is a good opportunity for proceeding *a similibus ad similia*. But if nothing of the same kind has ever happened before, then let such matters be referred to the Magna Curia." [3]

The very nature of the task that lay before the early judges and the desire of all such officials of the king to be uniform and consistent must have made them deeply aware of the value of precedents. Circumstances made conference and agreement very simple. The judges were, after all, very few in number and closely associated. Between circuits they lived in London and sat in the courts there. If they did not actually live together in the same quarters, they were at least constantly in each other's company. Much of the conversation must have taken the form of "reports" on the cases which they had decided. They "seem to have agreed among themselves," says Jenks,[4] "upon a process of fusion of the various local customs into a common or unified system, applicable throughout the country. The rules of their system they applied to the decision of cases heard in the tribunals at Westminster; and, very naturally, they applied the same rules when acting as royal commissioners or judges on circuit. Thus arose the famous division of labor between judge and jury—the judge declaring the law, the jury finding the facts—which to this day regulates the course of justice in England."

In some such way, by informal conference and discussion of their decisions, the judges formulated general rules of law, in the place of diverse customs, and devised writs for various kinds of actions. The writs multiplied rapidly; and their multiplication down to the reign of Edward I characterizes a period of luxuriant growth in the history of the common law. Then occurred a strange phenomenon. The flow of

[1] *A Constitutional History of England* (1921), p. 111.
[2] *Law in the Making* (2nd ed., 1930), p. 130.
[3] Quoted by Allen, *ibid.*, p. 129.
[4] *The Book of English Law* (1929), p. 21.

new writs dried up, almost abruptly. "It came to be a settled doctrine that, though the old formula might be modified in immaterial particulars to suit new cases as they arose, no new formula might be introduced except by statute.... Henceforward the cycle of writs must be regarded as a closed cycle; no one can bring his case before the king's courts unless he can bring it within the scope of one of those formulas which the Chancery has in stock and ready for sale."[1] Indeed, some of the existing forms of action were allowed to die out.[2] The remedies which could be had at common law were limited to restitution and pecuniary damages.

It may be said of all institutions that their development is rhythmic. They have periods of flow and ebb, like the tides; nervous activity gives way to lassitude; quietism succeeds revolutionary innovation. By the time of Edward I there came a pause in the swift expansion of the common law, a tendency towards definition, as Medley says,[3] towards a survey and appraisal of portentous changes and a consolidation of the results. English jurisprudence "took on an exceedingly rigid and permanent shape; it became a commentary on formulas," as round each old writ a great mass of learning collected.[4] New writs were framed, it is true, though not on the initiative of the judges. The Masters in Chancery, who were ecclesiastics and doctors of the civil law, were eager to fill the defects of the common law by the application of Roman principles. But the king's judges interposed a veto: they refused to recognize new writs. While their attitude may be explained broadly as a normal phase of reaction after prolonged feverish activity, three specific explanations have been advanced.

Jenks attributes it to the elaboration of administrative machinery.[5] The judges, having been isolated from the king, recoiled from novelty for fear of incurring the royal displeasure. They lost originality. The bold and daring spirit of Bracton's day degenerated into timidity and conservatism. J. M. Zane lays the responsibility on the jury system.[6] "There was no reason why the common law by further writs should not develop the law as new situations arose, had it not been that the law courts became wedded to a jury." Every trial became a jury trial; and questions which were really complicated, with rights and wrongs on

[1] Maitland and Montague, *A Sketch of English Legal History* (1915), p. 101.
[2] Jenks, *The Book of English Law* (1929), p. 257.
[3] *A Student's Manual of English Constitutional History* (6th ed., 1925), p. 377.
[4] Maitland and Montague, *op. cit.*, p. 101.
[5] *The Book of English Law*, p. 40.
[6] *The Story of Law* (1927), pp. 254, 258, 262, 263, and 278.

both sides, had to be ruled out or else reduced to an artificial simplicity for the purposes of a verdict of yes or no. The view more commonly entertained has to do with the exercise of legislative power.[1] New writs made new law, and made it without the concurrence of the estates of the realm. During the political commotions that mark the latter part of Henry III's reign, there are loud complaints against "illegal" writs; the king must no longer be an uncontrolled law-maker. As early as 1258, by the Provisions of Oxford, the chancellor is required to swear that, without the command of the king *and his council,* he will make no addition to the "writs of course," that is, writs framed to meet ordinary cases of continual occurrence.

Nevertheless, the rigid judicial opposition to new writs met with Parliamentary disapproval. Suitors charged that the courts sent them away empty-handed because no appropriate form of action was available. Parliament met this situation by passing, in 1285, the famous Statute of Westminster II.[2] If it shall happen in the Chancery, says the statute, "that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the Clerks of Chancery shall agree in making a writ." If the clerks fail to do so, appeal lies to Parliament. This is the origin of the numerous Actions of Case. On the analogy of existing writs many new writs were framed, all being grouped together under the word "case," as used in the statute (*in consimili casu*), and all enlarging the scope of some older writ by the omission of technical requirements. Thus, the Assize of Nuisance, at first open only to freeholders, was rendered available to all. By way of concrete illustration we may take Trespass on the Case, one of the earliest applications of the statute. The popular writ of trespass, dating from the middle of the thirteenth century, alleged that the defendant had, by force and arms against the peace of our Lord the King, interfered with the plaintiff's possession of his body, land, or goods. After a time the phrase about force and arms was ignored; even trifling interference with possession was now covered by the writ, provided only that it involved some voluntary act of the defendant, his servants, or

[1] See, for example, Medley, p. 378, and Maitland and Montague, p. 101. "In the past," says Harold Potter (*An Introduction to the History of English Law,* 2nd ed., 1926, p. 226), "the judges, and especially the Justices in Eyre, had largely made their own laws. With the emergence of the governing instinct of the barons, as expressed in Parliament, the inferior officials, such as justices, had to bow their wills before the state. Their discretionary powers of writ-making were directly limited, so that in the nature of things their vaguer jurisdiction over cases of injustice died what may have been a natural death."

[2] Jenks, *A Short History of English Law* (4th ed., 1928), p. 136.

his cattle. But what if a Humber ferryman, by overloading his boat, brought about the loss of plaintiff's horse; or if a smith, while shoeing a horse, lamed it; or if a doctor aggravated an injury which he had undertaken to cure? There was wrongdoing on the part of defendant, loss on the part of plaintiff; but technically no trespass. Therefore, the statute of 1285 was invoked and an analogous action of case, or Trespass on the Case, allowed.[1]

THE RISE OF EQUITY

Ultimately the Statute of Westminster II was effective in creating a whole set of new remedies. But, even if the numerous actions of case had made their appearance without delay, they could not have provided an adequate way of escape from the artificial restrictions and professional technicalities which now limited the discretion of the common-law courts and rendered them incapable of keeping pace with social and economic requirements. Moreover, the second half of the fourteenth century was a time of disorder—of violence, assaults, land-grabbing. Especially on circuit, judges were flouted by turbulent nobles and fraudulent practitioners. Trials were delayed; juries bribed and intimidated. It rested with the king, the fountain of justice, to correct abuses by the exercise of his prerogative. Now, the organ of the royal prerogative on its judicial side was the Chancellor, who had risen from the position of secretary to that of first minister and who, as the increase of administrative business led to greater specialization, had come to hold a jurisdiction distinct from that of the king's council.[2] In the reign of Edward III petitions asking for relief, as a matter of royal grace, when legal remedies were wanting, went to the Chancellor. These petitions or "bills" prayed the Chancellor, "for the love of God and in the way of charity," to find a remedy; "and this he did by

[1] Jenks, *ibid.*, pp. 136-137. Just as the original writ resembles the Roman *formula,* so the action of case resembles the Roman *utilis actio,* the "adopted action," which the praetors had devised thirteen centuries earlier. Under an old statute, *lex Aquilia,* action might be taken against anyone who caused injury to another by directly attacking person or chattel *vi et armis.* What if the attack were accomplished indirectly by frightening an animal over a precipice? The statute did not cover the case; but the praetor, "adapting" the action, allowed a *utilis actio legis Aquiliae.* Max Radin, *Handbook of Roman Law* (1927), p. 52. Radin adds: "It is quite possible that, in this particular resemblance between English and Roman pleading, we have an example, not of parallel development, but of conscious borrowing, since those who framed the writs of 'case' were men who might well have had an elementary knowledge of Roman law. But it is not certain that they used this knowledge, and the action of 'case' may be adequately accounted for out of the circumstances from which it grew, without assuming borrowing."

[2] Medley, *op. cit.*, pp. 406-407; Maitland and Montague, *op. cit.*, pp. 119-121.

virtue of an authority which, in its undefined width and its compulsive power, resembled the Roman *imperium.*" [1] As a means of supplementing the common law and making good the deficiencies of a rigid and inflexible system, a new court appeared, the Chancellor's Court, the Court of Chancery. The peculiar form of justice that it administered was called Equity.

Equity means equality. It introduces the conception of fairness as opposed to the formalism and technicality of recognizel legal rules; [2] of natural justice or the dictates of conscience, perhaps somewhat flavored by expediency; [3] and, as Roscoe Pound puts it, of "purely moral ideas developed outside the legal system," involving "a movement away from law, a temporary reversion to justice without law," and finding its chief reliance in the power of the magistrate.[4] Chancery intervened at first as a matter of "grace," which meant that the granting of relief was discretionary, an exercise of royal favor in the absence of any right; and a little later as a matter of "conscience." Down to the time of Wolsey the Chancellors were always ecclesiastics, to whom, in the light of the common law, conscience seemed to be the natural basis of action. The priestly inclination to probe the minds of penitents caused the Chancellors to lean heavily upon the intent of the parties, rather than upon those external forms which the common law revered, and enabled them to justify the practice of rigorous interrogations. Ecclesiastics gave way to statesmen like More and Bacon, who employed the forcible procedure *in personam,* compelling a particular person to do what Equity regarded as his duty; and in the latter part of the seventeenth century statesmen gave way to professional lawyers. The lawyers added a third ideal, that of "equality," this finding notable expression in the administration of the assets of deceased persons.[5]

As Aristotle explained, there is a contrast or opposition between law and equity. Legal rules are general; the circumstances of each individual case, particular. Whatever care may be taken in formulating a

[1] Bryce, *Studies in History and Jurisprudence* (2 vols., 1901), vol. II, p. 695.

[2] Sir Paul Vinogradoff, *Common-sense in Law* (1913), p. 208.

[3] Harold Potter, *An Introduction to the History of English Law* (2nd ed., 1926), pp. 227-228.

[4] *The Spirit of The Common Law* (1921), pp. 171-172. "The chancellor purported to be governed by a body of moral rules of superior sanctity to those of the strict law and to constrain men to perform the moral duties which both rules of equity and good conscience dictated." The result was "an infusion of morals into law and a making over of the law, although in theory the old rules stood unaltered."

[5] Edward Jenks, *A Short History of English Law* (4th ed., 1928), pp. 208-212.

general rule of law, that rule can never foresee and satisfy the variations that are bound to arise in the future. In the face of unforeseen complications, substantial justice can be attained only through a flexible treatment, entailing some departure from the letter of the law.[1] Law must give way to equity. "In one system the center of gravity lies in the formulated rule, and therefore there is a strong tendency to sacrifice the particular to the general, justice to certainty; while in the other there is a more direct quest after right and a wide discretionary power on the part of the judge to draw his own notions of what is fair and just." [2] This quest after right prompted the Roman praetor to expand the law and grant relief by means of fictions. He promised, in the edict, to treat a litigant under certain circumstances *as if he were* the heir or *as if he had* possessed the house for twelve months. As soon as an equitable rule had been evolved in the edict, the praetor's court began to apply it in place of or by the side of the old rule of the civil law.[3] At a later time Roman equity took on a new activity in the *responsa* of jurisconsults and in their commentaries.

It is now established that, in thirteenth-century England, the common-law courts frequently granted equitable relief.[4] At that time, says Zane,[5] they "would grant all kinds of specific relief, that is to say relief other than a money judgment. They would cancel a document, they would compel the delivery of deeds, they would compel the delivery of specific personal property, they would grant the specific performance of a contract under seal. They would take and state an account of long involved dealings." Consider this case, decided by Chief Justice Bereford at the beginning of the fourteenth century.[6] A has undertaken to hand over to B a certain document on a certain day, or else pay a certain forfeit in money. Going beyond the sea, he instructs his wife to deliver the document. She neglects to do so. Although B has suffered no damage, he now refuses to accept the document and demands the money, as specified in the bond. But the chief justice, remarking that what B seeks to recover is not properly a debt, but a penalty, continues: "What equity would it be to award

[1] Vinogradoff, *op. cit.*, p. 209.
[2] *Ibid.*, p. 219.
[3] Maine, *Ancient Law*, p. 67.
[4] C. K. Allen, *op. cit.*, pp. 223-229 and 245; Harold Potter, *op. cit.*, p. 226; J. M. Zane, *op. cit.*, pp. 261-263. According to Pollock and Maitland, *op. cit.*, vol. I, p. 189: "The need of a separate court of equity is not yet felt, for the king's court, which is not as yet hampered by many statutes or by accurately formulated 'case law,' can administer equity."
[5] *Op cit.*, p. 262.
[6] Allen, *op. cit.*, p. 226.

you the debt when the document is tendered and you cannot show that you have been damaged by the detention?" Similarly, Bracton cites a case in which, on complaint of a miller, an injunction was issued to prohibit certain persons from luring away business to another mill.[1] The miller had no ground for action at common law; the injunction is an equitable means of controlling future conduct. It was the abandonment of equitable remedies by the common-law courts that gave the Chancellor the opportunity, or rather forced him, to take action. Potter suggests that "the Chancellor, whether consciously or unconsciously, simply carried on a tradition whereby those connected with the King's justice had not held themselves bound by the strict letter of the law in cases of grave injustice." [2]

The new court of Chancery differed from the common-law courts most conspicuously in procedure.[3] There were no original writs. If the Chancellor found that the petitioner had made out a *prima facie* case, he issued a summons, which required the respondent, in his own proper person, to appear before our Lord the King in Chancery on such a day and under penalty (*sub poena*) of so much and answer to this bill or petition as stated in the summons.[4] There was no jury. Hence many technical requirements of the common law, rendered necessary by the incompetence of jurors, could be dispensed with—for example, the elaborate pleadings or exchange of arguments between the parties for the purpose of bringing the issue to a point of fact and thus enabling the jury to give a simple verdict of "yes" or "no." The Chancellor swept aside all such limitations. He chose the most direct methods of getting at the truth. The respondent was subjected to a searching examination, truly inquisitional, that was designed to purge his conscience of its burden of guilt. The trial closed, not with a verdict of guilty or not guilty, but with a decree, which, upon consideration of all the facts, ordered the parties respectively to perform, or refrain from performing, certain acts.

[1] Zane, *op. cit*, p. 261, where he also cites from Bracton another case of equitable relief.

[2] *An Introduction to the Study of English Law* (2nd ed., 1926), p. 226. "In the past," Potter adds, "the judges and especially the Justices in Eyre had largely made their own laws." Allen (*op. cit.*, p. 245) expresses the same opinion.

[3] Jenks, *The Book of English Law*, pp. 42-44 and 260-263; and *A Short History of English Law*, pp. 164 *et seq.* and 209 *et seq.*

[4] "The writs of subpoena or writs of discovery were of the greatest importance. It was with this writ for the first time that a party could be compelled to come into court where a discovery of his evidence might be had.... Except by agreement of the parties such evidence was not available in a law action." Irvin Stat-master, *What Price Jury Trials?* (1931), p. 59.

The decree was a flexible instrument, responsive to the varying needs of substantial justice. It could go far beyond the remedies then obtainable at common law, which were limited to the award of damages and the recovery of property. The Chancellor gave relief by controlling the action of the parties personally. Thus, if A, having contracted with B to sell him a certain picturesque building site, refused to fulfil the contract because he had discovered that C would pay a higher price, equity could compel A to do so on pain of going to prison. This was called specific performance of contract. It took into consideration the inadequacy of damages as a substitute for other kinds of satisfaction. Similarly, by control of the person, equity could compel the surrender of fraudulent bonds or deeds for cancellation. Unlike the law courts, Chancery was well staffed, with a large retinue of clerks, and consequently equipped to deal with partnership, the management of decedents' estates, the taking of accounts, and the guardianship of infants.

The injunction was a special form of decree.[1] It was somewhat limited in scope and specially designed to control future conduct. It frequently afforded an invaluable supplement to an action at common law. For example, if A asserted a right of way across B's field and proceeded to exercise it, B could sue for trespass on each successive offense, with the prospect of obtaining only nominal damages and getting involved in ruinous expense. By adding to his first common-law action, however, an equitable claim for an injunction, he could send B to prison for any repetition of his unlawful act. Thus used, the injunction furthered the ends of justice without interfering with the processes of the law courts. But it was also used to enjoin the continuance of actions in those courts and to supervise their judgments —to prevent the application of common-law remedies which seemed to be inconsistent with equity and conscience. Thus, equity laid down the principle that mortgages were redeemable at any time; and if a mortgagee, refusing to accept an overdue payment on the debt, commenced in the common-law courts ejectment proceedings against the mortgagor, an injunction would require him to drop the action. Again, the law courts held that a sealed instrument could be discharged only

[1] The injunction had a common-law forerunner known as the writ of prohibition, which had been directed either to other courts (such as the church courts) to prevent their going beyond their proper jurisdiction, or to the sheriff to prevent defendant from infringing plaintiff's rights in a certain case. But, following the maxim that equity acts *in personam,* the injunction was directed to the respondent. Potter, *op. cit.,* p. 230.

by another sealed instrument. Therefore, a debtor, who had paid his obligation, but failed to get from his creditor a sealed release, could be forced to pay a second time. But Chancery held it contrary to good faith that payment should be exacted twice. If the creditor obtained a common-law judgment, he would be restrained, by injunction, from proceeding further under it.

The law courts deeply resented the assertion of such superiority, all the more so because of the loss of lucrative business. They were soon pitted against Chancery in a protracted and scandalous rivalry. "For centuries in England," says Zane,[1] "was presented the spectacle of one set of courts doing all sorts of injustice that another court might remedy the injustice.... Both systems professed to emanate from the same king as the fountain of justice, both claimed to exert the same judicial power, both worshiped at the same legal shrine, and both professed to dispense justice in accordance with law. One system enforced in many legal relations rules which the other system pronounced to be unjust and unrighteous and boldly set at naught." The anomalous struggle culminated in a pitched battle between Lord Chancellor Ellsmere and Chief Justice Coke in 1616.[2] Coke doubtless felt that circumstances favored him at the time, because the power of the Chancellor had been somewhat reduced in the previous century, while common-law prestige had been enhanced by the introduction of new remedies. Two notorious swindlers, having obtained a common-law judgment by fraud, had been punished by Chancery; and Coke persuaded them to secure the indictment of their prosecutors for *praemunire,* that is, for calling in question a judgment of the king's court. On the advice of Francis Bacon, then attorney-general, James I intervened and gave his decision in favor of Chancery. From that time, in case of collision, equity was to prevail over the common law.[3] And so rivalry subsided.

In the main, equity did not have the character of a rival system. It was far from being complete in itself, self-sufficient. Maitland views it as a kind of supplemental law, in the nature of a gloss on the common law, correcting it and auxiliary to it. Equity came, he says, not to destroy, but to fulfil. Thus, while the common law, in its profound dis-

[1] *Op. cit.*, p. 254.

[2] Coke is pronounced like cook.

[3] This principle was reaffirmed in the Judicature Act of 1873, which fused the administration of equity and common law. Until 1675 (*Shirley v. Fagg*), when the right of appeal to the highest British court (the House of Lords) was established, decisions of the Court of Chancery had been final, except for the possible intervention of Parliament or the Crown.

trust of witnesses, would not look at a contract unless it were evidenced by a document under seal, equity was willing to have the existence of a contract proved by testimony. It is not necessary to multiply illustrations. But mention should be made of "uses" or "trusts," one of the earliest examples of equitable jurisdiction.[1] For various purposes, some of them quite reputable and others highly dubious,[2] landowners hit upon a device which permitted enjoyment of the benefits, without the responsibilities, of ownership. A conveyed land to B, who thereupon became legal owner, but bound him by an honorable understanding, an oath or solemn promise, to give C the benefit or use of the land after satisfying all public and legal claims. At first C, the beneficial owner (known as the *cestui que use*), had no means of redress if B (*feoffee to uses*) proved unscrupulous, derelict to his trust, and took full advantage of his position of ownership before the law. But Chancery could not tolerate the violation of a sacred pledge. It set the claims of conscience above the claims of law and used its powerful subpoena to enforce the rights of the beneficial owner. The common-law courts not only acquiesced in this overriding of strict law and recognized uses as a legitimate exercise of equitable jurisdiction, but they even advised suitors to apply for writs of subpoena in Chancery. Indeed, it was with the connivance of the judges, by means of their ingenious and tricky manipulation of the Statute of Uses (1535), that the trusts, and equitable jurisdiction over them, were saved from destruction at the hands of Parliament. The two jurisdictions were drawing closer together. The common law was learning from the success of Chancery the necessity of breaking through its rigid shell and granting ampler relief; equity was feeling the spell of tradition, as exemplified in that reverence with which common-law practitioners regarded judicial precedents.

EQUITY SYSTEMATIZED

It has already been observed that, toward the end of the thirteenth century, a pause came in the remarkable growth of the common law,

[1] For a short account of "uses" see Jenks, *A Short History of English Law*, pp. 95-100; Maitland and Montague, *op. cit.*, pp. 122-125; Medley, *op. cit.*, pp. 69-71.

[2] Uses furnished a means of escape from creditors, from feudal burdens, from forfeiture as a consequence of treason or felony, etc. Statutes put a stop to some of the more flagrant evasions of the law in such cases. The object of uses was often meritorious, however—to safeguard the interests of wife and children when embarking on a crusade; to endow the Franciscans, who, by the rules of their order, could not own property; or to obtain for land the power of testamentary disposition which had been obtained for chattels in the twelfth and thirteenth centuries.

that a premature stiffness and hardening of arteries set in. Various explanations have been given. Perhaps it is best to say that judicial prejudice against further innovation arose naturally from the need of consolidating the results already attained, systematizing them, making them clear and coherent. At the end of the seventeenth century equity faced the same situation. The period of luxuriant growth had come to an end. The Chancellors now were lawyers, men steeped in the common law, impregnated with the lawyer's caution and the lawyer's respect for precedents. They venerated the common law and showed their veneration in practical ways, refusing, for example, to enforce contracts that were invalid at common law or to order specific performance when damages seemed to be a sufficient remedy.[1] They looked askance at such an indefinite guide or accomplice as conscience. They were appalled by the chaos of unrelated precedents that lay hidden in a labyrinth of records. The time had come to end this disorder and to lay down consistent rules of procedure.

Nottingham, who became Chancellor in 1673, methodized the records. He fashioned out of them a symmetrical system, classifying the scattered fragments under logical headings. Partly because he performed this service and partly because he helped to develop a tradition of precedents, after the manner of the common law, Nottingham has been called the Father of English Equity. The principle of *stare decisis*—of adhering to past decisions or precedents—began to influence equity in Tudor times. The lay successors of Wolsey, being unacquainted with Roman law, were inclined to imitate the judges of the common law. They paid so much deference to reported decisions [2] that a Chancellor of Charles I once refused to give relief on the ground that he could find no precedent to guide him. This occurrence was exceptional, no doubt. In the absence of any precedent the Chancellor might act. But, when once a case had been decided, it was binding authority, at least from the time of Hardwicke. In the course of his twenty years on the Woolsack (1736-1756), the Chancellor's discretion was brought within narrow limits. In that century, according to Bryce,[3] "precedents gather round the Chancellor and fence him in: he cannot break through so as to move forward freely on new lines of reform. He is like

[1] Jenks, *A Short History of English Law*, pp. 215-217.

[2] The earliest Chancery reports date from Henry V. Reports began to be published in authoritative form under Elizabeth.

[3] *Studies in History and Jurisprudence* (1901), vol. I, p. 697. Jenks says (*Short History*, p. 234) that "the channels of Equity became choked with the stones of precedent and the weeds of form, and the fountains of justice ran slowly and painfully till the sweeping hand of Parliamentary Reform released the flow again."

a stream which, as it deepens a channel, ceases to overflow its banks." Under Eldon (1801-1827) equity quite ceased to expand.[1] Instead of seeking to enlarge the jurisdiction of his court, he devoted himself to explaining and harmonizing it. He could say, before the end of his long term, that the principles of equity were now almost as fixed and uniform as the rules of common law.[2] Equity had become as precise and as independent of individual caprice, as subservient to the rule of *stare decisis,* as the common law itself.[3] It had also become encrusted with notorious abuses and associated in the popular mind with fantastic miscarriages of justice.[4]

What were the abuses? Strangely enough, having begun as an expeditious court and a poor man's court, Chancery was now a synonym for delay and expense.[5] As Maitland says,[6] "a court which started with the idea of doing summary justice for the poor became a court which did a highly refined, but tardy justice, suitable only to the rich." The staff was wholly inadequate to deal with the enormous mass of business.[7] There were only two judges, the Chancellor and the Master of Rolls.[8] The outlines of organization were medieval; and, when new appointments were made from time to time, this was done by allowing the original officials, who continued to keep the fees, to appoint deputies, who did the work and received little pay. Procedure was so technical and slow—with interrogations, dilatory motions, rehearings without cause—that the time taken over an uncontested case amounted to a denial of justice. In many suits the whole estate vanished in costs.[9] Old practices withstood the attacks of reforming Chancellors

[1] Potter, p. 229; Maitland and Montague, p. 133; Vinogradoff, p. 208.

[2] Pound, *The Spirit of the Common Law,* p. 145.

[3] But, says Potter (*op. cit.,* p. 229), "there is authority for saying that even to-day equitable principles may be applied to new sets of facts in such a way as practically to constitute a new case of equitable relief."

[4] Sir William S. Holdsworth, *A History of English Law,* vol. IX (1926), pp. 335-441.

[5] Maitland and Montague, *op. cit.,* p. 122.

[6] "English Law," *Encyclopaedia Britannica* (14th ed., 1929). The Chancellors, freed from contact with plain men in the jury box, were tempted to forget how rough good law should be, and screwed up the legal standard of reasonable conduct to a point hardly attainable except by those who could command the constant advice of a family solicitor.

[7] Sir William S. Holdsworth, *Charles Dickens as a Legal Historian* (1928), pp. 85-87.

[8] As to the staff of Chancery, see Jenks, *Short History,* pp. 212-213. While the jurisdiction of the Master of Rolls was extended by the Chancery Reform Act of 1833, he still remained a subordinate judge, a preliminary hearer, whose decisions required confirmation by the Chancellor.

[9] Thus in *Bleak House* (Chapter XV), the sole question between Gridley and his brother had to do with the former's course in deducting a charge for board and lodging from a legacy of £300. Yet seventeen people were made defendant

because of the vested interests that profited from them. For example, though litigants had at one time been represented by the clerks of court, they later employed their own solicitors; and yet the clerks exacted fees for services which they no longer performed and for official papers which were altogether useless.

Everyone is familiar with *Bleak House* and the case of *Jarndyce v. Jarndyce.*[1] " 'Not [heard] of Jarndyce and Jarndyce? Not of one of the greatest of Chancery suits known? Not of Jarndyce and Jarndyce—the —a—in itself a monument of Chancery practice? In which (I would say) every difficulty, every contingency, every masterly fiction, every form of procedure known in that court, is represented over and over again? It is a cause that could not exist, out of this free and great country. I should say that the aggregate of costs in Jarndyce and Jarndyce... amounts at the present hour to from *six-ty* to *seven-ty thousand pounds!*' said Mr. Kenge, leaning back in his chair." Dickens tells us that "innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing why or how; whole families have inherited legendary hatreds with the suit," [2] indeed, Chancery had grown into monstrous inadequacy.

In spite of public clamor, Chancery proved incapable of curing its own diseases. Equity was saved by the reforming ardor of a reformed Parliament. First, by an act of 1833, Parliament reorganized the procedure of Chancery and then, after turning its attention to the defects of the common law, it consolidated all the superior courts into one Supreme Court of Judicature, consisting of a High Court of Justice and a Court of Appeal, with the House of Lords standing above them as a tribunal of last resort. Since that time the High Court of Justice has included three divisions—Chancery, the King's Bench, and Probate, Divorce, and Admiralty. All the judges are equally competent to ad-

in that particular suit. After a delay of two years the suit came up. It was then stopped for another two years while the Master inquired whether Gridley was in fact his father's son. Then still another person was made defendant in the suit, which, for that reason, had to be begun all over again. By that time the costs exceeded three times the value of the legacy.

[1] *Bleak House,* Chapter III. Although the book appeared serially in 1852-1853, the action of the story, according to Holdsworth, took place about 1827, six years before Parliament undertook the reform of Chancery procedure.

[2] The evil reputation of Chancery was perpetuated, doubtless by the reading of *Bleak House,* for many decades after its procedure had been reorganized. I can remember how, almost fifty years ago, as we drove past a ruined and derelict country mansion in the Eastern Townships of Quebec, some one explained its condition by saying in an awed tone and quite without truth, "It's in Chancery!"

minister both law and equity, under the proviso that, in case of conflict, the latter shall always prevail. It is true that the principles of equity remain essentially as Eldon left them, distinct from common-law principles, and that matters in which questions of equity most commonly occur are referred to the Chancery division. But, if the two systems of law and equity have not been fused, their administration has been. The Judicature Acts, 1873-1876, brought to an end that bifurcation of justice which for five centuries had disfigured English law.[1]

It would be a mistake to suppose that in the meantime the common law had remained stationary, incapable of further growth. After an interval of sluggishness and lethargy—that nature might have designed to meet the exhaustion of precocious development—something of the old vitality returned. The sap again ran strongly from the original trunk, continually refreshing new branches and clothing them with luxuriant foliage. In their long coexistence—separate, but side by side—equity and law learned much from each other, borrowed much. Little by little, as Roscoe Pound says,[2] equity was made over along common-law lines. Conversely, the common-law judges—by means of evasive fictions and in what Zane calls their "slow, ponderous, and inept way," which may be the English way[3]—began to invent new forms of action. Instead of clinging exclusively to sealed contracts, for example, they extended the action of trespass to cover every kind of contract, written or unwritten, sealed or unsealed, and, indeed, to cover almost any kind of wrong. Chancery doctrine was made into law. In accomplishing this, procedure became a maze of fictions which only a few learned men could penetrate.[4] By fiction the king's courts stole business from each other. By fiction a few comparatively speedy forms of action were set to strange and novel tasks. Two fictitious persons, John Doe and Richard Roe, reigned supreme. The most remarkable subtlety was displayed in

[1] It may be remarked that in Rome the praetor administered both civil law and equity and that a distinction between the two systems did not altogether vanish till the time of Justinian. Maine, *Ancient Law*, p. 67; W. W. Buckland, *The Main Institutions of Roman Private Law* (1931), p. 7. In the United States, the federal courts have always administered common law and equity through the same judges. Most of the states began in the same way; the existence of a Chancellor as an equity judge, separate from the judges of common-law-courts, was exceptional. New York and some other states have amalgamated the two systems by adopting a revised code of procedure. But, as long as a jury can be demanded in common-law cases, the distinction will never disappear entirely. Zane, *op. cit.*, pp. 396-400.

[2] *The Spirit of the Common Law* (1921), p. 73.

[3] *The Story of Law* (1927), p. 280. "The friends of the common law," Medley says (p. 409), "did everything in their power so to ameliorate the condition of the common law as to lessen the reasons for the interference of the Chancellor."

[4] Maitland, *s.v.* "English Law," *En. Brit.* (14th ed., 1929).

fabricating delicate devices for the accommodation of new wants within the law.

To say that the common law had assumed permanent shape, with ascertained and fixed principles, by the time of Charles II [1] seems to be a gross overstatement. The common law proclaimed its continued vitality and power of self-development in the pages of its history, which, unfortunately, cannot be reproduced here. A few examples must suffice. Consider the attitude of the courts towards serfdom or villeinage. In the fifteenth century villein tenants obtained for their holdings the protection of the law courts; they could bring an action of trespass against their lord if he ejected them. At last, in the case of *Pigg v. Caley* (1617), a villein, suing his lord in trespass for the taking of a horse, was held to be a free man. Consider the attitude of the courts towards slavery. In Anne's reign Chief Justice Holt expressed (*obiter*) the opinion that "as soon as a negro comes into England he becomes free." At last, in the case of *Sommersett v. Stewart* (1772), a still more illustrious Chief Justice, Mansfield, definitely pronounced against the legal existence of slavery in England. Mansfield was a bold innovator. It was he who, in the case of *Moses v. Macfarlan* (1760), held that where the defendant is "obliged by the ties of natural justice and equity" to pay a sum of money, no technical objections will be allowed to defeat the plaintiff's claim. This was a truly equitable decision. It became, says Jenks,[2] the parent of the whole modern doctrine of quasi-contract. One of Mansfield's great achievements was the absorption into the common law of the Law Merchant—the body of customs which European traders had built up to regulate their business transactions.[3] This Law Merchant covered manifold subjects about which the lawyers were woefully ignorant—salvage claims, bills of exchange, letters of credit, charter-parties, bottomry, etc. The courts of rustic England had been backward in recognizing even the most fundamental rules of mercantile practice. Mansfield now extended common-law jurisdiction over a field of enormous future significance. If he had not in this way

[1] Maitland and Montague, *A Sketch of English Legal History* (1915), pp. 132-133.

[2] *A Short History of English Law* (4th ed., 1928), p. 234.

[3] Jenks, *The Book of English Law* (1929), pp. 26-28. The Law Merchant had been so necessary to protect traders from the arbitrary and prejudiced action of local or national courts that foreigners would refuse to visit and display their wares in towns which did not grant a special court. Such a court was styled in England a pie-powder—a corruption of *pieds poudrés*, which referred to the dusty feet of strangers or foreigners. In 1447 Parliament recognized the right of every fair to have a court of pie-powders; but, of course, the law administered there could scarcely be called English law.

completed the process by which the king's courts had been striking dow all rivals (such as the ecclesiastical and manorial courts), Englan would have been seriously handicapped during the great period c commercial expansion already foreshadowed.

The very methods which common-law judges have employed mus frequently result in the working out of new doctrines. It is their tasl to bring the facts of a particular case under a general rule, a rule tha rests upon some earlier decision as a precedent or upon some provisior of statute law. This process is technically known as subsumption.[1] I may permit a very wide discretion. Thus, a statute provides that a workman or his family shall be compensated for accidents *arising out o and in course of his employment.* Does such language cover the case of a sailor who, returning from shore leave, falls from a ladder on the ship's side and is drowned; or the case of a carter who, having warned a drunken man that interference with his horse would be dangerous, is thereupon assaulted and killed? Who could say in advance what the decision of the court would be? "In a series of cases connected with some particular principle," Vinogradoff observes,[2] "it often happens that the original authority is gradually modified by practice: it is expanded or contracted according to the coming in of new circumstances, and also by the influence of new considerations arising out of the progress of opinion both among the public at large and among the professional class of lawyers." Thus the doctrine of the responsibility of masters for the acts of their employees has passed through four stages. In the middle ages the master was held responsible for any wrongs committed by servants in the course of employment; in the sixteenth century his liability extended only to acts which he had commanded; in the eighteenth century the command might be implied by the fact that the employee was acting for the master's business or benefit. The current test of responsibility may be expressed by the phrase "within the scope of the employment." [3]

[1] Sir Paul Vinogradoff, *Common-sense in Law* (1913), pp. 178-196.

[2] *Ibid.*, p. 190.

[3] In the second half of the last century the courts clearly evolved a series of new doctrines with respect to trade unions: common-law conspiracy (1851), deprivation of services (1853), civil conspiracy (1893), and responsibility for torts committed by officials of the union (Taff Vale decision, 1901). These were overridden by subsequent legislation. Jenks, *A Short History of English Law,* pp. 320-327. Of the first Jenks says: "For such a doctrine it is difficult to find historical warrant." Of the second he says that it was a wide departure from the older theory; of the third, that it was "hitherto unknown"; of the fourth, that it really marked a revolution in English law.

JUDICIAL PRECEDENTS

The discretion of English judges has been curtailed by the strict application of the rule of *stare decisis,* of adherence to past decisions. But, if this great principle has taken from the judges some of their former freedom in making new law, it has been the means of eliminating the dangers of judicial caprice and arbitrariness, and so of giving much more certainty to the law. Since judges are bound by the law reports, their decisions can often be foretold with some precision. But under the continental codes, such as the French, judges are forbidden to recognize precedents; and, therefore, so far as they obey the injunction, the meaning of a passage in the code may vary from one court to another at the same time and from one time to another in the same court. The advocate cannot advise his client, or the client commence his action, with the assurance that English reliance on judicial precedents affords.

The treatment of judicial precedents as binding authority came late in the history of the common law. The germ of case-law, it seems, was there from the beginning; judges seem always to have shown respect for past decisions and an appreciation of their value. "By the thirteenth century," Allen says,[1] "the judges show a distinct desire to tread the beaten path. In the Year Books... there is considerable evidence that both judges and counsel frequently reasoned by the analogy of previous decisions, for the most part drawing on their personal recollection or possibly upon private notes.... At the same time, there is an unmistakable consciousness on the part of judges that their decisions are helping to settle the law for the future; and on occasion they do not hesitate to say so." But the precedents are not yet binding authority; the court would, without hesitation, reject a decision which seemed to it ill-founded. Even in the seventeenth century Chief Justice Vaughan makes it clear that an incorrect judgment need not be followed,[2] and Blackstone himself, in the middle of the eighteenth, says that the rule of *stare decisis* has an exception—"where the former determination is most evidently contrary to reason."

Mansfield, who at times acted almost with the freedom of an equity judge, contended that the law would be a "strange science" if it depended upon precedents alone. "Precedents seem to illustrate principles and to give them a fixed certainty. But the law of England...

[1] *Law in the Making* (2nd ed., 1930), p. 201.
[2] *Ibid.,* p. 202.

depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them."[1] It can scarcely be said, however, that Mansfield's doctrine reflects the constant and powerful play of precedent at the end of the eighteenth century;[2] and it is quite contrary to the doctrine that was firmly established, though by insensible degrees, in the first half of the nineteenth. By 1833, says Allen,[3] the decision of a higher court had become binding upon all lower courts, unless "plainly" unreasonable and inconvenient; a judge was not at liberty to depart from it simply because he felt himself capable of giving a somewhat more reasonable judgment.

The English courts now form a hierarchy, or pyramid, with the county court at the bottom and the House of Lords at the top,[4] the High Court and Court of Appeal lying between them. No lower court may deviate from the decisions of a higher court. Indeed, the binding force of judicial precedents has been carried still farther. The Court of Appeal and the House of Lords are bound by their own decisions, the latter absolutely, the former except when the decision in question was reached by a bare majority.[5] As Lord Halsbury observed in 1898, "Nothing but an act of Parliament can set right that which is alleged to be wrong in a judgment of this House."[6] But this rule is less than a century old. Lord St. Leonards argued against it in the case of *Bright v. Hutton* (1852).[7] He admitted that the House could not reverse its own decision in any particular case. "Yet you are not bound by any rule of law you may lay down, if upon a subsequent occasion

[1] *Ibid.*, p. 150.

[2] Mansfield also errs in the position which he assigns to principles. The judicial process in England is inductive. The judges reason from particular cases to general principles. *Ibid.*, p. 200.

[3] *Ibid.*, p. 202.

[4] The House of Lords as a court, while historically and technically identical with the House of Lords as a legislative chamber, is in fact a distinct body. Although the seven hundred and more members of the House have a legal right to participate in the judgments of the highest law court, they do not assert it. A convention or understanding of the constitution requires them to keep away and leave this appellate business to a small body of qualified experts—those members of the House who hold or have held high judicial office. It should be added that the personnel is very much the same as the personnel of the judicial committee of the Privy Council, the highest appellate court for the Empire beyond the seas. The judges of the former may express different opinions, after the practice of legislators; and their vote becomes part of the proceedings of the House of Lords. The judges of the latter disguise any difference of opinion and tender collective advice to the king.

[5] H. B. Gerland in *Science of Legal Method* (1921), p. 239.

[6] *London Street Tramways Company v. L. C. C.*, A. C., 375.

[7] J. C. Gray, *The Nature and Sources of the Law* (2nd ed., 1921), p. 177.

you find reason to differ from that rule; ... this court, like every other court of justice, possesses an inherent power to correct an error into which it may have fallen." While the House of Lords has renounced that "inherent power," the judicial committee of the Privy Council, highest court for the Empire beyond the seas, occasionally resorts to it, although with manifest reluctance. In the United States no court is absolutely bound by its own decisions.[1] It is well known that the Supreme Court has reversed itself in matters of the greatest importance.

A precedent is followed, not because it ought to have been made, but because it has been made; [2] not because it is good law, but because it is law, until Parliament abrogates it. When hearing a case, the court informs itself whether any similar cases have been decided before and, if so, how they have been decided. "If once it be established," says Jenks,[3] "that a Court of equal or superior authority has previously, as a necessary process in the chain of its reasoning, expressed an opinion on a point of law, and acted upon it in its decision, then the Court which is hearing the case, must, in coming to its decision, follow that opinion, unless the latter has, since its delivery, been overruled by a higher tribunal or by Parliamentary legislation." The doctrine, thus stated, seems simple enough; but its apparent simplicity is complicated by factors which sometimes baffle acute lawyers. The alleged precedent must be scrutinized closely. The real issue, the actual basis of the decision, may have been disguised by mere expressions of opinion—called *obiter dicta*—which were not necessary to the judgment. While the *obiter dicta* of some eminent judge may be given some weight in future cases, they are not binding. It is the *ratio decidendi*—the rule of law upon which the decision logically rests—that creates the precedent.[4] Forensic skill may show that the *ratio decidendi* must be narrowed down to a very fine point and that it was applied to such special facts that its value as a precedent is negligible.

In the use of judicial precedents or case-law English practice differs greatly from practice in the Continental countries. The latter have enacted codes, in the manner of Justinian—a Byzantine rather than a Roman idea. The codes provide minutely for all contingencies that might arise in the future and, in most cases, debar the courts from giving any weight to precedents. By Article V of the French civil code the judges are forbidden "to lay down general rules of conduct or to

[1] *Ibid.*, p. 242.
[2] *Ibid.*, p. 199.
[3] *The Book of English Law*, p. 34.
[4] Vinogradoff, *Common-sense in Law* (1913), p. 178.

decide a case by holding that it is governed by a previous decision." The effects of any decision are thus confined to one particular case. Presumably, in contrast to the arduous task which confronts English judges, the facts in litigation will fit themselves almost automatically into the provisions of the code. The court becomes a sort of judicial slot machine: the facts are put in above and the decision taken out below.[1] The process seems to be automatic even when a certain amount of thumping and joggling is needed to get anything out of the machine. In reality, similar facts do not always bring forth similar decisions. With no precedents to guide them, the judges may follow inclination and caprice; and the law, which the enacted code attempts to lay down in plain language, becomes uncertain, erratic. A hundred years ago the most abrupt shifts might occur after some provision of the code had apparently acquired, by a long line of decisions, a definite meaning. Thus, for twenty-seven years the Court of Cassation held that the killing of a man in a duel did not constitute murder as defined in the criminal code, and then, in 1837, reversed itself.[2]

This situation has led to a strange extra-legal development. Judicial precedents are exerting more influence than the code would seem to allow. Law students learn from their text-books that, not individual leading cases, but a series of concordant decisions should be regarded as a form of law.[3] Jurists now admit that Article V of the civil code has failed of effect.[4] "Whoever knows merely the statutory law of France," says Eugen Ehrlich,[5] has no conception of the law as it actually there exists." Recorded decisions have assumed great importance. "The numerous and extensive collections of reports are now," says Allen,[6] "almost as much a part of the French as of the English lawyer's professional equipment. Nobody can hope to understand the workings of French law without constant reference to standard collections of decisions like those of Dalloz and Sirey.... The accumulation of precedents has had a visible and growing effect in modern French jurisprudence.... It is no secret that a strong and uniform line of decisions may modify or even completely reverse a rule of legislation, and that far-reaching principles may establish themselves quite independently of any enactment in their behalf." But, although

[1] Roscoe Pound, *The Spirit of the Common Law* (1921), pp. 170-171.
[2] Sir James F. Stephen, *A History of the Criminal Law of England* (3 vols., 1883), vol. III, p. 353.
[3] Roscoe Pound, *The Spirit of the Common Law* (1921), p. 181.
[4] *Ibid.*, p. 180.
[5] *Science of Legal Method* (1921), p. 70.
[6] *Law in the Making* (2nd ed., 1930), pp. 124-125.

the French courts are tending towards English practice, they cannot yet be said to approximate it. A single decision of the highest court, the Court of Cassation, has no binding authority; it is not a "leading case" which lower courts must follow. Indeed, a lower court, when it has been reversed on appeal, may reiterate the original decision when rehearing the case and can be brought into line only by a second appeal in which all divisions of the highest court (forty-nine judges) have taken part; and the final adjudication is supposed to create no precedent for later cases.

The obvious tendency, in France and other Continental countries, to abandon their mechanical view of the judge's functions and move towards the rule of *stare decisis* seems to vindicate the method of the common law. That purely empirical method, although crude in superficial appearance, has justified itself by the results. "It is, in truth," says Roscoe Pound,[1] "the method of the natural scientist, of the physician and of the engineer, the method of trial-hypothesis and confirmation. The tentative results of *a priori* reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward and in a time a rule is developed. If the results are not just, a new line is taken, and so on until the best line is discovered. With all its defects, then, this method has stood the test better than any other. Speaking of this method and of its results in English law, Kohler, who must be pronounced the leader among modern jurists, says: 'Their science does not go beyond the few necessary beginnings, yet their administration of law far surpasses our own.'" The doctrine of law-making by judicial decision "combines certainty and power of growth as no other doctrine has been able to do."[2]

[1] "Courts and Legislation," *Science of Legal Method* (1921), pp. 214-215. Other contributors to this invaluable volume are Eugen Ehrlich, Heinrich B. Gerland, Edouard Lambert, and John W. Salmond. The chief critic of common-law method is Gerland, who lists seven defects (pp. 242-248): paralysis of legislative reform, since the spur of necessity is lacking; rigidity and backwardness, attributable to the rule of *stare decisis;* the embalming of stupidity as well as genius in the recognition of precedents; the inclination of hard-worked judges to escape responsibility by discovering precedents; piecemeal development without great comprehensive ideas; the accumulation of an enormous and unmanageable mass of case-law; and the erection of every legal proposition which has once been authoritatively enunciated into a rule beyond further elaboration. But Gerland does admit (pp. 240-241) that textual controversies are greatly narrowed, that the number of appeals on points of law is reduced, and that the authority and prestige of the Bench is greatly enhanced.

[2] Pound, *The Spirit of the Common Law* (1921), pp. 181-182.

ROMAN LAW IN ENGLAND

It is not alone the rule of *stare decisis* that differentiates English law from Continental law. There is a marked contrast in other forms of procedure and in substance or material. Probably English law borrowed relatively little from the *Corpus Juris Civilis*. "The materials with which the first common-law judges wrought," says Pound,[1] "were Germanic materials. The ideas from which and with which they laid the foundations of the Anglo-American legal system were ideas of Germanic law.... Our law is to-day more Germanic than the law of Germany itself. The Norman conquest brought a Romance element into our speech. But it brought little that was Roman into the law." The common law of Coke's age was English. "Roman law undoubtedly contributed many analogies and many conceptions which were worked into the system. But they were worked over as well as worked in and acquired the character of endemic law." [2] Edward Jenks, in *A Short History of English Law* and *The Book of English Law*, pronounces a similar verdict.[3]

The exact influence of Roman law, the extent of its diffusion in England, is, however a subject of controversy. Some admirers of the *Corpus Juris Civilis* assert that the borrowing from it reached very considerable proportions. J. M. Zane, in *The Story of Law*, gives a picture that bears little resemblance to Pound's or Jenks'. Even Anglo-Saxon law was "largely founded on Roman tradition"; and "practically everything in Anglo-Saxon law, so far as it was substantive law, and the most of the procedural law, came from churchmen who were trained in Canon law." [4] It was a Roman rule which gave the judge, in place of the doomsmen of the county court, the right to pronounce judg-

[1] *Ibid.*, p. 16.

[2] *Ibid.*, p. 17.

[3] Perhaps, he admits, when customs of the realm gave no answer to a problem, the judge fell back on the Digest and Code (*History*, p. 20); Roman law "had a good deal of indirect influence" (*Book*, p. 30); "a certain amount of influence" (*Book*, p. 37). But that influence was "secret, and, as it were, illicit" (*History*, p 20). Neither Roman nor Canon law had any "inherent force" in England. "They are here, as it were on sufferance, and to a limited extent" (*Book*, p. 37); and, even if they may be included among its origins, "they form no part of the common law as generally understood" (*Book*, p. 23). The early judges "made no attempt, happily, to apply (as was done in many other European countries) the actual rules of the *Corpus Juris Civilis* to the England of their day" (*Book*, p. 30). The law of England emerged as English; it "is of native or popular growth in the sense that the materials were drawn from the actual customs of the people"; it has "a thoroughly native character" (*Book*, pp. 20, 22, 21, and 37).

[4] *The Story of Law*, pp. 230 and 235.

ment.[1] "All these writs were borrowed directly from Roman law."[2] With evident approval, Zane draws attention to the bold statement of Sir John Holt, in Anne's reign, that "practically everything" in English law had come from Rome.[3] Perhaps these few illustrations will suffice to make Zane's position clear.

Now, according to general agreement, it was in the twelfth and thirteenth centuries, particularly between 1150 and 1280, that English law was most receptive of Roman ideas. The successors of Irnerius had formed round themselves a great school at Bologna and, as if a new gospel were being revealed, had attracted students from all corners of Europe. About 1150 the Lombard lawyer Vacarius began teaching in England, perhaps at Oxford, and wrote a manual of Roman law. From that time proofs multiply that both Roman and Canon law are being studied.[4] The king's justices are almost exclusively ecclesiastics, trained in the Canon and often in the Roman law as well. One of these justices, shortly after the middle of the thirteenth century, wrote a book entitled *De Legibus et Consuetudinibus Angliae*. This was Bracton. The core of the book reflects the practice of an English court; it is concerned with writs and decisions, with judicial precedents and case-law. But Bracton had read a great deal of Italian jurisprudence. From Azo of Bologna he not only got the idea of what a law book should be like and how its contents should be arranged, but also borrowed many generalizations and maxims.[5] The comprehensive introduction is based on Azo. It was, says Sir Paul Vinogradoff,[6] "undoubtedly intended to strengthen native legal doctrine by the infusion of legal conceptions of a high order, drawn from the fountain-head of civilised and scientific law. But there might also be a second aim, namely, to influence the material development of English legal doctrine, to provide it with clues for the solution of difficult problems, and to improve on the existing practice of the courts."

What inroads did Roman law actually make during that period? The king's judges borrowed some great maxims and a few concrete rules, we are told;[7] but what they borrowed chiefly was logic, method,

[1] *Ibid.*, p. 241.
[2] *Ibid.*, p. 248.
[3] *Ibid.*, p. 327.
[4] Pollock and Maitland, *op. cit.*, vol. I, pp. 89 and 97-99.
[5] Maitland and Montague, *op. cit.*, pp. 42-43.
[6] *Roman Law in Mediæval Europe* (1892), p. 90. "Bracton's treatise may be called a private treatise on the common law in its relation to general jurisprudence." *Ibid.*, p. 93. A second edition of Vinogradoff's book, edited by de Zulueta, appeared in 1929.
[7] Maitland and Montague, *op. cit.*, p. 42.

and spirit, rather than matter. Civil procedure, say Pollock and Maitland,[1] "was rationalized under the influence of the canon law," which itself owed a great deal to the Roman. The challenges against jurors were patterned on the challenges against witnesses in the church courts; a whole chapter of law was borrowed "in this exceptional case." According to Potter,[2] the judges "must not infrequently have been compelled to supply the deficiencies of this piecemeal system from the more mature.... *Corpus Juris*. It is clear that from time to time the judges and lawyers did consciously supply from this alien jurisprudence gaps which they realized to exist in the common law. Perhaps, however, an even greater influence in fact was to be found in the part played by Roman law in legal education...." Yet the leading historians of this period say that Roman law "led to nothing" and that English law showed itself "strong enough to assimilate foreign materials, to convert them to its own use."[3] The tide of Roman influence ebbed as rapidly as it had risen.[4] No longer was the common law directly affected by the foreign systems of Canonists and Civilians.[5] "From Bracton's day onwards Roman law exercises but the slightest influence on the common law."[6] Ecclesiastics gave way to practitioners of the common law as judges, to men ignorant of Digest and Decretals, and "interested in the maintenance of a system that was all their own."[7] The Inns of Courts not only provided a thorough discipline for students, but also bred in them an exclusive veneration of the common law. There grew up, indeed, a national antagonism to cosmopolitan legal doctrine.[8]

The views that have been presented here in very abbreviated form tend to substantiate Pound rather than Zane. Perhaps it may be argued that those who have devoted themselves primarily to the common law may fall under the suspicion of being biased. The broad erudition of Sir Paul Vinogradoff must free him from the possibility of any such charge; and for that reason his general conclusions may appropriately be given here. Civil law was never acknowledged and enforced by the courts, he says,[9] as a constituent part of the common law,

[1] *Op. cit.*, vol. I, p. 113.
[2] *An Introduction to the History of English Law* (2nd ed. 1926), p. 250.
[3] Pollock and Maitland, *op. cit.*, vol. I, pp. 102 and 114.
[4] *Ibid.*, xxxiv.
[5] Potter, *op. cit.*, p. 251.
[6] Maitland and Montague, p. 45.
[7] Pollock and Maitland, vol. I, pp. 112 and 114. See also Potter, p. 251.
[8] Vinogradoff, *Roman Law in Mediæval Europe*, p. 85.
[9] *Ibid.*, pp. 84 and 104.

"but it exercised a potent influence in the formation of legal doctrine during the critical twelfth and thirteenth centuries when the foundations of common law were laid. Indeed the teaching of Roman law inaugurated by Vacarius seemed for some time to carry everything before it." The influence of Roman law cannot be estimated by reference to paragraphs of the Digest or of the Codex. "If we want to find definite traces of it we have to look out not for references but for maxims, some of which, besides, had passed through the medium of canon law. The only real test of its character and extent is afforded by the development of juridical ideas, and in this respect the initial influence of Roman teaching on English doctrines will be found to be considerable. On many subjects the judges and legal writers of England were . . . prompted by their Roman predecessors, and this intercourse of ideas is nowhere as conspicuous as in the frequent cases when English lawyers did not simply copy their Roman models, but borrowed suggestions" and developed them in their own way.[1]

Whatever infusions the common law received from alien sources, it remained on the whole distinctively English. Vinogradoff has himself shown with what determination and with what success it resented powerful efforts to Romanize it in the sixteenth century. In its early days, as compared with the finely matured system of Justinian, the native product betrayed defects and crudities. Perhaps the rise of equity may be explained in part as an effort to temper harshness and fill interstices in the light of Roman and canonical principles. When the systematic intervention of the Chancellor began, and for something like a century and a half afterwards, ecclesiastics held the office. They recognized conscience as a basis of legal action, but must have found conscience, very often, exemplified by the concrete rules of Roman and canon law.[2] Amid the recorded *dicta* of the chancellors, says Maine,[3] "we often find entire texts from the *Corpus Juris Civilis*

[1] In another volume, *Common-sense in Law,* Vinogradoff says (p. 197): "Counsel did not quote the Corpus Juris, and courts never grounded their decision on clauses from the Digest or the Codex; but general propositions evolved from the study of Roman law were constantly circulated in the course of trials, and sometimes endorsed and construed by the judges" Again (p. 199): "Eventually a body of conveniently stated rules arose which could not always be traced directly either to Roman law or to precedent, but which served as a guide for parties and judges in litigation. Of course their legal authority has to be distinguished carefully from their doctrinal or literary history: legal authority could be imparted to them only by their recognition in the courts for the purpose of formulating the principle of the decision (*ratio decidendi*) in given cases."

[2] Vinogradoff, *Common-sense in Law,* p. 216; Pound, *The Spirit of the Common Law,* p. 72; etc.

[3] *Ancient Law,* pp. 44-45.

embedded, with their terms unaltered, though their origin is never acknowledged." Zane goes so far as to say that practically the whole of Chancery procedure and practice were Roman, as also its legal doctrine.[1] But against this we must set the assertion of Maitland that "the influence exercised by Roman law upon Equity has been the subject of gross exaggeration." [2] Wolsey was not quite the last ecclesiastical chancellor. But the office soon came into the possession of men steeped in the common law and ignorant of the civil law. After the period of rivalry closed in the early seventeenth century, equity drew closer and closer to the common law and borrowed from it much more than the rule of *stare decisis*—just as the common law borrowed from equity.

Jenks asks the question: Did the Chancellors act entirely on their own views of right or did they borrow from some existing body of doctrine? [3] He answers: Probably both. According to Selden, "Equity is a roguish thing, for that it varies as the length of the Chancellor's foot." But, Jenks concludes, it can hardly be doubted that some doctrine was borrowed from the Roman law and some procedure from the canon law. His own view, "though it is not capable of exact proof," is that "the chancellors were guided by the practice of the 'good citizen'—i.e. the really upright and conscientious person; and, if so, the claim of Equity, that it acts on 'the conscience,' is intelligible."

[1] *The Story of Law*, p. 301.
[2] "English law," *En. Brit.* (14th ed., 1929).
[3] *The Book of English Law*, pp. 44-45.

CHAPTER XIII

INTERNATIONAL LAW: (1) CONTENT AND CHARACTER

THE State is sovereign; the State is law-giver. It issues commands and exacts obedience, controlling the behavior of individuals and groups within its domain. To put the matter more correctly, the government does these things in the name of the State, which has no existence apart from its three constituents—people, government, and territory. But there are sixty-odd States in the world to-day. Who controls their behavior? Who has authority to issue commands and exact obedience when controversy or conflict arises among them?

Their situation resembles that of the family at a stage of social development anterior to the setting up of authoritative government. While the patriarch ruled over his own family with autocratic power and imposed peace upon its members, the anarchy of inter-family relations was modified only by rather ill-defined custom—the habitual and recognized modes of conduct—and by dread of the general disapprobation that would probably result from any breach of it. Custom permitted self-help, retaliation for injury. Only as government came into being was the injured party or his kinship-group compelled to waive revenge and accept a money-payment. Later still, with the full power of government behind them, magistrates or judges developed out of custom, by a gradual process of adjustment, more precise rules and applied them as the law of the land against all violators. Such was the contribution of the Roman praetor and of the English itinerant justice. In course of time statutes supplemented, and even overrode, this more slowly built system of precedents. The State now had separate law-making and law-enforcing agencies, although judges had not been divested completely of their old law-making function.

The community of sovereign States has not reached these later stages of evolution. There is no law-giver, no law-enforcer. The international system of to-day reproduces some of the features of society as it was organized before the origin of authoritative government. In the place of the family, we have the State; in the place of the patriarch,

the government of the State. Inter-state relations, like primitive inter-family relations, are regulated by custom. What we call international law[1]—the law between States or nations[2]—consists in the main of customary rules; and these rules can be ascertained only by observing the behavior of States as their official acts reveal it.

CUSTOM AND CONSENT

Custom does not embrace all habitual conduct or usage. It is usage which, in the language of Westlake,[3] the society of nations "has consented to regard as obligatory." According to Lord Alverstone,[4] "It must be really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it." According to Lord Coleridge,[5] "The law of nations is that collection of usages which civilised states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence." Consent may be tacit or express.[6] It is tacit when merely implied by behavior that indicates submission to certain rules. It is express when two or more States, concluding a treaty, lay down rules to govern their future conduct.

[1] Jeremy Bentham coined this English term in 1789 (*Introduction to the Principles of Morals and Legislation*, chap. xvii): "The word 'international,' it must be acknowledged, is a new one, though it is hoped sufficiently analogous and intelligible. It is calculated to express, though in a more significant way, the branch of law which goes commonly under the name of the law of nations"—an ambiguous phrase that would seem rather to suggest national (municipal) law. Although writers generally used the term "law of nations," or its equivalent in Latin or French, Bentham found a precedent in the *jus inter gentes* of Victoria and of Richard Zouche.

[2] See Chapter xvi, where the term "nation" and its special use in the field of international law are discussed.

[3] *International Law* (2nd ed.), vol. I (1910), p. 14. See also L. Oppenheim, *International Law* (4th ed.), vol. I (1928), p. 25. J. L. Brierly, *The Law of Nations* (1928), p. 39, says: "Custom in its legal sense means more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one."

[4] *West Rand Central Gold Mining Company v. The King* (1905), Scott's *Cases on International Law* (1922), p. 7.

[5] *The Queen v. Keyn* (1876), Scott's *Cases*, p. 245. In the same case Chief Justice Cockburn said: "To be binding the law must have received the assent of the nations who are to be bound by it."

[6] See, for example, Oppenheim, *International Law* (4th ed.), vol. I (1928), p. 25.

The doctrine of consent has been condemned in certain quarters, and most cogently by Professor Brierly of Oxford.[1] He considers it "untrue in its assumptions and inadequate as an explanation." Law, he says, is obligatory. But how can we speak of a State being obliged to do only what it consents to do? If we argue that consent, once given, cannot be withdrawn, we do not save the doctrine; "we are deserting our premises and calling to our aid an unacknowledged source of obligation, which, whatever it may be, is certainly not the consent of the state, for that may have ceased to exist. . . . Obligations may arise from consent, as in a contract or a treaty, but only within a legal system which has already, somehow or other, binding force; the system cannot be founded upon a consensual basis." Thus summarily is the doctrine of consent disposed of.

Professor Brierly admits, however, that "a new rule of law cannot be imposed upon a state merely by the will of other states." By this admission his argument is seriously weakened, since it recognizes the need of consent when changes in existing law are proposed. He should have said that, without its own consent, no State can be bound by a new rule of conduct. Such language is more accurate. Consent may be involuntary. The new rule may, in fact, be imposed by the will of other States, because of their superior power, their ability to command acquiescence. While the rule becomes a part of international law only by common consent, it makes no difference whether that consent be given freely or extorted. If this is now the process of law-making, there is no reason to suppose that a different process was followed in the past. States had contacts with each other; they felt the need of settled rules to facilitate intercourse; and, being unequal in power, they did not have equal influence in determining what the rules should be. Professor Brierly insists that a newly-created State has never consented to the rules of international law "in any way whatever." [2] Yet, when such a State, or a State that has hitherto remained outside, enters the community of nations, membership involves acceptance of the whole body of international law.

Is this merely a quarrel about words? Would we be better off if we dropped the word "consent" and looked about for one more appropriate? In spite of occasional criticisms, common sense seems to suggest that we should keep the word "consent," as we have kept the word "sovereignty." Its meaning has been clarified by persistent efforts

[1] *The Law of Nations* (1928), pp. 37-39.
[2] *Ibid.*, p. 38.

to discredit it. Controversial discussion has put in our hands a gloss that not only illuminates the word itself, but also throws light upon some obscure aspects of international practice.

International custom is discovered by observing the behavior of governments. Where do we go for the most significant data? We scrutinize diplomatic relations and all official pronouncements bearing upon them, judicial decisions,[1] legislation, and much besides. The importance of judicial decisions has been exaggerated. A chief reason for this exaggeration is found in the assumption by law schools that the case-book method, used in the study of torts or contracts, is equally applicable to international customary law. In fact, relatively few international controversies, apart from prize cases in time of war, come before the courts; one's knowledge of international law would be grotesquely spotty and deficient, if one did not dig up precedents from the historical record. Moreover, in using the decisions of national courts, there is a dangerous tendency to ignore their probable bias and to think of them as speaking with the same authority in international as in municipal matters. For the past sixteen years the Permanent Court of International Justice or "World Court" has been acting as an impartial interpreter of the common law of nations. Unfortunately, since its jurisdiction is for the most part voluntary, few disputes come before it; and, since it is forbidden to regard past decisions as precedents, the opportunity of building up a system of judge-made law, as the courts did in England, has been restricted, if not taken away entirely. Arbitral awards are seldom good evidence.[2] Under the terms of reference the arbitrators may be bound by rules that are inconsistent with international law, or they may be authorized to reach a decision according to their own view of natural justice. Political pressure may limit their discretion.[3] To prove the existence of a rule of international

[1] "The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail here." Chief Justice Marshall in *Thirty Hogsheads of Sugar v. Boyle* (1815), Scott's *Cases*, p. 682.

[2] For example, in the case of the *North Atlantic Coast Fisheries* (1910) the arbitrators rejected the conception of state servitudes, but did not thereby convert the writers of textbooks to that point of view. Oppenheim, *op. cit.*, vol. I, pp. 430-432.

[3] As in the Alaska boundary arbitration. The British government was given to understand that, unless the American contentions were accepted, serious consequences would ensue. This may explain Lord Alverstone's desertion of his two Canadian colleagues, Jetté and Aylsworth. See Newton's *Lord Lansdowne: A Biography* (1928).

law, recourse is had also to textbooks that have been written by jurists of high reputation.[1]

TEXTBOOK WRITERS

Sometimes it is mistakenly assumed that the textbook-writers themselves have made the legal rules. According to Ramsay Muir,[2] "international law sprang fully-developed from the brain of Grotius." Such a statement is utterly misleading. In the first place, although Grotius wrote disparagingly of his predecessors,[3] he borrowed a great deal from them. He borrowed especially from Alberico Gentili, professor of civil law at Oxford, whose *De Jure Belli* appeared at the end of the sixteenth century and whose interest inclined far more to actual practice than to a vague law of nature. Nothing will tend more to deflate the great reputation of Grotius than an analysis of his chief work, *De Jure Belli ac Pacis*. He set out to write a systematic treatise. To fill innumerable gaps he discourses at length about matters that involve municipal law alone and even about matters that involve no kind of law. Macaulay left behind him in India a recipe for reading *Clarissa Harlowe*—directions for skipping the many dull and inapposite passages. Some one should perform a similar task for the readers of Grotius, who padded his "three books" until the padding became their chief ingredient. To some extent he relies upon international practice, which, being established by consent,[4] goes by the name of *jus gentium* or volitional law and which he distinguishes sharply from and subordinates to natural law, "the dictate of right reason." [5] The principles of natural law, he says,[6] are "in themselves manifest and clear." A rule conforms to natural law when it is in agreement with rational or social nature or when it has been accepted by all the more civilized nations.[7] The first method of proof is entirely *a priori*, subjective; the second depends on factual evidence. The evidence that Grotius offers is not

[1] The qualifying phrase, "by jurists of high reputation," deserves emphasis. There are several textbooks used in American colleges that carry no authority whatever. They are derived from authoritative works; plagiarism is thinly disguised. But numerous slips reveal the ignorance of the authors. The post-war vogue of international law, exhausting the small supply of experts as teachers, has placed instruction in the hands of men little versed in a most intricate subject, who feel that, because they teach it, they are qualified to write about it.

[2] *Nationalism and Internationalism* (1917), p. 147.

[3] *De Jure Belli ac Pacis*, Carnegie Endowment ed., 1925, vol. II (translation), p. 22.

[4] *Ibid.*, p. 44.

[5] *Ibid.*, pp. 38-39.

[6] *Ibid.*, p. 23.

[7] *Ibid.*, p. 42.

always satisfactory. He makes no distinction as to the relative value of ancient and modern practice; and he gets his data not only from historians, but also from philosophers, poets, and orators, the last two groups being enlisted, but admits,[1] merely for purposes of embellishment. Since the existence of volitional law is likewise proved by acceptance,[2] the two kinds of law get sadly confused. They remain distinct only when, in the absence of an accepted rule, Grotius pulls one down from the clouds of natural law.

The reputation of Grotius should rest, not upon the rules that he invented for the guidance of posterity, but upon the customary practice that he recorded. He did not succeed in making law. What he proposed—deductions from the dictate of right reason—could become law only by being acted on and accepted; and, as Fenwick observes,[3] "governments in any case were not disposed to pay much attention to the doctors of the law." *De Jure Belli ac Pacis,* upon its publication in 1625, was greeted with enthusiasm. "But," says Brierly,[4] "if by success is meant that the doctrines of Grotius as a whole were accepted by states and became a part of the law which has since his time regulated their relations, then his work was an almost complete failure." Nor was he always successful in ascertaining the content of volitional law. His method, as already mentioned, was at fault. Paying little attention to the contemporary behavior of states, he looked for evidence in the past, often in the remote past, as though custom were timeless and unchangeable.

Muir calls international law "book-made law."[5] He says, by way of illustration: "It is universally recognized that the territorial sovereignty of every maritime state ends three or four miles from the high-water mark along its shores, and that beyond that line the seas are equally open to all nations. This principle is universally recognized in the courts of all nations, as well as by their governments. But where did this principle come from? Who imposed it? Solely the treatises on international law." We must say, on the contrary, that freedom of the seas was the outcome of clashing national interests and of changing material conditions. Bookish doctrines had little or nothing to do with it. For example, twenty years before he wrote his famous book,

[1] *Ibid.*, p. 26. The vast number of quotations, while of little interest to students of international law, might well be published separately by some enterprising Bartlett.

[2] *Ibid.*, p. 44.

[3] *International Law* (2nd ed., 1934), p. 32.

[4] *The Law of Nations* (1928), p. 25.

[5] *Nationalism and Internationalism* (1917), p. 148.

Grotius was retained by the Dutch government in a dispute with Portugal. The Dutch, being anxious to share the lucrative spice trade, opposed the Portuguese claim to dominion over the Indian Ocean. The free-sea doctrine of Grotius reflected national interest.[1] Similarly, Selden's *Mare Clausum* reflected a shift in English policy—a shift from the free-sea policy of Elizabeth, dictated by her attitude towards Spain, to the shut-sea policy of the Stuarts, dictated by their attitude towards the Dutch.[2] The eventual triumph of the free-sea doctrine involves a story too complicated for brief exposition. It must suffice to indicate the reasons for its triumph in the words of Butler and Maccoby: [3] "For, as the world shrank, monopolistic pretensions broke down; they vanished not in obedience to any abstract theory, nor in the twinkling of an eye, but gradually, as nation after nation estimated the effort necessary for the maintenance of each particular claim and, openly or tacitly, threw up the sponge. The claim to an extensive lordship of the seas became meaningless, but few, it may be suspected, who have traced the history of that claim will dogmatically assert for the doctrine of the Freedom of the Seas either a universal or a perpetual validity."

The textbook-writers do not make law. When their opinions were submitted in the case of *The Queen v. Keyn,* Chief Justice Cockburn asked: "Upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down signified their assent to it? . . . For even if entire unanimity had existed . . . , in place of so much discrepancy of opinion, the question would still remain how far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are bound by it." If jurists do not make law, however, they sometimes have influence in getting it made. "It is important," says Lord Birkenhead,[4] "to notice exactly how their influence has been exerted. In some cases, by minute historical investigations, these great jurists have influenced practice by recalling it to the channel of an almost forgotten precedent. In others

[1] Sir Geoffrey Butler and Simon Maccoby, *The Development of International Law* (1928), p. 40.
[2] *Ibid.*, p. 42.
[3] *Ibid.*, p. 53.
[4] *International Law* (6th ed., 1927), p. 23.

they have openly advocated changes which, by their inherent reasonableness, have afterwards procured acceptance for themselves." [1] They contribute to changes in the law, says Birkenhead, just as diplomatists do.

There are reasons why textbooks, as evidence of international law, are regarded with distrust. Even among the most eminent writers few have the courage, patience, and ability to collect evidence in the manner of John Bassett Moore.[2] They recoil from the colossal task, borrow data from their predecessors, and add some contemporary material that others have made easily available. They show, too often, a disposition to confuse the actual with the ideal, and they take refuge in what Henshaw Ward has called "thobbing," [3] which means the excogitation of doctrine in a more or less factless intellectual desert. Generalizations which, if confronted with actual practice, would shrivel into impostures, pass from one book to another, until they appear to have almost universal backing. Laziness explains this phenomenon. The attitude of jurists towards such doctrines recalls the reference that Samuel Johnson made, in his *Lives of the Poets,* to Congreve's *Incognita.* "Biographers have praised this book," he said; "I would rather praise it than read it." The textbook-writers, though not frank enough to say so, would rather repeat a doctrine than go to the trouble of testing its validity. A good deal of the international law that the books set forth is fiction.

Criticism of this kind must not be attributed to erratic individuals and dismissed lightly. It is heard in high places. Lord Alverstone said: [4]

[1] Consider, for example, the nature of their influence in fixing the present three-mile limit of territorial waters (Butler and Maccoby, pp. 53-57). As early as the fourteenth century lawyers suggested either 60 miles (a one-day journey) or 100. In the sixteenth century the *portée de vue*—the distance at which land or port could still be sighted—was adopted by the kings of Scotland, Denmark, and Spain; and this tended to become a standard measurement of fourteen miles. Grotius (*op. cit.,* vol. II, p. 214) proposed a distance from land at which "those who sail over the part of the sea along the coast may be constrained from the land." Seventy-five years later Bynkershoek urged the *portée de canon,* which was generally adopted without being expressed in terms of miles. In the latter half of the eighteenth century theorists advocated a more definite measurement of two or three leagues (six or nine miles). The most important influence in setting up the present rule was exerted, not by theorists, but by Sir William Scott (Lord Stowell), whose decisions introduced the three-mile limit into English jurisprudence. For his classic decisions see *The Twee Gebroeders* (1800 and 1801) and *The Anna* (1805).

[2] Consider, for example, his eight-volume *Digest,* his two volumes on extradition, his six volumes on arbitration, and his latest work on *International Adjudications,* of which seven volumes have already appeared.

[3] See his remarkable book, *Thobbing* (1926).

[4] *West Rand Central Gold Mining Company v. Rex* (1905), L. R. 2 K. B., p. 402.

"The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiment of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, 'law.' " According to Mr. Justice Gray,[1] the jurists, "by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat"; but he is constrained to add that the court is not interested in their speculations "concerning what the law ought to be." The opinion of Sir James Fitzjames Stephen is certainly entitled to respect. Referring to the question of territorial waters and to the writers cited in *The Queen v. Keyn,* he says: [2] "No single passage is quoted in which any such writer discusses, or proposes to state, the actual practice of any nation. All the passages collected are statements of the theories of the various writers as to the rule which ought to prevail; for, in their language, 'is' in nearly every case means 'ought.' " Stephen then refers to the contentions of Grotius, which Selden showed conclusively to be inconsistent with the practice of nations. Grotius "opposed to facts an ideal of his own. The *a priori* character thus claimed for international law by its founder has never, in modern times, been effectively disclaimed by his successors. Their theories all rest at last neither upon common usage nor upon any positive institution, but upon some theory as to justice or general convenience, which is copied from one writer to another with such variations or adaptations as happen to strike his fancy. Moreover, the history of these theories shows how uncertain and variable they are." [3]

[1] *The Paquete Habana* (1900), 175 U. S. 677.

[2] *A History of the Criminal Law of England* (3 vols., 1883), vol. II, p. 38.

[3] Stephen adds, however, on p. 40: We must make "a distinction between cases in which writers on international law agree in their relation of actual occurrences, implying or constituting usage as between nation and nation, and cases in which they agree in speculative opinions as to what is desirable or just. Where a definite usage between nation and nation exists, and where there is no special law upon the subject to be found in the Statute Book or elsewhere, it is undoubtedly part of the law of England that such usage should be enforced as law, and the works of writers on the subject are the evidence by which the existence of such usages is commonly proved." The Statute of the World Court (Article 38) recognizes "the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law."

In the effort to determine whether a given usage has ripened into a custom—whether it has been accepted by the community of nations as binding—evidence will be sought in many different places. The chief places have already been indicated. As to the cogency of the evidence two considerations must be kept in mind: [1] first, that recent, as against older, practice is preferred; and, second, that, in cases where governments hold diverse views, special attention should be given to the number and power of concurring States, as well as to their interest in the subject. Thus, on a point of naval warfare, the concurrence of the chief maritime states would be more or less decisive.[2] Under the circumstances, says Brierly,[3] it is neither necessary nor practicable "to show that every state has recognized a certain practice, just as in English law the existence of a valid local institution or custom of trade can be established without proof that every individual living in the locality, or engaged in any trade, has practised the custom. The test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible of exact or final formulation." According to Lord Alverstone,[4] "it is obvious that, in respect to many questions that may arise, there will be room for difference of opinion as to whether such a consensus can be shown to exist."

TREATIES AS A SOURCE OF LAW

Customary law has defects. Its very existence is hard to establish, since proof should require the citation of repeated affirmative acts by many governments. It often lacks definiteness and clarity. In a period of rapid social change, its development seems to be unconscionably slow, especially to impatient idealists and reformers. Such men complain that, failing to keep pace with ethical progress, it continues to approve

[1] Birkenhead, *International Law* (6th ed., 1927), p. 23.

[2] Said Mr. Justice Strong in *The Scotia* (1871), 14 Wall. 187: "Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.... Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part, at least, and so far as relates to these vessels, the laws of the sea."

[3] *The Law of Nations*, pp. 43-44.

[4] *West Rand Company v. The King*, Scott's *Cases*, p. 6.

the standards of a disreputable past and that it is unable to penetrate the areas of international friction which are most in need of regulation. Condemning custom, they turn hopefully to the only alternative. There is no world legislature,[1] but there is a method of world legislation. States need not wait for the formation of new customs through tacit consent; they may give express consent, by means of treaties or conventions, to formal changes in the law. At first sight the two law-making processes look very much alike: both customary and conventional law draw their validity from official acts and depend upon the favorable disposition of governments. In reality the difference is considerable. It may be illustrated in this way. The existence of a customary rule requiring the arbitration of all disputes could be established only by uniform behavior over a very long period; by treaty, on the other hand, all States could set up such a rule at a given moment. Treaties in the international field, like statutes in the national, open the way to quick reforms—a somewhat deceptive way, because action is so often taken in response to temporary pressure of some kind and because, when the pressure subsides, the treaty becomes a mere "scrap of paper." Hall rightly observes, "Treaties are only permanently obeyed when they represent the continued wishes of the contracting parties." [2] Be that as it may, the volume of conventional law has grown enormously in recent decades.[3]

Here we encounter an anomaly. While textbooks often refer to conventional law—which includes all treaties or conventions—as if it were a branch of international law, only a very small part of it fits into that category. Seldom, indeed, do treaties create international law. This statement requires little elucidation. Let us remember, in the first place, that, although a rule of international law must have received the tacit or express consent of all States, most treaties are bilateral, binding only the two parties.[4] In the second place, most treaties do not purport to change the law. They commonly take the

[1] It may be urged that the assembly and council of the League of Nations constitute a world legislature. On the one hand, however, the League is not world-wide, since four of the Great Powers, Brazil, and certain lesser States do not belong to it; and, on the other hand, the organs of the League have a very limited competence in making laws for the actual members.

[2] *A Treatise on International Law* (6th ed., 1909), p. 12.

[3] According to Brierly (*op. cit.*, p. 46), conventional law has already, "perhaps," surpassed customary law in importance. With less restraint Fenwick (*op. cit.*, p. 33) says that by the opening of the twentieth century it "rapidly exceeded" the other in growth.

[4] If a bilateral treaty substitutes, as between the parties, a new rule of their own for an old rule of international law, that treaty sets up a limited exception, showing what the law is *not* rather than what it *is*. Birkenhead, *op. cit.*, p. 25.

form of bargains or contracts, as when Russia agreed to sell, and the United States to buy, Alaska. International law is no more affected by such a transfer of territory than is the law of California when a contract is made for the sale of a crop of oranges. A true law-making treaty may scarcely be said to exist; for, strictly speaking, such a treaty must not only be concerned with the statement of legal rules, but also be signed and ratified, or else adhered to, by all members of the community of nations. "Thus," says Brierly,[1] "except for the almost impossible event of every state in the world becoming party to one of these treaties, its terms will not be law for every state." Perhaps the Pact of Paris (the Kellogg-Briand Pact) comes closest to satisfying the requirements. More than sixty states are parties to it.

What shall be said, then, of treaties which are law-making from the standpoint of purpose and which fall short of universality from the standpoint of the number of parties involved? As between the parties they set up new rules of conduct. The World Court, for example, would hold such rules binding upon the parties unless they prejudiced the legal rights of third States. How shall we escape the dilemma? What name shall we give to such law? Oppenheim, who seems to have developed the idea from Liszt,[2] offers an ingenious solution.[3] Law-making treaties, he contends, create three different types of international law, according to the number of parties: (1) *particular,* when only a few states are involved; (2) *general,* when a majority of the states, including the Great Powers, are involved; and (3) *universal,* when all the members of the family of nations are involved. "General international law," he adds, "has a tendency to become universal because such states as hitherto did not consent to it will in future either expressly give their consent or recognize the rules concerned tacitly through custom."

It has already been remarked that idealists, finding custom too tough and stubborn for their purposes, resort to treaties as an instrument of reform. They did so particularly in the years following the World War. In various countries self-constituted brain-trusts took shape. Out of the seclusion of universities and other retreats emerged men whose knowledge of practical affairs and, indeed, of international law was in

[1] *Op. cit.,* p. 46.

[2] Amos S. Hershey, *The Essentials of International Public Law and Organization* (rev. ed., 1927), p. 1 note. He comments: "But rules which are not generally or universally recognized as binding can scarcely be said to deserve the name International Law at all."

[3] *International Law* (4th ed., 2 vols.), vol. I (1928), pp. 26-27.

most cases deficient. They set out to abolish war. They were carried to momentary prominence by the fervor of post-war pacificism and by the support of a righteous and vociferous minority. To stand out against their extravagant propaganda entailed denunciation for sympathy with militarists and jingoes. Governments gave way. Treaty after treaty was negotiated; promise after promise given; document heaped on document. Perhaps the most significant aspect of this paper edifice is found in the implication that, by constantly exacting new promises, governments showed little faith in the promises already given. The multiplication of treaties lowered their prestige, undermined the sanctity that belongs to them by virtue of a rule of customary law. The pacifists, once started upon their route, moved far in advance of any position that an informed view of international realities could justify. They forgot that habitual behavior does not change simply because prohibitions are inscribed on scraps of paper. Reaction set in. There was the failure of the disarmament conferences, the failure of naval limitation, the failure of the League machinery in Manchuria, Ethiopia, and Spain. The effect of reforming ardor has been disastrous.

ACTUAL PROCESS OF LAW-MAKING

There are, then, two sources of international law, custom and treaties, the former contributing by far the larger and more important part. Professor Brierly would add a third source: reason.[1] In preferring this claim he is being modest, almost tragically modest; for, after the manner of Clive, he has helped himself only to reason, when he had, within his grasp, the whole treasure of natural law. Indeed, he tries to identify natural law with reason.[2] It is "an essential underlying principle of the art of legislation" and "a principle that is necessarily admitted in the actual administration of the law." When filling gaps and meeting situations that have escaped human foresight, the English common law constantly justifies decisions, Brierly insists, by an appeal to reason, which is merely an appeal to natural law.[3] By

[1] He is apparently following the lead of John Westlake, *International Law* (2nd ed., 2 vols.) vol. I (1910), p. 15. Birkenhead also (*op. cit.*, p. 22) recognizes reason, but with qualifications.

[2] *Op. cit.*, pp. 16 and 44.

[3] *Ibid.*, p. 17. He says (pp. 44-45): "Reason in this context does not mean the unassisted reasoning powers of an intelligent man, but a 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid; for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established."

way of comment it must be said that judicial reasoning is quite a different thing from the natural law of Grotius. A common-law judge is not free to announce as law any rule of his own devising that he considers in agreement with social nature. As Brierly admits,[1] the judge bases his decision upon an existing rule of law. He resorts to reasonable interpretation in applying it to a new set of facts that it does not precisely fit. He makes new municipal law, almost surreptitiously, by a succession of slight modifications. But, when he deals in this fashion with customary international rules, his decision will be received in other countries, as Chief Justice Marshall said, with respect, but not as authority. It still must await the test of tacit or express consent. What of the World Court? Will international judges expand the law by "reasonable" interpretation? They cannot derive principles from precedents and apply those principles to new cases, since such a course is expressly forbidden by Article 59 of the Court Statute. Oppenheim seems to be right. "Reason is a means of interpreting the law," he says,[2] "but it cannot call law into existence." Reason may be the source of a proposed change. Actual change requires consent.

Whatever may be said in behalf of reason, the law of nature has been utterly discredited as a source of international law.[3] Diplomatic correspondence, as viewed by Lord Birkenhead,[4] almost suggests the rule that the law of nature is invoked only when no other argument is available. Reliance upon such a vague and subjective thing as the dictate of right reason would produce chaos. "It is scarcely too much to observe," says Hall,[5] "that if the fundamental ideas of the more prominent systematic writers on international law were worked out without reference to that body of international usage which always exerts its wholesome influence wherever particular rules are under consideration, there would be almost as many distinct codes as there are writers of authority." Sound definitions of international law leave no room whatever for excogitated doctrines. Oppenheim may be quoted as an example: "the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with

[1] *Ibid.*, p. 44.

[2] *International Law* (1st ed., 2 vols., 1905), vol. I, p. 22 note. Hershey approves, *op. cit.*, p. 24 note.

[3] The sarcasm of Bentham, in his *Introduction to the Principles of Morals and Legislation* (chap. II), contributed to this result. "A great multitude of people are continually talking of the law of nature," he says; "and they go on giving you their sentiments of what is right and what is wrong; and these sentiments, you are to understand are so many chapters and sections of the law of nature."

[4] *Op. cit.*, p. 7.

[5] *Op. cit.*, p. 2.

each other." [1] Nevertheless, we still come across definitions that refer to principles as a part of international law.[2] Thus Fenwick places "general principles" alongside of "concrete rules"; [3] Hall, "principles" alongside of "definite rules." [4] What does the term "principles" imply? For Fenwick it includes abstract rules, originally derived from natural law, but now divested of much of their *a priori* character through the play of practical conditions.[5] He insists that "principle must prevail over practice when practice cannot be shown to be of generally acknowledged obligation," although it must give way before a specific rule which "has come to be regarded as the correct application of the general principle." [6] Here walks the ghost of natural law, a spirit summoned from the vasty deep. To be effective, principles must have been incorporated in international law by custom or treaty. There are many such principles or broad rules: free ships, free goods; a blockade to be binding must be effective; treaties must be applied in good faith. But principles do not form a part of the law unless they have been so incorporated.

The principles that Hall has in mind—and Fenwick includes these also—reflect the essential facts of State existence, such as independence and sovereignty.[7] Customs that give effect to them "possess a much higher authority than any other part of international law." Moreover, the principles are "distinct sources of law. States are consequently bound, not only to respect those principles in the shape of existing usage, but in dealing with fresh circumstances to apply them whenever their application is possible." Finally, customary rules that conflict with the principles, "must be looked upon with disfavor" and forced to prove their own right of existence.[8] Now, principles of such primary significance should be identified easily and recognized universally. It is surprising, therefore, to find that the textbook writers compile such very

[1] *Op. cit.* (4th ed.), vol. I (1928), pp. 3-4. According to Lord Alverstone (Scott's *Cases,* pp. 6-7), international law "rests upon a consensus of civilised states, not expressed in any code or pact, nor possessing, in case of dispute, an authorised or authoritative interpreter, and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history."

[2] For example, Hershey (*op. cit.,* p. 1): "the body of principles, rules, and customs." Again, Brierly (*op. cit.,* p. 1): "the body of principles and rules of action."

[3] *Op. cit.,* p. 32. But in his first edition (p. 34) he referred only to "the body of rules."

[4] *Op. cit.,* p. 5. But on page 1 he refers only to "certain rules of conduct."

[5] *Op. cit.,* p. 62.

[6] *Ibid.,* p. 63.

[7] Hall, *op. cit.,* p. 5, and chapter II (pp. 43-59).

[8] *Ibid.,* p. 6.

different lists. Some recognize eight fundamental rights or principles; others half a dozen; Fenwick, two (existence and independence);[1] Pillet, one (sovereignty) and Kaufmann, one (self-preservation).[2] Westlake,[3] Brierly,[4] and Oppenheim[5] recognize none at all. In place of fundamental rights Oppenheim finds many "real rights" which belong to States through membership in the family of nations and which are recognized by custom. It seems safe to say that, apart from custom, no such rights exist.

A hundred years ago the language of natural law persisted, as if in pious memory of the dead. We must not be deceived thereby. Chief Justice Marshall declared in 1815 that the unwritten part of international law must be ascertained from "the great principles of reason and justice."[6] He went on to say, however, that those principles were "differently understood by different nations under different circumstances." Ten years later he expressed himself more realistically: International law must be "tested by the test of usage."[7] In *La Jeune Eugénie,* Mr. Justice Story seemed to give precedence, among the sources of international law, to "the general principles of right and justice" and to every doctrine that might reasonably be deduced from the rights of nations and the nature of moral obligation.[8] The passage is incredibly obscure. A careful analysis reveals the fact that such principles and doctrines give way before customary practice. Even so, the learned judge seems to have given more than mere lip-service to natural law. Nowadays, theorists work back to the principles of justice in a different fashion. International law takes form through customary behavior, they agree; but behavior itself responds to the dictates of justice. "The ultimate foundation of international law," says Pitman B. Potter,[9] "is the sense of justice. However imperfect the vision which men have gained of what constitutes justice in general or justice among nations in particular, and however imperfect the statements given to that principle as it is visualized, and the applications made of the

[1] *Op. cit.,* p. 148.
[2] Oppenheim, vol. I, p. 235.
[3] *Op. cit.,* vol. I, p. 306.
[4] *Op. cit.,* p. 35.
[5] *Op. cit.,* vol. I, pp. 235-236.
[6] *Thirty Hogsheads of Sugar v. Boyle,* Scott's *Cases,* p. 682.
[7] *The Antelope,* J. B. Moore, *Digest of International Law* (8 vols., 1906), vol. I, p. 7.
[8] (1822), 2 Mason 409.
[9] *An Introduction to the Study of International Organization* (3rd ed., 1928), p. 73. Cf. Brierly (*op. cit.,* p. 16), who detects a purpose in law and contends that we strive to embody in law social justice.

rules as stated, no other conclusion is possible than that the nations intend the law to give every state its due. To intend otherwise were to undertake what in the long run would be impossible and to undertake the unnatural."

Statements like this, being figments of the imagination, are easy to make; but they cannot be established by concrete data. International law would lend itself less readily to the excogitation of absurd doctrines and emotional pietisms if the historical evolution of its rules had been thoroughly explored.[1] Wherever the facts have been brought to light, the motive of justice can hardly be discerned. What usually appear are the clash of selfish national interests and some compromise that is dictated by circumstance and by the relative strength of contending parties. The conflict between the shut-sea and free-sea interests has already been noticed. Consider also the law of neutrality. While sketching its evolution, Oppenheim remarks: [2] "Thus the general rule, that the development of International Law has been fostered by the particular national interests of the members of the Family of Nations, applies also to neutrality. Unless it had been to the interest of belligerents to remain during war on good terms with neutrals, and to the interest of neutrals not to be drawn into war, the institution of neutrality would never have developed so favorably as it actually did during the nineteenth century." The World War introduced new considerations. Experience suggested that, in another long war, neutrals might be little better off than belligerents and that the anxiety of evenly-matched belligerents to obtain assistance might make the maintenance of neutrality difficult.[3] The Covenant of the League of Nations left little scope for neutrality. By providing for collective intervention, it may have been animated to some extent by the motive of justice, as well as by the determination to prevent, in any practicable way, another holocaust. But the League machinery proved ineffective; it collapsed in Manchuria and elsewhere. The new type of neutral legislation, as in the United States and Canada, gives no excuse for prating of justice. It abandons traditional neutral rights on the ground that embroilment in war may be avoided by minimizing contacts with the belligerents, no matter how much injustice such isolation may entail.

[1] The need of such investigation has often been emphasized. Says Hershey (*op. cit.*, p. 69): "The relative value and influence of each of these factors [theories and custom] is so difficult to determine that they have never been sifted or separated—a task left for the future historians of International Law." Butler and Maccoby's volume appeared a year after this was written.

[2] *Op. cit.*, vol. II, pp. 463-464.

[3] *Ibid.*, vol. II, p. 468.

The process by which rules evolve may be seen in relation to the capture of private property at sea. That story has been told.[1] It illustrates the play of divergent national interests. At one time belligerents seized not only enemy goods and enemy ships, but also neutral goods on enemy ships and neutral ships carrying enemy goods. Such was the French practice, though not without some variations, from the end of the sixteenth century. Grotius, generalizing too exclusively from Dutch practice, asserts that, with exceptions, neutral goods and neutral ships enjoyed immunity.[2] Now, while England and France were constantly at war, the Dutch hoped to deflect the carrying trade to their own merchant ships by remaining neutral. Hence the Dutch rule: free ships, free goods; enemy ships, enemy goods. In other words, English and French goods on Dutch ships should not be liable to confiscation, but neutral goods on enemy ships should be. On the other hand, the English, being so frequently engaged in war and having a large mercantile marine, made ownership the test. Enemy (French) goods on neutral (Dutch) ships should be confiscable, but neutral goods on enemy ships should not. The French, as just noted, held that enemy goods tainted a neutral ship and that an enemy ship tainted neutral goods. They confiscated neutral (Dutch) ships for carrying belligerent (English) goods and neutral (Dutch) goods when carried on an enemy (English) ship.

By adhering to these divergent rules and trying to secure their general adoption, the maritime States acted in conformity with their material interests. How did a uniform rule emerge from this chaos? France and England entered the Crimean War as allies. In order to act in harmony at sea, they had to sacrifice particular interests. Moreover there was some prospect of naval war in the Baltic; and it was imperative, therefore, to make sure of the benevolent attitude of Sweden, Denmark, and Prussia—States which, condemning certain belligerent practices, had played a prominent part in the Armed Neutralities of 1780 and 1800. This situation explains the new rules that were soon formulated in the Declaration of Paris (1856). These rules granted immunity from confiscation—except in the special cases of contraband and blockade—to enemy goods on neutral ships and to neutral goods on enemy ships. Professor Potter would have some difficulty in finding a place for his ingenious formula here. Was it a sense of justice or

[1] Butler and Maccoby, *The Development of International Law* (1928), pp. 268-332. See also Oppenheim, *op. cit.*, vol. II, pp. 310-317 and 458 *et seq.*

[2] *De Jure Belli ac Pacis* (Carnegie Endowment ed., 2 vols., 1925), vol. II, p. 668.

self-interest that led Great Britain, in the latter part of the nineteenth century, to stand alone, but successfully, against the movement to exempt private property from capture at sea? Was it a sense of justice that brought France, Japan, and Russia to her side at the Hague Conference of 1907?

DEFICIENCIES OF INTERNATIONAL LAW

When custom is regarded as binding by States in their mutual dealings, we call it international law. The very phrase that we employ assumes that it is "law." The normal methods of handling international questions confirm the assumption. Diplomats draw up their documents, and jurists elaborate their opinions, by a course of legal reasoning; they attack and defend the behavior of States by citing precedents and relying upon legal considerations alone; they recognize, in international affairs, a distinction between law and morality, understanding that conduct does not violate the law simply because it is odious in an ethical sense.[1] But upon closer scrutiny we find that international law differs sharply from municipal law, from the national law that controls behavior within a State. It is imperfect law. It embodies the customary observances of a crudely organized society, although those observances may be on their way to become true law as social organization ripens. "Strictly speaking," said Lord Coleridge,[2] "international law is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states, and no tribunal has the power to bind them by decree or coerce them if they transgress."

Such realistic language is distasteful to those who dream of a world-wide and well-ordered society. Their idealism leads to misunderstanding and misrepresentation. Thus, while Professor MacIver admits the absence of a law-giver and a law-enforcer, he contends that international law need not therefore be denied the general title of law.[3] Did the English common law, he asks, emanate from any legislature? The weakness of his position is easily revealed. The common law was made by the judges; the judges were the legislature; and they were able to legislate successfully because their decisions were backed by the authority of a powerful government. But who tries the offender against inter-

[1] W. E. Hall, *A Treatise on International Law* (8th ed., 1924), p. 14; Sir Frederick Pollock, *Oxford Lectures and Other Discourses* (1890), pp. 18 *et seq.*

[2] *The Queen v. Keyn* (1876), Scott's *Cases*, p. 244.

[3] *The Modern State* (1926), p. 282.

national law; who punishes him? "As between nation A and nation B" —I take this illustration from Lord Birkenhead—[1] "international law declares A bound to do a certain act. A refuses; it has broken the law. War follows in which A is victorious. So far as international law is concerned the nation is now justified in its refusal. Such a practice is almost anarchical, and no analogies, however striking and numerous, between international law and law proper can blind us to the impassable gulf which divides them."

What is the nature of that impassable gulf? It exists because, on the one side, municipal law has behind it the organized power of the State in the form of a sovereign government; and, because, on the other side, international law applies to a congeries of States which have set up no common agency of enforcement. The community of States bears some resemblance to any primitive community: its customary law finds no more effective sanction than public opinion and self-help. Public opinion —the moral conscience of mankind—constrains States to obey the law for several reasons.[2] Like individuals, States wish to enjoy the prestige of a good reputation; [3] on material grounds, though not on these alone, they value the friendship of their fellows; above all, they realize that grossly illegal conduct may inflame foreign opinion and lead to the vicarious enforcement of their obligations. Self-help may consist of forcible acts falling short of war or of war itself. In the final assertion of alleged rights a State may appeal to the arbitrament of the sword, piously hoping that, in the bloody litigation, God will defend the right. But war is so costly, and the outcome of it may be so uncertain, that there will be reluctance to incur it unless paramount national interests are involved. Such a deterrent operates against the just and the unjust alike, without distinguishing between a good and a bad cause. Still, something is gained when the rules of international law will not be broken lightly by an aggressor at the risk of war and when all members of the community of nations understand that compliance with con-

[1] *International Law* (6th ed., 1927), p. 10.

[2] Robert M. MacIver (*op. cit.*, pp. 284 and 289) says: "The sanction of all law goes back to public opinion.... We must again insist that the only support and sanction necessary for the effective operation of international law is a broad-based public opinion." By way of comment it must be said, first, that even within each State public opinion has always required the support of organized force and, secondly, that centuries must elapse before we can expect to have a world-wide public opinion which will not be jarred periodically into national fragments.

[3] "My dear dear lord,
The purest treasure mortal times afford
Is spotless reputation; that away,
Men are but gilded loam or painted clay."

venient and even necessary rules is a cheap price to pay for them. The principle of the balance of power is also a very effective deterrent. It has been the chief keeper of the European peace, because it stands in the way of aggrandizement by any single ambitious State. It explains why so many little States are left unmolested. Are they not at the mercy of some great neighbor? No: they live in comparative security, aware that some other strong State will come to their assistance rather than have the balance upset to the advantage of a potential enemy. At least the attack is likely to be postponed until the aggressor has made sure of a free hand either by negotiating for it, perhaps by the offer of compensation to the opposite group of the balance, or by waiting for a moment when circumstances render intervention on the part of any third State improbable or impossible.[1]

What should be said about the value of public opinion and of war as sanctions? At critical moments, certainly, the former is not very effective. The community of nations becomes almost mythical when we contrast it with the various national communities; and the opinion that forms within its world-wide boundaries is constantly being subordinated to the more insistent opinion that forms within the boundaries of each State. The cosmopolitan outlook cannot prevail over the national. Nor can public opinion, even when it comes fairly close to unanimity, secure adequate obedience to law without relying, at last analysis, upon force. But there is no international army or police. When force is employed, it is national force; and it may be employed either to vindicate or to flout the law. Moreover, war is a test of material strength, its outcome having no necessary relation to justice. Some writers argue that war is no longer permissible. They are inaccurate. True, members of the League of Nations are required to submit international disputes to some form of pacific settlement and to abide by the decision. But the requirement is subject to important exceptions and does not affect non-members. Again, almost all States are parties to the Pact of Paris of 1928, under which they renounce war as an instrument of national policy and undertake to use none but pacific means in the solution of controversies. But the Pact, according to official interpretation, still permits defensive war; and, since each State is left free to decide whether the circumstances justify its going to war for self-defense, the Pact cannot be said to impose any serious

[1] The aggressions of Japan in Manchuria and of Italy in Ethiopia were nicely timed, this indicating in both cases a shrewd preliminary survey of the international situation. Both governments knew in advance that they would not encounter material opposition.

moral restraint. Every one knows how frequently aggression has been disguised as defense—how easy it has been, by ingenious diplomacy, to preserve the semblance of rectitude. Moreover, there being no positive obligation to submit a controversy to pacific settlement, one State may provoke another to war by refusing to acknowledge a just claim.

After the World War it seemed that international law would approach more closely to municipal law in type. Within the new League of Nations, which was expected to include ultimately all States and thus become the organized family of nations, new sanctions were set up; indeed, under certain circumstances, the sanctions extended to non-members. The Covenant of the League, after requiring the submission of disputes to alternative means of pacific settlement,[1] applied certain penalties to a recalcitrant state:[2] its isolation—by means of an embargo on personal, financial, and commercial intercourse—and, as a last resort, collective military compulsion. On paper the plan looked promising; in practice it broke down. Practical considerations, the realities that had to be faced, prevailed over abstract doctrine in determining the efficacy of the League sanctions. To coerce feeble States, at any rate in Europe and while the current of post-war pacifism ran strong, proved to be a simple matter. But even a second-rate power like Poland found that it could violate the Covenant with impunity.[3] A Great Power stood above the law. Italy's drastic behavior towards Greece in 1923 first made this apparent. During the next decade, in the absence of untoward incidents, pacifists recovered complacency. But the collapse of the machinery of the League could no longer be disguised when Japan in Manchurja (1931-33) and Italy in Ethiopia (1935-36) successfully defied the League and when Germany, by unilateral act, liberated herself from the military restrictions of the Treaty of Versailles (1936).[4]

Great hope gave way to unreasonable despair. There seemed to be grounds for complete disillusionment. Instead of fulfilling the dreams of pacifists and establishing an era of peace, the League had failed to meet the first rigorous tests. Instead of becoming a world-wide organization, it had been deserted by six Latin-American states (including Brazil) and by two Great Powers—Japan and Germany. A third Great

[1] Articles XII, XIII, and XV.
[2] Article XVI.
[3] By the seizure and retention of Vilna. See, for example, T. P. Conwell-Evans, *The League Council in Action* (1929), pp. 89-100.
[4] Having given notice of withdrawal in October, 1933, Germany had, under the terms of the Covenant, ceased to be a member of the League two years later

Power—the United States—showed not the slightest sign of reconsidering her original decision to remain outside. The fact that Italy had not withdrawn or been expelled, in spite of her defiant conduct, gave further proof of the impotence of the League. There was a widespread disposition, in 1937, to believe that one more noble experiment had collapsed. It was not within the framework of the League that twenty-seven European States dealt with the menace of civil war in Spain. Apparently no one thought of the League as capable of meeting any major crisis. At the end of 1937 Italy gave notice of withdrawal.

Viewed realistically, however, the future of the League is now less dubious than it has been in the past. The League could not possibly do what was expected of it originally. The architects of the Covenant were idealists, who thought that the actual facts of international life could be transformed by a paper scheme and that evil propensities could be subdued by a sort of emotional camp-meeting conversion. Sudden repentance should inspire little faith, when sin has been a matter of habit.[1] Customary behavior changes slowly, through the medium of minor adjustments. It tends to persist even when force is used against it; and whatever force the League has at its disposal must be furnished by the voluntary action of its members. In fact, it is the Great Powers alone, among those members, that would bear the burden and hazard of applying forcible sanctions. As long as the Great Powers hold together, they can use the machinery of the Covenant and exact compliance on the part of little States; and every one will acknowledge that in this way the League has, in the past, done a great deal to avert minor conflicts. When they fall apart, the League cannot invoke sanctions. They have fallen apart. A common front has become impossible even for the three Powers remaining in the League. We see the League now in its essential character, stripped of the garment that for years disguised it as a worker of miracles. It is no longer expected to suspend the operation of natural laws. It will perform an invaluable service as long as Geneva remains a regular meeting-place of statesmen, as long as coöperation is suggested by the practice of sitting down together and discussing common problems. And it will continue to serve mankind, as heretofore, in social, especially humanitarian, matters.

Only ten States of any importance stand outside the League. When

1 "Indeed, Indeed, Repentance oft before
I swore—but was I sober when I swore?
And then, and then came Spring, and Rose-in-hand
My thread-bare Penitence apieces tore."

they find that grandiose visions are no longer entertained at Geneva and that the meetings there are held for the purpose of discussion rather than action, most of them may apply for membership. Otherwise they will be represented by observers. If nothing more remains, the salvaging of the council and assembly of the League may be reckoned as a great achievement. At least three times a year the council meets, this body including delegates from three Great Powers, which have permanent seats, and from eleven other States, which have temporary seats. At least once a year, in September, the assembly meets, each member of the League being entitled to three delegates, though only one vote. These bodies may be as powerless to legislate as is the Conference of the British Commonwealth of Nations, and yet as serviceable in affecting the attitude of governments and of public opinion. Periodic contacts and discussions mean a great deal to prime ministers and foreign secretaries. From that modest starting-point they may take tentative and cautious steps towards "the parliament of man, the federation of the world." For the present, it seems, the sanctions of Article XVI of the Covenant will not be invoked.

Closely connected with the League is the Permanent Court of International Justice. Its expenses are paid by the League, and its fifteen judges are elected, at nine-year intervals, by the council and assembly. The jurisdiction of the court is voluntary, depending upon agreement between the parties to the dispute.[1] As members of the League of Nations have undertaken in the Covenant to submit disputes to arbitration or judicial settlement or inquiry by the council, there will probably be a tendency to turn to the court, whose personnel inspires general confidence. The original plan for the court, formulated by a committee of jurists, provided for compulsory jurisdiction. Such a provision would have wrecked the whole project on account of the reluctance of Great Powers to concede such a restraint upon their liberty of action. Fortunately, the council and assembly saw that, however desirable in the abstract, compulsion did not suit actual conditions. Under the existing arrangement the parties, having agreed of their own

[1] Article 36 of the Statute says: "The jurisdiction of the court comprises all cases which the parties refer to it." But the Article continues: "and all matters specially provided for in treaties and conventions in force." Various treaties do give the court compulsory jurisdiction as to certain or all of their provisions. It is also provided that, by signing a protocol, any State may recognize the jurisdiction of the court as compulsory in relation to any other State that has bound itself similarly. Eight or ten years ago numerous States signed the protocol; but they did so, as the Article allows, conditionally or for a limited period. Since that time enthusiasm has subsided.

CHAPTER XIV

INTERNATIONAL LAW: (2) CONTRIBUTING FACTORS

INTERNATIONAL law is primitive law. It consists mainly of custom, which comes into existence as States, in their mutual relations, recognize certain habitual modes of behavior as binding. When we contrast it with municipal law, the law of the sovereign State, we realize how vague its rules are—how difficult, indeed, the task of merely proving their existence. There is no court to which violators of the law may be haled against their will; there is no government that can compel sovereign States to obey whatever decisions the World Court may deliver when disputes have been brought before it. Perhaps international law is on the way to pass beyond this inchoate stage; perhaps a center of power, capable of punishing lawbreakers, will slowly take shape. If we look towards such a future, we must not be foolish enough to believe that wishful thinking will bring it nearer. We must look rather to the play of certain economic forces to which attention will now be directed; and we must also get back to reality and understand that ages will elapse before such a central authority makes its appearance and that war itself may be the means of creating such an authority.

A NINETEENTH-CENTURY LEAGUE OF NATIONS

It is strange to recall that only a few years ago pacifists were bent upon perfecting the Covenant of the League of Nations—filling the notorious gaps that, in certain circumstances, permitted recourse to war. They are now busily engaged in picking up flotsam and jetsam. Rude collision with international realities has swept away a flimsy ideological superstructure which went so far as to provide for collective enforcement of the law. Something withstood the shock, however. The hull was sound. The League still floats, as a means of bringing statesmen of the world together for consultation. But it no longer objectifies the grandiose dream of a transformed world. Transformation takes time.

The artificers of the League were too ambitious and too idealistic.

Overlooking the apparently fundamental differences between civilizations—between those of the East and West, for example—[1] they felt that the world-wide war and world-wide peace treaty should be followed by a world-wide organization. They did not stop short at the frontiers of prudence and content themselves with laying a durable foundation for the future to build upon. They thought that, by a stroke of the pen, they could capitalize momentary post-war emotion and substitute world harmony for world discord. As a matter of fact, the writ of the League ran nowhere outside of Europe. This should have been foreseen. No effective world-wide organization can be built before a basis has been laid in regional organization. History should have suggested, indeed, that the first step ought to be the relatively modest one of organizing Europe.

We look back through a whole century to an earlier world war or series of wars. When peace was concluded at Vienna in 1815, men had grown weary of fighting. A Europe that had been bled white by twenty years of war sought repose. The Great Powers tried to maintain peace by making some approach to a European confederation.[2] The origin of the experiment looks back to a scheme that Alexander I of Russia submitted to William Pitt in 1804. The Czar proposed the formation of a "league" and the setting up of a procedure that would discourage any breach of the European peace; and, vague as his words were, he evidently intended to have the forces of the "new union" used against recalcitrant governments. Pitt agreed that a "federative system" should be established. However, the Third Coalition failed to crush Napoleon; the war continued. It was only after Waterloo that Alexander's plan came to partial fulfilment. In 1818, when France was given a place alongside of the other four Powers, reference was made to the "august union," the "general association," the "effectual guarantee of the independence of each government." Congresses were held at Aix-la-Chapelle, Troppau, Laibach, and Verona. They represented something new in Europe. Congresses were by no means a novelty; but their old purpose had been to make peace at the end of a war, while their new purpose was to prevent the occurrence of war.

For a time Congresses met with such frequency that the assembly of

1 "Oh, East is East, and West is West,
and never the twain shall meet,
Till Earth and Sky stand presently
at God's great Judgment Seat."

2 See W. Alison Phillips, *The Confederation of Europe* (rev. ed., 1919), and Ramsay Muir, *Nationalism and Internationalism* (1917), pp. 155-169.

the League of Nations comes to mind as affording an analogy. Why, then, did this union for a common purpose fall apart? Why did this ingenious experiment in coöperation fail? It failed, as the League of Nations failed a hundred years later, because it attempted to do too much and because the interests of the Great Powers diverged when confronted with such a program. The autocratic Powers—Austria, Prussia, and Russia—were determined to support legitimate governments against revolution. When they did so, Great Britain drew away. She turned to a policy of intervening in behalf of revolution, and was soon joined by France. By 1830, when Belgium was allowed to separate herself from the Netherlands, in defiance of the territorial settlement at Vienna, the nineteenth-century league was dead.

The desire for peace, however, still found ardent expression. The peace societies, which had been formed at the close of the war in various countries, and especially in Great Britain and the United States, carried on a ceaseless propaganda. The language employed in articles and speeches strangely resembles what we hear to-day; at times the similarity suggests plagiarism. Tennyson's famous lines in "Locksley Hall" (1842) might have been written to-day, if any one now living possessed such magic:

> For I dipt into the future, far as human eye could see,
> Saw the Vision of the world, and all the wonder that would be;
> Saw the heavens fill with commerce, argosies of magic sails,
> Pilots of the purple twilight, dropping down with costly bales;
> Heard the heavens fill with shouting, and there rain'd a ghastly dew
> From the nations' airy navies grappling in the central blue;
> Far along the world-wide whisper of the south-wind rushing warm,
> With the standards of the peoples plunging thro' the thunder storm;
> Till the war-drum throbb'd no longer, and the battle-flags were furl'd
> In the Parliament of man, the Federation of the world.

Tennyson's superb lines were prophetic, but the "airy navies" have come nearer to realization than the "Federation of the world." Nine years later one of a series of peace congresses met in London. From a dozen countries delegates came, sixty of them from the United States.[1] It was natural that, since the Great Exhibition—the first world's fair—was then in progress, orators should stress the rôle of manufacture

[1] A. C. F. Beales, *The History of Peace* (1931), pp. 82-83. The extravagant language of some speakers invited criticism. One newspaper referred to the meeting-place, Exeter Hall, as Humbug Hall, denouncing the enormous self-sufficiency of the delegates and their "contemptible" assumption of moral superiority.

and commerce in breaking down artificial barriers and strengthening international ties.[1] Would not other commercial states follow Great Britain in establishing a policy of free trade? Would not economic interest bring victory to the idealism of the peace movement? An era of perpetual peace had dawned. War was a thing of the past. Many pacifists shared this delusion. Three years later came the Crimean War, and after it a series of wars that kept Europe in a mood of tension for twenty years.

The pacifists of 1851 were right in perceiving the connection between commerce and the peace movement, but wrong in thinking that commerce would obliterate the causes of war so quickly and that it would act solely in that direction. They underrated the persistence of long-established modes of behavior. For ages before the advent of the power-driven machine peoples had lived in comparative isolation one from another; and they had thus acquired a consciousness of group identity, a local culture, a local patriotism, a distrust of strangers, and a greed for group aggrandizement. Perhaps the homogeneous groups that we call nationalities or nations[2] came into being through prolonged isolation. Perhaps they are a survival of the old isolated environment as contrasted with the new environment that mechanical invention is creating. Certainly, they have offered stubborn resistance to cosmopolitan economic pressure. They could not entirely, but they did in part, make the machine serve the purposes of nationalism, using the protective tariff to shut out foreign products, subsidies to preserve their merchant marines against more efficient competitors, and colonies to furnish raw materials and consume manufactures. If commerce tended to create a new environment by breaking down international barriers, it was forced also to preserve the old environment by becoming the tool of nationalism. If it made for peace, it also made for war. These two incongruous rôles of the machine were not perceived clearly in the middle of the nineteenth century.

Nevertheless, the pacifists deserve credit for depending upon something more tangible than mere ideas. History does not show that ideas

[1] Let it also be held in mind that the peace movement drew its supporters from the middle class. Justin McCarthy (*A History of Our Own Times,* vol. I, chapter xxvi) says: "Mr. Kinglake is right when he says that the doctrines of the Peace Society had never taken any hold of the higher classes in this country at all. They had never, we may venture to add, taken any real hold of the humbler classes; of the workingman, for example. The well-educated, thoughtful middle-class, who knew how much of worldly happiness depends on a regular income, moderate taxation, and a comfortable home, supplied most of the advocates of 'peace,' as it was scornfully said, 'at any price.'"

[2] For a discussion of these terms see chapter xvi.

have had any considerable effect upon human conduct, apart from material considerations; until recently the gospel of peace and brotherhood won little more than lip-service in pagan and Christian times. In 1713, when a quarter-century of warfare was brought to a close by the Treaty of Utrecht, Abbé de Saint-Pierre wrote his *Project for Making Peace Perpetual in Europe*.[1] He proposed a permanent league of European States, with a mutual guarantee of territorial integrity and the observance of treaties; compulsory arbitration of all disputes, and the collective enforcement of awards. Yet no practical step of any kind was taken; we do not even hear of the formation of peace societies. Why is it that the peace movement, after languishing in the eighteenth century, assumed such notable proportions in the first half of the nineteenth and became still more impressive in the first half of the twentieth? Why did the attempt to propagate the idea fail dismally at one period and meet with a favorable response at another? One must find some reason for the abrupt expansion of an idea that had lain dormant for centuries. One must do better than assume that the ideologists—their hidden genius suddenly emerging—composed the new international harmonies. They did not compose a single bar. Somebody else wrote the score. They played it.

DYNAMIC RÔLE OF THE MACHINE

The significance of the organized peace movement will be quite lost, unless we relate it, at every stage, to its social environment and unless we interpret its recent progress in terms, not of a dynamic idea, but of a momentous economic transformation.[2] The extent of that transformation is reflected in the thought of the twentieth century; in the concrete argument of J. A. Hobson, that imperialism does not pay, and of Sir Norman Angell, that war, even victorious war, does not pay. The transforming element has been the Industrial Revolution. The age of mechanical power and swift communication came in the train of marvelous inventions, one invention leading to another or even requiring it. The peace movement has, to some extent, kept pace with the Industrial Revolution, growing with its growth and strengthening with

[1] Beales, *op. cit.*, pp. 34-35; F. M. Russell, *Theories of International Relations* (1936), pp. 188 *et seq.*; Ramsay Muir, *op. cit.*, pp. 139-143.

[2] On the economic aspects of internationalism many books have been written. For brief surveys see Francis Delaisi, *Political Myths and Economic Realities* (1927); J. H. Randall, *A World Community* (1931); Raymond B. Fosdick, *The Old Savage in the New Civilization* (1929); and W. C. Redfield, *Dependent America* (1926), with which may be contrasted S. Crowther, *America Self-contained* (1933).

its strength. In the nineteenth and twentieth centuries, despite the contrary influence exerted by nationalism, the machine has been binding isolated States together and breaking down barriers of ignorance and prejudice. First came the factories, the English factories; and it is well worth notice that, when Napoleon tried to exclude English manufactures from the Continent, when he marched against Russia for that very purpose and fought the battles of Eylau and Friedland, his soldiers wore great-coats from the factories of Leeds and shoes from the factories of Northampton.

Now the growth of the factory system gave a vital impulse to commerce: when goods had been produced, they had to be taken to market. On the other hand, the factory system could not expand without improvement in the means of transportation. In those means miraculous advances have been made. In 1815 the horse afforded the fastest means of travel on land. A letter dispatched from Rome took as long to reach Paris in the days of Napoleon as in the days of Hadrian. While Geneva is now within six hours of London by airplane, it took William Pitt two weeks to communicate with Wickham, his agent at Geneva, and another two weeks to get a reply. The sailing ship afforded the fastest means of travel at sea. This explains why the battle of New Orleans was fought two weeks after peace had been arranged at Ghent. The treaty was signed on December 24; forty-nine days later a copy reached New York. If communications had not been improved, the factory system must have stopped growing for lack of markets. As long as peoples were separated by time and cargo-space, the world community remained a figment of the imagination. Change thought, and you change the world! How could thought prevail against facts such as these? Indeed, how could the mere idea of world unity become current?

Observe the transformation occurring in the nineteenth and twentieth centuries. On her maiden voyage in 1838 the *Great Western,* a steamship of 1100 tons, crossed the Atlantic from Bristol to New York in fifteen days.[1] To-day the *Queen Mary* and *Normandie,* both of which exceed 80,000 tons, make the crossing in a little more than four days. The gross tonnage of the world's merchant marine has increased, during the past century, from six to sixty-six million. Steam has enormous advantages over sail; in particular, speed, cargo-space, and regularity

[1] Her best subsequent record was under ten days and a half. A sailing ship, the *John Bain,* made the voyage from Boston to Liverpool in twelve days, six hours. When threatened by the competition of steam, sailing ships were designed to develop great speed.

of service. Before the building of railroads commerce was impeded by the fact that perishable goods, like meat or fruit, could not be carried far on land without spoiling, and that goods whose value was small in relation to bulk or weight—wheat, ore, machinery, for example—could not be transported profitably at all. Into the picture of modern means of communication, alongside of steamboat and railway train, have come the automobile, the airplane, the airship, the telegraph,[1] the telephone,[2] the wireless and radio, and other instrumentalities.

As we look back to conditions within living memory, the effect of modern inventions seems incredible. The contrast between our own newspapers and those of a hundred years ago is astonishing. Nowadays metropolitan newspapers print despatches from all parts of the world. They furnish us with the story of events that take place in remote foreign lands almost as soon as they have occurred; and it is now the practice to have a description of an earthquake in the Dominican Republic or a tidal wave at Belize accompanied by photographs. When the intrepid André's balloon disappeared over the Arctic Ocean in 1897, his fate was enveloped in a mystery that was solved only with the recovery of his frozen body thirty-three years later; but Rear Admiral Byrd kept the whole world informed of his daily activities by wirelessing long despatches from his secluded quarters in the Antarctic. How small the world has grown! Four centuries ago one of Magellan's ships circled the globe in three years. Nellie Bly, representing the New York *World,* created a sensation in 1890 by beating the fictitious record of Phileas Fogg, hero of Jules Verne's *Around the World in Eighty Days;* but in 1936 Leo Kieran, representing the New York *Times,* and using only the conveyances ordinarily available, took only 24 days, 14 hours and 20 minutes.[3] The potentialities of the airplane were demonstrated in 1933 when Wiley Post made the journey alone in the *Winnie Mae* within seven days

[1] Morse devised his code in 1832 and applied for a patent in 1838. The first telegraph line dates from 1844; the first successful Atlantic cable, from 1866.

[2] Alexander Graham Bell invented the telephone in 1876, the first telephone system being established at New Haven two years later with 21 subscribers. In the United States alone telephone companies now have more than 15,000,000 subscribers; they operate over 83,000,000 miles of wire; they employ more than 250,000 persons. The investment in plant alone exceeds $4,500,000,000.

[3] He confined himself to scheduled services available to any voyager. By chartering special planes, a representative of the *World-Telegram* did better than Kieran, his time being 18 days, 14 hours, and 21 minutes. Kieran's trip cost $2,368. See the *Times,* October 26, 1936. Seven years earlier the *Graf Zeppelin,* a dirigible, went around the world from Lakehurst, N. J., in 21 days, 7 hours, and 34 minutes.

and nineteen hours. American airlines carry more than 750,000 passengers—not to speak of letters and packages—and fly more than 55,000,000 miles in a single year. Railroad and steamboat, airplane and radio, have accomplished miracles in annihilating space and abolishing isolation. Like the roads of the Roman engineers, they have been the apostles of cosmopolitanism, the apostles of peace.

The commercial interdependence of widely-separated parts of the world is imposed by the modern industrial system. Factories must not only find markets for their finished products; they also must satisfy an almost insatiable appetite for raw materials.[1] In the Malay Peninsula, the Dutch East Indies, and other places vast amounts of rubber are produced to meet the needs of industrial States. Where does England get her raw wool? When English spinning mills were first established, no one gave any thought to a possible shortage in the domestic supply; sheep-rearing had been for centuries a chief source of English wealth. In fact, however, the machines soon began clamoring for more wool; and the demand created the supply. In Argentina, in Australia and New Zealand, and in South Africa prairies that had hitherto served no economic purpose were made to support immense flocks of sheep. Who could have foreseen such a development? What brain-trust could have planned it? Yet peace-lovers could not have devised a better way to bridge distance by a community of interest.

Commerce exists because of the desire to exchange one kind of goods for another. It grows with specialization of function. It assumes particular importance, therefore, between agricultural and industrial States, since they supplement each other in the staples that they produce. The industrial State needs markets for its manufactures; and it must receive in exchange raw materials for its machines and food for its workers. The agricultural State can furnish what the other wants, and it wants

[1] Fuel plays a prominent part in the industrial process. Great Britain established, and long maintained, industrial supremacy because of her natural wealth in coal, as well as iron ore. Coal ran her machines; it furnished cargoes for outgoing tramp steamers; it facilitated the establishment of coaling-stations all over the world; and it made other nations pay tribute. On the other hand, Great Britain has no domestic supply of oil and has found little within the Empire; yet oil has become indispensable as a fuel, especially for means of transportation. Hence her rivalry with other nations in getting possession of oil fields in backward countries, such as Persia (Iran), Iraq, Mexico. Oil lies behind many diplomatic complications. Among the numerous books that deal with this subject may be noted: E. H. Davenport and S. R. Cooke, *The Oil Trusts and Anglo-American Relations* (1920); L. Denny, *We Fight for Oil* (1928); L. Fischer, *Oil Imperialism* (1926); F. C. Haughen, *The Secret War* (1934); J. Ise, *The United States Oil Policy* (1926); A. Mohr, *The Oil War* (1926); P. de la Tramerye, *The World Struggle for Oil* (1924).

what the other can furnish. Exchange leads to mutual dependence, closer association, better understanding. It may also lead to friction. Take the investment of surplus capital—stored-up profits—as an illustration. Surplus capital accumulates in mature industrial States because the machine tends to produce more goods than consumers can pay for. Over-production makes it necessary to abandon the practice of reinvesting profits and expanding plant. The money is sent abroad. Whatever may be the immediate purpose of lender or borrower, the transaction gives the latter the means of buying more manufactured goods. Sometimes, having borrowed too extensively, he defaults in the payment of interest or principal. The creditor may then insist upon satisfaction and exact it by force; or he may demand local concessions for the building of a railroad or the exploitation of mineral resources. International antagonism results.

One might think that industrial countries would be rivals rather than mutual customers. If commerce flourishes between the producers of raw materials and the producers of manufactures, each supplementing the other, will it not languish between industrial States? In fact, the latter have developed, within the range of the factory system, a considerable specialization. France excels in turning out fine fabrics and luxury goods; the United States, in the mass-production of automobiles, agricultural implements, watches, etc. Each country can claim superiority in certain directions. This helps to explain why Great Britain is the best customer of the United States and why the United States is the third-best customer of Great Britain. British trade with Germany is so vital that, after the late war, the restoration of German prosperity and buying-power was a matter of deep concern to the statesmen of Great Britain.

International good-will tends to come with the recognition of mutual dependence, and such dependence is an inevitable result of the Industrial Revolution. Consider the position of Great Britain, the original home of the machine and the most highly industrialized of all countries. The world holds her captive. Her very life depends upon the continuous importation of food for her hungry workers and raw materials for her rapacious machines; and she cannot obtain the necessary supplies without finding foreign markets for her manufactures and for her surplus capital. If China or India boycotts her cotton goods, there is unemployment and privation in Manchester. Unseasonable frost in Mississippi or rain in Texas affects the cotton mills of Manchester, as distemper among sheep on the Argentine pampas affects the woolen

mills of Bradford. Great Britain lives through foreign commerce. She must be stronger at sea than any possible combination of enemies or else pursue a policy of peace. She can be conquered without the landing of a single soldier; for, once having lost command of the sea, she can be starved into submission within five or six weeks.

The position of the United States, most self-sufficient of all countries, differs from that of Great Britain in degree, but not essentially. Americans consume much more than half the rubber produced in the world, yet import every pound of it. They produce half the world's steel, yet must import for that purpose nickel, manganese, vanadium, and many other minerals. Since the domestic supply of hides satisfies little more than a third of the demand, it is necessary to import every year some 60,000,000 hides, as well as half the materials for tanning. On the other hand, the United States requires foreign markets for the absorption of surplus products of farm and factory. How necessary are the commercial ties with foreign countries William C. Redfield made plain in his *Dependent America* (1926). Was not the Hoover moratorium of 1931 dictated by the necessity of protecting American financial interests in Germany? Are not those manufacturers whose prosperity depends upon foreign sales, as the domestic market becomes saturated, beginning to denounce the very high rates of the protective tariff as an anachronism? The business depression that began at the end of 1929 gave momentary vogue to the doctrine of isolation. Much was said about autarky, self-sufficiency. With the return of prosperity, however, the volume of foreign commerce will steadily increase and draw the United States into closer and closer contact with fellow-members of the community of nations.

Francis Delaisi, in his *Political Myths and Economic Realities,* tries to show how large the influence of commerce has been in destroying self-sufficiency and how little the ordinary man realizes it. He tells how a Parisian spends his day.[1] "On awakening he washes himself with soap manufactured out of the Congo peanut and dries himself with a cotton towel of Louisiana. He then proceeds to dress himself. His shirt and collar are made of Russian linen, his coat and trousers of wool from the Cape or Australia. He puts on a silk tie made of Japanese cocoons, and shoes whose leather is derived from the hide of an Argentine ox and tanned with a chemical product from Germany. In his dining room, adorned with a Dutch sideboard made of wood from Hungarian forests, he will find the table laid with plated metal made of

[1] Pp. 139-140.

Rio-Tinto copper, tin from the Malay straits, and silver from Australia. He will find a fresh loaf of wheat which, according to the season of the year, may come from Beauce, from Rumania, or from Canada. He may eat eggs newly arrived from Morocco, a slice of frozen 'pré-salé' from the Argentine, and preserved small peas which have seen the California sun; his sweet will be English jam made of French fruit and Cuban sugar, and his excellent coffee will come from Brazil. Restored to vigor, he now goes to work. An electric tram, run on the Thomson-Houston system, takes him to his office. After making a note of the Liverpool, London, Amsterdam and Yokohama exchanges, he dictates correspondence, which is taken down on an English typewriter, and he signs it with an American fountain pen. In his workshop 'Paris articles' for a Brazilian clientele are being manufactured out of materials of many origins, by machinery built in Lorraine according to German patents, and fed with English coal. His instructions are to send them to Rio by the first German steamer that puts in at Cherbourg." In this vein the narrative continues. At last "our Parisian falls asleep under his great quilt made of feathers of Norwegian ducks, and dreams that France is decidedly a great country, entirely self-supporting and able to snap her fingers at the rest of the world."

While the modern man has become a citizen of the world, Delaisi comments, he is completely unaware of the fact. He is also unaware of the reason. He does not perceive the significance of the economic forces that are at work, compelling intercourse, encouraging friendly coöperation, and by degrees substituting for the old localism larger interests and a wider horizon. He fails to appreciate their connection with the growing sense of international solidarity. Without them a "community" of nations could not exist. It is the play of these economic forces, not the play of excogitated ideas, that is binding nations together in a web of common interests.

We are all entangled in that web, inextricably caught in its meshes, so tamed by captivity that, if it were possible to break the filaments and spread our wings in flight, we could hardly survive in a wild state, isolated from our kind. Yet the past still casts a spell over us. Ages of isolation bred in us certain modes of behavior, so habitual as to be almost instinctive; modes of behavior that appear, in our present environment, almost anti-social. It will take a long, long time to eradicate them; and our period of captivity in the web of common interests has been relatively brief. Perhaps they never will be eradicated. Nationalism seems to possess a wonderful recuperative power. Sir Arthur Keith

believes that nationalism, instead of being an evanescent survival of the past, is the instrument used by nature in the creation of new races. At any rate, world-unity and the reign of peace cannot be discerned already approaching. Therefore, if some Cassius comes around, with his lean and hungry look and his inclination to think too much, we must not welcome him too warmly or swallow his ideological nostrums too readily. We must wave aside his pharmacopoeia of excogitated ideas. There are times when it is better to let nature take her course.

THE PROBLEM OF WAR

Economic forces, and particularly commerce, are forging bonds of amity between the nations of the world. Their action is so gradual, however, that it can hardly be detected within the space of a few decades. Indeed, when observed over a short period, it seems to follow an irregular course of alternating advance and retreat. At one moment socialists announce that there can be no war between France and Germany: proletarian conscripts will refuse to march; a general strike will convulse both countries. At the next moment, a surge of national patriotism overrides every argument of economic solidarity and sustains Frenchmen and Germans in the face of incredible suffering and sacrifice. The baffled pacifist finds himself transported from a mood of elation to one of dark pessimism. Then, with the return of peace, his hopes revive and, drawing vigor from the universal post-war desire for repose, make him believe that he can now banish war forever. History, as he reads it, suggests that through the ages mankind has been pursuing a pathway towards peace, that world-wide peace is the inevitable outcome of social evolution, and that it can be secured now by drawing up a plan and resorting to propaganda. He has a strange faith in propaganda, which he prefers to call, more politely, education. He ought to know from experience that propaganda has only a short-time value, that it succeeds only by way of intensifying sympathetic social tendencies already in existence, and that the more energetically it is applied, the greater will be the ultimate reaction against it.

But does the past reveal an evolutionary inclination towards permanent peace? A very different view is widely entertained. Some years ago, in a rectorial address at Aberdeen University, Sir Arthur Keith expounded it.[1] In substance, he said that man has always fought man, that war is recurrent, and that it is part of the ceaseless life-struggle,

[1] The N. Y. *Times*, June 7, 1931.

an instrument in the obscure processes of nature, perhaps a biological necessity. He gave little comfort to those who now, in the spirit of 1851, believe or affect to believe that future war can be prevented; who are busily engaged in erecting paper barricades against its recurrence; and who, by their very reliance on mere promises of good behavior, show how fragile their hopes really are. From the standpoint of international law their attitude has been disastrous. The interval of peace should have been occupied, not by futile efforts to stop future wars, but by practical efforts to improve the law regulating their conduct.

Progress in improving the laws of war had been made at the Hague Conferences of 1899 and 1907. If war had not intervened, a third conference would have met. But the Hague conventions, so far as they went beyond customary rules, did not bind any of the parties to the World War, since some of the belligerents had not ratified them. None had ratified the Declaration of London (1909), a code of naval warfare. Moreover, the World War revealed the inadequacy of existing law to deal with new instrumentalities of war like the submarine, the airplane, the long-range cannon, and poison gas. Customary rules, which take shape slowly, could not keep pace with the innovations of a mechanical age. Interstices in the law must be filled by treaty. Yet the one pressing need, the need of humanizing methods of warfare and of regulating the use of new devices, has been neglected. Instead, the Pact of Paris has been given to the world! War has been outlawed—on paper. For the men concerned in this maneuver it would have been more than incongruous to set about perfecting the laws of war while abolishing it; they would thereby have confessed insincerity in their professed belief in emotional ideas and paper schemes. But does any one of those men doubt to-day that nations will be fighting again within the next twenty years? [1] Nothing is more certain than the recurrence of war. Nothing is more tragic than the failure to mitigate its horrors.

Of course, pacifists often maintain that it is idle to make rules for the conduct of war, since belligerents will not obey them; and even paradoxical, since war is beyond the law and not susceptible of being limited by it. Professor MacIver observes: [2] "The idea that war, the sheer supersession of law by force, should have a law of its own is absurd in principle and disproved in practice. Mere force creates no

[1] They have been fighting in a small way; but to save face neither the Japanese conflicts with China in 1932 and 1937 nor the Italian adventure in Ethiopia was officially classified as war. The failure to recognize the belligerency of the parties to the Spanish civil war is a clear breach of customary practice.

[2] *The Modern State* (1926), p. 283.

rights and acknowledges none. War is not a game of chess between belligerents. It is a struggle of life and death, and its means are the agencies of destruction. Considerations of humanity forbid useless destruction, destruction which does not serve the ends of victory. But who can frame rules to determine the limits beyond which, in time of war, destruction ceases to be effective?" [1] Now, it is true that international law in general, being somewhat vague and lacking machinery of enforcement, is frequently violated. Violations are by no means peculiar to war-time. The fact that they so frequently occur in time of peace is one of the causes of war; the aggrieved State may have no other adequate remedy. Consistency would seem to require Professor MacIver to advocate the scrapping of the law of peace.

Moreover, the impression that belligerents flout most of the rules is derived mainly from their behavior in the late World War. That war was very different from the eight wars that preceded it between 1894 and 1913 and from the wars fought between 1854 and 1871. All the Great Powers, as well as many smaller States, were engaged in it; and for that reason neutral opinion carried little weight. But there is no justification, in the light of history and of existing attitudes, for assuming that most of the future wars will be of the same world-wide type. If they follow what may be called the normal pattern, the neutrals will be very much stronger than the belligerents. Now, the efficacy of the laws of war—and they have been effective in imposing restraint —depends upon respect for neutral opinion. In the case of a war involving only two or three of the seven Great Powers, the utmost care would be taken by the belligerents to do nothing likely to bring about active intervention on the side of the enemy. It has already been pointed out that in the Crimean War Great Britain and France abandoned their traditional practices as to the capture of private property at sea and that they did so in order to placate certain countries bordering on the Baltic. The pressure that neutrals can apply varies with their individual and collective strength. That pressure has been the chief means of securing obedience to the laws of war. It is unfortunate, therefore, that, under the neutrality act of 1937, the United States has receded so far from its traditional position.

[1] According to Clyde Eagleton (*International Government*, 1932, p. 61), "The hopeless effort to make war more polite has been abandoned, and efforts are now directed toward the control of war itself. It is significant to observe that recent texts of international law practically omit what previously occupied over half of their space, the law of war." Thus, Elizabeth H. Read's handbook on international law, published by the American Foundation in 1925, allotted nine pages to the discussion of war!

It may be that disarmament would reduce the frequency of wars. In *The Napoleon of Notting Hill,* however, Chesterton shows that the total disappearance of modern warlike equipment would not put an end to military ambition or conquest. The Roman legions had no machine guns or tanks; discipline and courage enabled them to conquer the world. War will never end until there has come into being a center of force capable of keeping the peace between nations, as the kings of France kept the peace between unruly vassals and outlawed their private wars. Universal disarmament or a universal abjuration of military service lies outside the domain of possibilities. It would not further the cause of peace, if in some countries, but not in all, swords were beaten into plowshares and all men sworn to obey the Christian injunction and to turn the other cheek.[1] The disarmed converts to non-resistance would fall an easy prey to some more robust nation that scorned such a servile oath. By their demonstration of moral superiority they would sacrifice self-respect and the pride of free men. It may be better to die fighting than to live as a helot.

PRACTICAL ARGUMENTS AGAINST WAR

If the pacifist encounters difficulty in his effort to disarm all nations or to convert all men to the gospel of non-resistance, he may, nevertheless, move forward towards his goal. If he fails in the grandiose plan of ending all war by mere persuasion, he may be able to discourage bellicose inclinations. Practical arguments, addressed to self-interest, may succeed better than emotional appeals. Just as the conditions of a mechanized society suggest temperance in the use of alcohol (which idealists try in vain to outlaw), so nations will be less disposed to wage war, if they believe that war is both futile and dysgenic. It was in *The Great Illusion* that Sir Norman Angell sought to demonstrate the futility of war.[2] He argues "that the commerce and industry of a people no longer depend upon the expansion of its political frontiers; that a nation's political and economic frontiers do not necessarily coincide; that military power is socially and economically futile, and can have

[1] "The man who refuses to fight for his country while other peoples remain bellicose is not preventing war at all; he is even helping to kindle war, by letting his weakness encourage violence." André Maurois, N. Y. *Times Magazine,* October 7, 1934.

[2] This famous book, published at the expense of the author, attracted little attention until Lord Esher, struck by the cogency of its thesis, distributed several hundred copies among men of high station. Then came astounding success. Within a few years a million copies had been sold. See also *The Fruits of Victory* (1921), a sequel to *The Great Illusion* (1909).

no relation to the prosperity of the people exercising it; that it is impossible for one nation to seize by force the wealth of another—to enrich itself by subjugating, or imposing its will by force on another; that, in short, war, even when victorious, can no longer achieve the aims for which peoples strive."[1] This summary, of course, cannot do justice to a thesis that is developed with great dialectical skill and supported by an abundance of concrete data.

Sir Norman's arguments are persuasive, but not unanswerable. For example, he assumes that the prosperity of small European States condemns the militarism of the Great Powers and shows that military strength "can do nothing for trade." Dutch bonds, he points out, stand higher than German; and public credit is a rough indication of security and wealth. But we must ask why the Netherlands, incapable of defending herself against Germany, remains independent and why she continues to enjoy the possession of the highly lucrative East Indies. We must ask why Germany does not conquer Belgium and take over the Belgian empire in Africa. If Germany alone were armed, she would do it. What saves the little countries is the mutual jealousy of the big ones. Without any expense to herself the Netherlands can command the services of the French and British armies in case of German aggression. Again, Sir Norman insists that "the wealth of a conquered territory remains in the hands of the population of such territory" and, therefore, does not add to the wealth of the conqueror. This contention is equally erroneous. When one State, forcibly annexing a neighbor, increases its territory and population by fifty per cent, it is—if the conquered people stand at the same level of prosperity—enabled thereby to increase its revenue by the same proportion or to reduce the burden of taxation, the cost of the military establishment, say, or of the diplomatic and consular services remaining what it was before. Likewise the expansion of the area of free trade brings advantages to all inhabitants, the domestic market being more profitable than any other, and opens the way to the economies of mass-production as a means of reducing prices and penetrating foreign markets. Then, from the economic standpoint, war has been profitable both to victor and vanquished.

Even if it were true, and generally understood, that war does not pay in a material sense, aggression would not cease. Financial profit is by no means the only incentive to war. The desire for power and prestige, or insistence upon a false code of honor that requires the

[1] *The Great Illusion* (ed. of 1914), p. viii.

avenging of any real or imagined affront, actuates nations as well as individuals. Should the victim of aggression meekly submit? Should he reconcile himself to foreign domination simply because the conqueror's books show an entry in red? Somehow, neither party thinks in terms of a balanced budget. Let it be said, however, that *The Great Illusion* exposed some widely-entertained fallacies. One illustration must suffice. When France paid a huge indemnity after the Treaty of Frankfort, the receipt of so large a sum caused prices to rise in Germany and thereby handicapped her foreign trade in competition with France.[1] It had the effect of raising the bank-rate higher in Berlin than it was in Paris. France met the financial crisis of 1878-79 more successfully than did Germany. "All the evidence plainly and conclusively shows that [the receipt of the indemnity] was of no advantage; that the conqueror would probably have been better without it." [2]

The thesis that war is always futile has not been backed by adequate proof or generally accepted. The spoils of victory still look real; and the combative instincts of men still respond to the hope of economic gain, of the accumulation of wealth at the expense of others. It may be true that nations grow soft, civilizing themselves into decay, and that they become over-responsive to the still small voice of conscience that makes cowards of us all. The peoples of the West, it is often said, are growing soft. They are getting to the point where they will not be able to bear pain or inflict it on others without shuddering. Already they recoil from using the force that is necessary to the control of subject races. They no longer embark spontaneously upon such desperate adventures as fired the enthusiasm of Cortez or Magellan; instead, they look carefully into account-books and calculate every hazard before making up their minds to act. And yet, if the West disarmed and actually outlawed war, the East, instead of following suit, might give in to a great temptation. Here lies the chief obstacle to pacificism: Goths and Vandals look covetously across the Rhine-Danube frontier.

BIOLOGICAL EFFECTS OF WAR

Latterly war has been subjected to a vigorous assault on the ground of its biological effects. As a selective agency, we are told, war is dysgenic; it leads, not to the improvement, but to the deterioration of national stock. The doctrine of Nietzsche or Bernhardi—that war is biologically advantageous, entailing the survival of the fittest—has ap-

[1] *Ibid.*, pp. 84-86.
[2] *Ibid.*, p. 93.

parently been unable to stand critical scrutiny. Nicolai maintains that, while the struggle against nature preserves the fit and improves the breed, the struggle against kind destroys fit and unfit alike and that modern conscription, while it preserves the physical weaklings, exposes the very fittest to destruction.[1] A distinction must be made, however, between primitive and modern conditions. When all the men of the tribe took to the war-path, the more capable and vigorous were likely to survive; fighting tended to eliminate the weaker societies and the weaker members of strong societies. "Human nature," says Professor S. J. Holmes,[2] "with its pugnacity, its combination of self-assertion and subordination, and the various herd instincts by which at times it is powerfully moved has been fashioned in the stern school of conflict.... If warfare had been dysgenic during the earlier periods of human development, we may well wonder how the race should ever have arrived at its present high state. But as civilization advances and as human beings become organized into larger social groups the character of warfare gradually changes. With the development of armies which carry on their operations at a distance from the civilian population, and especially since the perfection of fire arms, the advantages in favor of the strongest and most skilful warriors were decreased."

Even under modern conditions the best stock is likely to win, or at least the most efficient, the one possessed of superior technical equipment.[3] "I do not wish to minimize the effects of group selection," says Professor East.[4] "Generally speaking, the nation showing the greatest general efficiency will be victorious in battle, provided its fighting strength is adequate. The many desirable virtues which are not alto-

[1] G. F. Nicolai, *The Biology of War* (1918), pp. 52-82.

[2] *The Trend of the Race* (1921), pp. 213 and 215. "When human beings possessed only a very small amount of culture," says Professor Holmes (p. 214), "differences in innate endowments of rival groups must have frequently, if not usually, played a decisive rôle in the determination of supremacy."

[3] "It may be argued," says Professor Holmes (*op. cit.*, pp. 217-218), "that conflicts will still be more apt to be won by nations of the highest endowment of intellect, and which by nature are best endowed with the instincts which make for loyalty and co-operation. But granting that this tendency exists, there are so many factors that modify its influence that its actual biological effect is much in doubt." Mere numbers may determine victory, or fortunate alliances, or geography. "While we may admit that on the average and in the long run the success of a nation may be the result of superior hereditary endowments, it is possible that... the rôle of hereditary differences becomes less as civilization advances. Granting that war is most apt to be won by the best stocks, its biological value depends upon the advantage that is taken of victory." Do the victorious people expand into the conquered territory, or do the conquered people remain there and multiply more rapidly, perhaps, than their victors? "The biologically defensible wars are wars of extermination.... The biological victory, such as it is, may belong to the side which loses the battle."

[4] E. M. East, *Heredity and Human Affairs* (1927), p. 249.

gether the product of a social heritage will be preserved. But there can hardly be a doubt that within the victorious nation the net effects of war are bad. Every battle leaves a nation less good germ-plasm than it had before." An advanced nation, according to East, will lose its position if it fails to conserve its best men; and modern war is a chief means of dissipating human resources. His conclusions, like those of Professor Holmes, are based, not upon general biological deductions, but upon a number of investigations relating, in the main, to French military statistics.

During a period of three hundred years, ending in 1913, France was at war half the time. She incurred heavy losses of life from enemy weapons, disease, and privation; and the civilian population suffered almost as much as the armies. Wars between 1792 and 1913 cost France three million lives, not to speak of the debility and enfeebled health of many survivors. After noting these facts, Gaston Bodart concludes: [1] "As France, of all nations of the world, has made the largest sacrifice of human life in prosecuting the longest and bloodiest wars of modern times, we range ourselves on the side of those who affirm that war has had its large share in producing the present stagnation or even decrease in the French population." Examining French statistics, Professor Kellogg shows that the minimum height for army recruits sank from 1624 mm. in 1701 to 1598 mm. in 1799 and to 1544 in 1804.[2] Half the recruits were rejected for lack of stature or for infirmities of various kinds.[3] The picked men, the men having the greatest life-expectancy and the greatest sexual vigor, were exposed to death and disease at the front, this resulting in a disturbance of sexual equilibrium and the prevention of advantageous sexual selection. War restrained the most desirable element from contributing its full and highly important hereditary influence, while it gave a weaker element the chance to reproduce itself and increase its proportion within the race.[4] War is dysgenic.[5]

[1] *Losses of Life in Modern Wars* (1918), p. 156. To this book Vernon L. Kellogg contributes a section on "Military Selection and Race Deterioration."

[2] *Ibid.*, p. 171.

[3] *Ibid.*, p. 178.

[4] *Ibid.*, p. 186. Darwin said: "In every country in which a large standing army is kept up, the finest young men are taken by conscription or enlisted. They are thus exposed to early death during war, are often tempted into vice, and are prevented from marrying during the prime of life. On the other hand, the shorter and feebler men, with poor constitutions, are left at home, and consequently have a much better chance of marrying and propagating their kind." Quoted by Holmes, *op. cit.*, p. 207.

[5] *Ibid.*, p. 137. It must be said of Professor Kellogg here and of others engaged in the same enterprise that they seem bent on proving that war is dysgenic

Professor Kellogg also considers the ravages of disease.[1] Even in time of peace the army death-rate equals or exceeds the civilian,[2] disease striking with unusual power at a selected group. Military life fosters venereal diseases, which may be communicated by husband to wife and by mother to children and which may pass from generation to generation in the form of blindness, insanity, idiocy, or paralysis. In 1910 only 15 per 10,000 were rejected for enlistment in the British army because of syphilis, yet in the army 230 per 10,000 were admitted to hospital on account of it.

President David Starr Jordan wrote a number of brochures to prove that war is the most potent of all forces making for national deterioration.[3] From the standpoint of scientific method they are disappointing; there is too much emotion and too little evidence. His position may be illustrated by a passage from *The Human Harvest*. "Send us your best, your fittest, your most courageous, your youths of patriotism, and your men of loyal worth, send them all, and breed your next generation from war's unfit remainder.... Like seeds, like harvest. You cannot breed a Clydesdale from a cayuse, neither can the weakling remnant of a warlike nation breed a new generation of heroes for a new generation of wars." *War's Aftermath,* in which President Jordan collaborated with his son, shows the effect of the Civil War on the people of two counties of Virginia. The tentative conclusions are based on answers to a questionnaire addressed to certain veteran officers and certain other survivors of the war. It appears that men of the highest character and finest physique enlisted first, fought longest, and had the highest death-rate—at least 40 per cent dying without issue; that the later and inferior conscripts suffered less; that deserters and draft-dodgers, the least desirable class, had the highest survival-rate; that the widows of soldiers met with great hardship, most of them never remarrying and their death-rate being unusually high; and that girls of the aristocracy, through lack of suitable mates, married beneath

rather than on discovering the truth. In some cases the data given might be very differently interpreted. Thus Kellogg shows above that in five years the height requirement declined twice more than in the previous century. He attributes this apparently to war losses. He should attribute it to the vast increase in the military establishment by Napoleon.

[1] Holmes points out (p. 209) that sickness is more deadly than gun-fire. During the Napoleonic Wars the British lost 49.61 per 1,000 from disease, but only 7.6 from gun-fire. In the war with Spain the Americans lost ten times as many from disease as from gun-fire.

[2] Bodart, *op. cit.*, p. 181.

[3] *The human Harvest* (1907); *The Blood of the Nation* (1910); *War and the Breed* (1915); and, in collaboration with E. H. Jordan, *War's Aftermath* (1914).

them in station. The book ends with this verdict: "The theoretical argument for reversed selection seems beyond question."

MORAL EQUIVALENTS OF WAR

The contention that war is futile and dysgenic may appeal to thoughtful and cautious temperaments, but it will probably have little effect upon vigorous peoples as a deterrent. The military feelings, according to William James,[1] are too deeply grounded. "Showing war's irrationality and horrors is of no effect.... The horrors of war make the fascination. War is the *strong* life; it is life *in extremis;* war-taxes are the only ones men never hesitate to pay, as the budgets of all nations show us.... Such was the gory nurse that trained society to cohesiveness. We inherit the warlike type; and for most of the capacities of heroism that the human race is full of we have to thank this cruel history.... Our ancestors have bred pugnacity into our bone and marrow, and thousands of years of peace won't breed it out again. The popular imagination fairly fattens on the thought of wars." The combative instincts of mankind must be given a foremost place among the factors making for war. Yet it has been and still is characteristic of the pacifist to deny their very existence. War is evil, we are told, and the masses are virtuous; therefore, the masses hate war. Why, then, do they fight? They are manipulated by sinister interests, served up as cannon-fodder for some hidden anti-social purpose, moved about like "helpless pieces" for the satisfaction and enrichment of a privileged minority.[2]

This delusion, though a dangerous one, appeals to the self-righteous and to those who believe in the righteousness of the people. In searching for an explanation of war, it is unfashionable to expose popular propensities to evil or commend the reply that Frederick the Great made to Sulzer: "You don't know the damned race." Malign spirits of darkness are stalking about the land and leading virtue astray. Witch-hunting has become prevalent. "The problem before us," says Moon,[3] "is to discover the men, the active, interested minorities in each nation, who are directly interested in imperialism, and to analyze the reasons why the majorities pay the expenses and fight the wars necessitated by

[1] In his famous address on "The Moral Equivalent of War," *Memories and Studies* (1910), pp. 267, 269, and 272.

[2] "But helpless Pieces in the Game he plays
Upon his Chequer-board of Nights and Days.
Hither and thither moves, and checks, and slays,
And one by one back in the Closet lays."

[3] *Imperialism and World Politics* (1926), p. 58.

imperialist expansion." Moon lists certain business interests—exporters and importers, munition-makers and bankers—and groups of persons closely allied to them.[1] Capitalists generally and munition-makers in particular (the scapegoats of Senator Nye's investigating committee in 1936) are charged with the responsibility of fomenting war and dragging the masses into it.[2] Formerly, kings and princes were identified as the conspirators. War would cease when once they had been overthrown in favor of democracy. In reality, however, kings were held back by various considerations, especially by a sobering sense of responsibility, by prudence, and by fear of losing their thrones. Democracies, being anonymous, have shown less restraint. And yet, since the people are pure of heart, it follows that they are being misled and exploited. The devil that possesses them must be exorcised.

This is strange logic; and its conclusions are not borne out by the facts of experience. "Those who imagine that war can be abolished by blaming a few capitalists," says André Maurois,[3] "are just like those who thought that it would vanish with the overturning of thrones. Most of the recent great wars have not been economic wars, but attacks of collective frenzy.[4] The French philosopher, Alain, has remarked: 'Interests always compromise; passions never do.' The truth of the matter is that it is in ourselves—in each one of us and not in a few scapegoats—that the warlike passions must be subdued." The pacifists, Maurois continues, "have more good intentions than sound methods. Their ideas regarding mankind, and the means of pacifying mankind, are inaccurate and puerile.[5] They claim to show that wars are made by a few guilty individuals, and that if only men would get rid of them or refuse to follow them, our planet would be instantly

[1] *Ibid.*, pp. 58-74.

[2] C. H. Hayes, in his *Essays on Nationalism* (1926, p. 188), finds a place for munition-makers and their capitalistic interests, although he is quite alive to the warlike spirit of nationalism.

[3] "Taming Man's Instinct for War," N. Y. *Times Magazine*, October 4, 1934.

[4] The writer remembers vividly the wild excitement that greeted even the prospect of war with Spain in 1898; and, therefore, he cannot put much faith in the idea that William Randolph Hearst precipitated the war. Music-hall audiences rose to their feet and cheered when a man and a woman, waving the American flag and glorifying battle and the cannon's roar, ended with the chorus:

"Right face! Quick march! Don't you hear them shout?
Last night I dreamt I put a regiment to rout.
Oh, I'd give anything if the war'd break out,
For I want to be a soldier."

Toronto welcomed the Boer War with similar enthusiasm, which had nothing whatever to do with sinister capitalism. Mafeking night was a saturnalia.

[5] William James complains (*op. cit.*, p. 274) of "deficiencies in the program of pacificism which set the militarist imagination strongly, and to a certain extent justifiably, against it."

transformed into one vast contented sheepfold. They forget that the causes of war include age-old and powerful instincts common to all men." If it were not for the combative instinct, the war-propaganda of the munition-makers would fall on deaf ears. No amount of persuasive advertising would popularize the sale of canned human flesh: a powerful instinct stands in the way. On the other hand, no such obstacle confronts the vote-buyer or vote-seller among certain classes of the American population; and a Kansas farmer, when questioned about the political prospects, replied, "We'll win sure—if they don't buy us." Cupidity, too, is a powerful instinct. But, while the greed of a vote-seller can scarcely be be paraded as a virtue, pugnacity may very easily be exalted by clothing itself with the much-praised garments of patriotism.

Apparently men crave adventure; they like to fight. Can that craving be satisfied only by actual warfare? Can no adequate substitute be found? André Maurois has tried, not altogether successfully, to answer that question.[1] He thinks that the appetite for adventure might be satisfied by athletic and artistic activities, by hazardous occupations (such as mining) and airplane-flying, or, vicariously, by attending the movies and reading spirited novels. William James offers a solution in "The Moral Equivalent of War."[2] Permanent peace, he declares, is impossible and even undesirable unless some of the old elements of military discipline are preserved. "We must make new energies and hardihoods continue the manliness to which the military mind so faithfully clings. Martial virtues must be the enduring cement; intrepidity, contempt of softness, surrender of private interest, obedience to command, must still remain the rock upon which states are built." According to his plan, young men would be drafted for several years' service in a disciplined army and assigned to dangerous or disagreeable tasks. The childishness would get knocked out of them in coal mines, fishing fleets, foundries, stokeholes. They would return to society with healthier sympathies and soberer ideas. "Such a conception, with the state of public opinion that would have required it, and the many moral fruits that it would bear, would preserve in the midst of a pacific civilization the many virtues which the military party is so

[1] There will always be, Maurois admits, a certain proportion of violently adventurous men who cannot be satisfied with anything short of real danger. "So long as they are few, it is comparatively easy to keep them busy.... But as soon as economic confusion increases the total of those daredevils too far, only a war can give them all plenty to do."

[2] *Memories and Studies* (1910), pp. 267-296.

afraid of seeing disappear in peace.... Until an equivalent discipline is organized, I believe that war must have its way."

CYCLE OF PEACE AND WAR

One curious aspect of war is its periodicity. Any one who sets down on a time-chart the important wars occurring from 1689, say, to the present will make the discovery that peace and war alternate rhythmically, very much as do periods of economic prosperity and prostration. The superficial explanation has become familiar. War affords an escape from the wearisome restraints of civilization, an emotional relief to thwarted instincts. "One of the deepest causes of war," says André Maurois,[1] "is the repressive action of social existence upon the animal element surviving in each one of us. We accept constraint, but we suffer from it. The ancient civilizations accepted the need of the orgy, which, once or several times a year, liberated the instincts.... Modern civilizations are more exacting, and, especially in puritan societies, impose conventional morals upon mankind. Men conform to these rules, because they are constrained by the pressure of public opinion; but they become bored. The daily life of an office clerk in a large town is monotonous to a degree which his remote ancestors, warring against wild beasts or hewing down the forest, would have felt to be intolerable."

Quietism suits men for a time; then, under the spur of pent-up emotions, it induces rebellion. In a mood of exaltation and violence difficult tasks are accomplished and heroic deeds performed. But, says Aldous Huxley,[2] "periods of intense excitement never last very long." Abnormal agitation leads to fatigue—a longing for repose, a dread of responsibility—and cannot last more than about twenty years or so.[3] Fatigue, rendering the old stimuli ineffective, induces a return to routine. According to Huxley, the commonest rhythm of human life is "routine punctuated by orgy." Routine supports men's weakness, makes the effort of thought unnecessary, and relieves them of the dreaded burden of responsibility. Huxley maintains that orgies "provide that

[1] *Op. cit.*

[2] "Do We Require Orgies?" *The Yale Review,* vol. XXIII (1934), p. 480.

[3] Huxley says: "This fatigue, it should be noticed, need not be experienced by the same people as originally cultivated the fatiguing emotions. One generation lives an intense emotional life, and the next generation is tired. The community behaves as though it were a living organism, in which individuals play the part of cells. It is the organism as a whole that feels fatigue; and this fatigue communicates itself to the new cells which, in the natural course of growth, replace those originally stimulated." The children become tired "by psychological reaction to their parents' enthusiasm."

periodical excitement which all of us crave and which most of us are too insensitive to feel except when under the most crudely violent stimulation." Every one must have observed, dimly at least, an alternation in human affairs of activity and fatigue, stimulation and repose, orgy and routine, comparable to the ebb and flow of the tide or the succession of the seasons and of day and night.

Now, the apparent existence of a cycle of peace and war has attracted the attention of economists. They have at least correlated that cycle with their own trade cycle. Kondratieff and de Wolff agree that war always falls in the rising part of the long-wave of economic change, in the period of expansion that expresses itself in a rising price-level and higher commercial returns.[1] Since 1670, according to Wagemann,[2] there have been five long-wave periods of expansion, each followed by a period of stagnation. It seems to be definitely established that war is connected, almost invariably, with economic prosperity; peace, with depression. From that standpoint consider the following table:

1790-1815—Expansion
1815-1845—Stagnation
1845-1873—Expansion
1873-1895—Stagnation
1895-1920—Expansion
1920- Stagnation

The periods of expansion are filled with wars; the periods of stagnation, free from them. The economic upswing of the nineties, for instance, brought in its train a long series of wars: Sino-Japanese, Greco-Turkish, Spanish-American, Boer, Russo-Japanese, Italo-Turkish, first Balkan, second Balkan—these culminating in the colossal World War. Wagemann observes: [3] "The overflow of feeling, the mad exaltation of the European intellectual and political life of that time mounted to the acute mania of the World War, then collapsed in darkness. Every form of pessimism, of philosophical and political despondency, now had free rein. Social self-criticism and investigations of political and economic problems ruled public discussion. The time had come for thoughts of reform, of internal development. So it was after the Napoleonic Wars and again in the seventies and eighties."

[1] Ernst Wagemann, *Struktur und Rhythmus der Weltwirtschaft* (1931), p. 369.
[2] *Ibid.*, p. 368.
[3] *Ibid.*, p. 369.

Wagemann explains the peace-war cycle in terms of the long-wave business cycle. Howell explains both in terms of the production of the money-metals.[1] After establishing first of all the periodicity of war and peace, he insists that this cannot be the outcome of chance; it indicates a cause that itself works in cycles.[2] The cause must be world-wide. There are good reasons for rejecting human depravity, the ambition of rulers, and armaments. "It would be accurate to say that the periodicity of warfare is due to the periodicity of the war complex, meaning thereby the resultant of the psychological tendencies that are conducive to war." But the solution itself needs solving. "My hypothesis is based on what was to me a chance discovery made in the course of investigating another subject. The discovery was that for at least 200 years last past the war cycles have practically coincided with the eras of rising prices, and the eras of rising prices have in like manner coincided with the peaks in the production of the money metals—gold and silver during the days of bimetallism, and gold alone since then." By means of a diagram that represents the production of gold and silver since 1492 and by explanatory comment, Howell seeks to show the correspondence of rising prices with the peaks of money-metal production and the correspondence of war cycles with those peaks. "We have found," he concludes, "the cause of the recurring war-cycles and hence the economic cause of war itself. . . . Let a

[1] Edward Beach Howell, "The Economic Cause of War: An Hypothesis," *The Atlantic Monthly*, vol. CXXXVI (1925), pp. 128-133.

It scarcely needs to be noted here that economists, disagreeing among themselves, attribute the business cycle to various causes: human psychology, monetary policy, the instabilities inherent in the economic process, and those proceeding from the capitalistic organization of industry. The celebrated economist W. Stanley Jevons suggested that sun-spots affect climate, agricultural production, trade, and human psychology. His position has gained support from the Harvard astronomer, Dr. Loring B. Andrews, who says: "As the number of sun-spots mounts, prosperity turns the corner; as the number of sun-spots diminishes, prosperity hides itself in a depression. It may be pointed out that the last sun-spot maximum was in 1928, an epoch in the economic history of the United States to which one commonly refers as 'the good old days.' The last sun-spot minimum occurred in 1933. Someone has mentioned an economic depression similarly dated." N. Y. *Times*, July 12, 1936. (To avoid possible confusion I should point out that the peace-war cycle is correlated to the long-wave, not the short-wave, economic cycle.) Professor H. L. Moore of Columbia sought to correlate the economic cycle with the behavior of the planet Venus. See *Economic Cycles: Their Law and Cause* (1914).

[2] "In the physical sciences the periodicity of phenomena is regarded as a fact of great significance. When yellow fever was the great scourge of tropical countries, it was known to be a seasonal disease. . . . It was this periodicity, perhaps more than any other clue, that led to the discovery of the Stegomyia mosquito as the disease carrier. In other words, in looking for the cause of the periodicity of the disease, the cause of the disease was discovered." So, by inquiring why war is periodic, Howell discovered the cause of war.

new and important source of gold be found, such as was the Rand thirty years ago, and presently the whole commercial world will feel the change. The price index will slowly climb, and the rising market will bring hoarded money into active circulation." Then comes war. The Thirty Years War, the Napoleonic Wars, and the recent World War "bestride the summit of a great money metal production." [1]

This much we can say about war. It recurs periodically, responding to a rhythm of quietism and activity, routine and orgy, repose and stimulation. It also has some connection with the economic cycle, as it occurs only in the long-wave periods of commercial expansion. The psychology of prosperous times is a war-psychology; economic depression induces a pacific attitude. It was in ignorance of this established principle, or for ulterior purposes, that Mussolini, when asked by the New York *Times* whether war was imminent, pointed pessimistically to the stagnant economic situation.[2] Moreover, the generation that has experienced the horrors of war clings to the blessings of peace, while the post-war generation sets out gaily on new adventure. The latter is not much impressed by the story of sufferings that it has not itself felt. The lesson has to be learned all over again, learned from contact with realities.

War will not begin again until the men haunted by war-memories have been thrust aside and until the psychology of rising prices has infected their successors. Usually other conditions must be satisfied. In the case of post-war Germany, her military forces must be reconstituted, mechanized, and backed by enormous reserves; her industry and finance adjusted to the needs of war; and the necessary understandings and alliances arranged. The negotiation of alliances must wait for the appropriate mood to develop in foreign countries. Even when all these preliminaries have been dealt with, the necessity of waiting for a favorable moment to attack may interpose a long delay.

The principle of recurrent war is infinitely distasteful to those pacifists who, in the intervals of quietism, work so hard for peace and (because it exists for other reasons) seem to accomplish so much. They cannot bring themselves to believe in that sort of predestination —in the fruitlessness of all their efforts. Yet they might be comforted

[1] "And as the last of these terrible conflicts recedes in the near background of memory it becomes mankind to inquire why the very culmination of the most stupendous gold production of all time should find the leading nations of the world springing at each other's throats in the most deadly and destructive conflict of all human history."

[2] N. Y. *Times*, September 16, 1934.

by the thought that war has been in the past the great instrument of peace. Have they forgotten the *Pax Romana* and how it was achieved? Roman legions conquered the whole Mediterranean basin, and a good deal besides. Within an enormous territory they afterwards kept the peace. Within that peace-area a sense of unity prevailed, through the establishment of a common government, a common law, a common language, and a common religion. Perhaps the age of the Antonines was the happiest that mankind has known. But at last decadence set in. The legions could no longer keep the barbarians from sweeping across the frontiers and breaking the Empire into fragments. Political chaos and chronic warfare ensued. It took much time and much fighting to set up new peace-areas.

WAR AS AN INSTRUMENT OF PEACE

The European States or peace-areas are the product of warfare. No one can dispute facts that are equally apparent in the unification of England and France in the Middle Ages and of Germany and Italy in the nineteenth century. The king of France, by the exercise of force, converted his meager feudal suzerainty into actual sovereignty. He did it in alliance with the sturdy burghers, who had come into being as commerce had revived and as a surplus of movable wealth had been painfully built up; whose walled towns were centers of the new wealth, of intelligence, and of organization; and who desired peace as an essential basis of trade. They desired peace so much that they were ready to fight for it. Their foot-soldiers proved superior to the feudal levies and brought the king, in France as in England, to see the advantage of a hired standing army. The unruly vassals were subdued, private warfare eradicated, Frenchmen no longer being allowed to fight against Frenchmen; and the only kind of warfare that remained was public warfare, waged by State against State.

The efficacy of force as a check on force and as an instrument of peace has been demonstrated by the setting-up of these peace-areas. It has been demonstrated over and over again in human history. But the question must arise: Why did victory rest with the king, not with his feudatories, and why did the peace-area stop short at certain boundaries? This question is important as bearing upon the value of force in the solution of political problems. Force, like propaganda, meets with lasting success only when it is allied with other factors that operate in the same direction. The political interests of the king of France harmonized with the economic interests of the powerful burgher

class; and all sorts of influences were at work sapping the vigor of the feudal system and enhancing the importance of the bourgeoisie. When force confronted force, the side that won was being carried forward towards ultimate success by the current of social and economic life. Boundaries were determined partly by nature—the mountains, the sea—and partly by distinctions of blood and language. In spite of local differences, there was a French people, which had resulted from the intermarriage of Franks and Roman provincials; and, again in spite of local differences, there was a French language, which bore the mark of prolonged Roman rule in Gaul. Similarly, there was a German language and a German people. The French king would have attempted the impossible in trying forcibly to restore the Carolingian Empire and weld Frenchmen and Germans together.

The European States (barring Russia) have shrunk portentously in size under modern conditions. Europe itself should form one State instead of being Balkanized into nearly thirty; it should form one free market, one peace-area. In spite of local differences Europeans have an astonishing sense of homogeneity, which becomes apparent when they associate with peoples of other continents; they have their own common history, memories, culture. They fear the approach of economic impotence in the face of competitors like Russia and the United States, whose huge domestic markets facilitate mass-production. They fear self-destruction by recurrent warfare. How can some degree of consolidation be brought about? How can the projected United States of Europe be made a reality? Ideas will not do it. Talk will not do it. Perhaps war can. Perhaps the effort that has been made several times in the past will succeed, under modified conditions, in the future, some vigorous State establishing an hegemony over Europe. Perhaps the very fear of such an eventuality and the losses that such an effort would entail will lead to the confederation of Europe without the compulsion of war. Fear of forcible subjection may be a strong enough motive. In either case action will be dictated by force.

Americans sometimes say impatiently, Why don't they do it as we did it? Such a question should not be asked. It overlooks the fact that the thirteen American states, before asserting their independence, had always been united under a common sovereign, that they had won that independence by concerted military action, and that their people were homogeneous in blood and culture. Even under those circumstances the states were reluctant to coöperate. They were forced into a more perfect union by economic and military troubles. It was force

that crushed the Whiskey Rebellion and saved that union from dissolution almost at the time of its birth; and at a later time it was force once more that checked the secession of eleven southern states. The Revolution, the Whiskey Rebellion, the Civil War are obvious reminders that force lies constantly at the basis of all government. Pacifists overlook this axiomatic truth when, in their numerous enterprises, they enthrone ideology as a substitute for force.

Part III

THE STATE: DIVERGENT TYPES

CHAPTER XV

THE CONSTITUTION OF THE STATE

EVERYTHING that is alive or dead—animal or machine, plant or pudding—has a constitution. *The Boston Cook Book* is an encyclopaedia of constitutional texts or recipes; it gives all the ingredients of a mulligatawny soup or mince pie, proportioning them in pints, ounces, and even *soupçons*. The constitution of any object is the sum of all its parts. Therefore, the constitution of the State should properly include the three elements that are necessary to statehood: people, territory, and government. Usage, however, has given the term a narrower implication, confining it to the form and functions of the government.

At first this may seem strange. The State, we agree, must have territory as well as government; and, if people can exist without government, the latter cannot exist without people; it is a fragmentary sort of constitution that deals with two of the three great political factors, if at all, only in an incidental way. What is the explanation? When the term "constitution" came to have a place in our popular political vocabulary, interest centered upon the nature of the government and its relation to the welfare of the people. The foremost issues concerned popular control and popular liberties. When constitutions were put into writing, there was little object in describing frontiers and political geography; still less in describing the size and character of the population, or social and economic life. Theoretically, it might be said then, and may be said now, that such matters fall within the constitutional domain. But prolonged usage, fixed by the foremost writers in the political field, forces us to abandon the theoretical view. The term "constitution" has been preëmpted by government.

There is only one way to discover the meaning of political terms. We must consult good usage, the usage that has been established by eminent authorities.[1] Suppose we take first, by way of examples, the definitions of "constitution" given by three writers of the eighteenth

[1] I have collected forty-odd definitions from writers of the past two and a half centuries, but must content myself with quoting only a few of them. There has been no attempt to suppress diversity. Quite the opposite.

century. (1) Bolingbroke (*On Parties*): "That assemblage of laws, institutions, and customs . . . , according to which *the community hath agreed* [my italics] to be governed." (2) William Paley (*The Principles of Moral and Political Philosophy*): "So much of its law as relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office, and jurisdiction of courts of justice. The constitution is one principal division, section, or title of the code of public laws, distinguished from the rest only by the *superior importance* [my italics] of the subject of which it treats." (3) Sir James Mackintosh (*Discourse on the Law of Nations*): "The body of those written and unwritten *fundamental laws* [my italics] which regulate the most important rights of the higher magistrates, and *the most essential privileges of the subjects* [my italics]."

Consider next six writers of the past hundred years. (1) Sir George C. Lewis: [1] "Constitution signifies the arrangement and distribution of the sovereign powers in the community, or the form of government." (2) A. V. Dicey: [2] "All rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state [which is an attribute of government]. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority." (3) James (Lord) Bryce: [3] "The aggregate of the laws and customs under which the life of the State goes on"; or "the complex totality of laws embodying the principles and rules whereby the community is organized, governed, and held together." (4) R. N. Gilchrist: [4] "That body of rules or laws, written or unwritten, which determine the organization of government, the distribution of powers to the various organs of government, and the general principles on which these powers are to be exercised." (5) Herman Finer: [5] "The system of fundamental institutions." (6) K. C. Wheare: [6] "That body of rules which regulates the ends for which

[1] *Remarks on the Use and Abuse of Some Political Terms* (1832; 1898), p. 20 of the reprinted edition.

[2] *Introduction to the Study of the Law of the Constitution* (8th ed., 1915), p. 22. The first edition appeared in 1885.

[3] *Studies in History and Jurisprudence* (2 vols., 1901), vol. I, pp. 136 and 217.

[4] *Principles of Political Science* (3rd ed., 1927), p. 211.

[5] *The Theory and Practice of Modern Government* (2 vols., 1932), vol. I, p. 181.

[6] *The Statute of Westminster* (1933), p. 12.

and the organs through which governmental power is exercised." It would only be wearisome to give further examples.

One point becomes tolerably clear when we analyze these definitions; and it would become clearer still if we analyzed thirty or forty instead of nine. The province of the constitution is government, not the State as a whole. Indeed, there is a tendency to restrict this province still further. Paley would include only laws of "superior importance"; Mackintosh, only "fundamental laws"; Dicey, only matters affecting the sovereign power in government. Dicey did not have before him any document or any related series of documents which had officially been recognized as the British Constitution. To write a book about that constitution he had, first of all, to determine what kinds of material properly belonged to it and then, by a sifting process, bring these together in an orderly arrangement under the somewhat arbitrary label of constitution. He applied the test of relative importance. Constituent assemblies or conventions have generally proceeded in like manner. They have drawn up a frame of government, a set of fundamental or organic laws, even though their conception of relative importance may have been clouded at the time by the pressure of momentary circumstance. It may be said that a constitution deals with the fundamental concerns of government.

Must that definition be still further qualified? Note the italicized phrases in the quotations taken from Bolingbroke and Mackintosh: laws "according to which the community hath agreed to be governed," says Bolingbroke; "the most essential privileges of the subjects," says Mackintosh. In similar fashion, a contemporary English writer, C. F. Strong,[1] includes in the constitution "the power of government, the rights of the governed, and the relations between the two." He adds: "The object of the constitution is to limit arbitrary power, or, in

[1] *Modern Political Constitutions* (1930), p. 10. Cf. Henry Sidgwick, *The Elements of Politics* (4th ed., 1915), pp. 500-501: "In states where there are certain laws not alterable by the ordinary process of legislation, the body of specially stable laws is commonly spoken of as 'the constitution' without regard to its subject-matter. According to this use of the term, a 'constitutional' rule (1) is always strictly a law, and (2) its essential distinction from other laws lies in the fact that a special process is required for abrogating or altering it. But, according to another no less common usage, the same terms are implicitly defined by reference to the subject-matter of the rules which they denote. In this sense a 'constitution' is understood to mean a body of rules that either (*a*) determine the structure of government—the mode of appointment of different organs, and the distribution of functions and powers among them—or (*b*) impose obligations, positive or negative, on the government in the interest of the governed, and thus establish 'constitutional rights' of the governed which the government is bound to respect." Sidgwick then proceeds to criticize these different views.

other words, to guarantee certain rights to at least some of the governed." Not one of these qualifications can be accepted. In the light of present good usage it is impossible to contend that a State, however autocratic the government may be, can exist without a constitution,[1] or that the frame of government is not a constitution unless "the community hath agreed" to it, or unless it guarantees "rights" and "privileges" to the people. There are different kinds of governments, different kinds of constitutions. If the democratic State has a constitution, so has the autocratic State if only in the law of succession to the throne. We must be on our guard against writers who mix up ideals and actualities, and who regard all deviations from their ideal type as embryonic or perverted forms, not to be recognized at all.

No doubt, we frequently come across such terms as "constitutional monarchy" and "constitutional government," implying a contrast between "constitutional" and "arbitrary" and the erection of certain safeguards for civil liberty. A constitutional monarchy is the same thing as a limited monarchy. Here we have a special use of the word "constitutional." It appears in a period of transition where a king who ruled by divine right was being converted into a king who reigned without governing. But in fact a constitution existed before any guarantees of civil or political liberty were incorporated in it. If an absolute monarch respects whatever rudimentary rules of law or custom may be designed to restrict his freedom of action (as in naming a successor), he is a constitutional monarch in the true sense.

While possessing a common characteristic in content, constitutions diverge greatly in type. In the first place, there is the distinction between the written or codified type and the unwritten or dispersed. This distinction, resembling that between the continental legal codes and the English common law, is not merely superficial. It reflects, to some extent at least, two opposed political conceptions: one rather mechanical or Newtonian, which assumes the superiority and even the permanence of a consciously-planned system; the other evolutionary or Darwinian, which recognizes the complex nature of institutions, their gradual development and unpredictable change under the play of day-by-day adjustments, and the danger of seeking to improve upon nature's process of stimulus and response. However, the written or

[1] R. N. Gilchrist puts the matter correctly in his *Principles of Political Science* (3rd ed., 1927, p. 211): "Every state must have a constitution. It is true that some constitutions may be more clear and developed than others; but wherever there is a state there must be certain fundamental rules or principles governing the exercise of power in the state."

codified constitution does not attempt to provide for everything and, among peoples of political experience and sagacity, indulges in little innovation. Such novelties as the national economic council of the Weimar constitution of the German Republic frequently die of inanition, nowhere mourned. The evident aim of Irishmen to break with English precedents came to nothing. The fancy ideas of extern ministers, the initiative and referendum, a multiple party system, the subordination of the Oireachtas or parliament, and judicial control were soon smothered to death, like the Senate.[1] Native originality, as against experience, persists in Gaelic names which some citizens of the Irish Free State find it hard to master.

Written or codified constitutions differ among themselves. When de Tocqueville made his famous remark, that "the English constitution does not exist at all," he was thinking partly of its dispersed character, and partly of something else. He thought not only in terms of a single document, but also in terms of a clear distinction between constitutional and statutory law. The former, embodying the will of the sovereign, should not be responsive to the will of any lesser authority; it should not be alterable by the ordinary legislative process. In a word, it should not be flexible (on the same footing with statutes), but rigid (interposing a barrier to statutory encroachments). But who shall say what a particular clause of the constitution means or whether this or that statute is consonant with it? Shall the legislature be left free to determine its own powers under the constitution? It might then, by specious arguments, escape from one limitation after another and, in practice, make the rigid constitution as malleable as the sculptor's clay. Mere words, and the pious hope of legislative respect for them, will scarcely afford an adequate safeguard. Rigidity must be carried farther—or so the opponents of legislative supremacy often contend. The courts become guardians of the constitution. They fix its meaning; they set bounds to the competence of the legislature under it. This method of securing rigidity is called judicial control. The distinction between rigid and flexible constitutions, as between codified and dispersed, is a real one. Its reality was brought home when, for eighteen years, the Congress of the United States found itself without power to levy an income tax, and when, by decisions of the Supreme Court, Roosevelt's New Deal was torn to shreds. A sharp contrast is afforded by British practice. Ordinary statutes may override any decision of the highest court.

[1] Nicholas Mansergh, *The Irish Free State* (1934). *Passim.*

It is now generally recognized that a constitution, whether dispersed or codified, never consists wholly of enacted law. Custom plays a considerable and often a preponderant rôle. "The attempt to embody the fundamental institutions of a state in a single document or small group of documents," says A. Lawrence Lowell,[1] "is rarely, if ever, successful; and even if the constitution when framed covers all the main principles on which the government is based, it often happens that they become modified in practice, or that other principles arise, so that the constitution no longer corresponds fully with the actual government of the country." Thus, the question of ministerial responsibility—whether the minister shall be responsible to executive or legislature—is surely fundamental. It was ignored in the French Charter of 1830; and yet during the reign of Louis Philippe the ministers passed into the control of the lower house. The constitutions of Canada and Australia are equally reticent, using phrases that would rather suggest control by the governor-general; and yet there was never the slightest doubt as to what the practice would be. "Responsible government" already existed in the separate colonies before federation, though the granting of it had been, in one case, covered by an obscure phrase about government "according to the well-understood wishes of the people." In the Constitution of the United States there is no mention of a cabinet or of ministerial responsibility (except for impeachment); indeed, there are only two casual references to departmental heads, one saying that the president may require their written opinions upon any subject relating to the duties of their respective office. Seeing that Congress sets up the departments and defines their functions, it might have subordinated the secretaries to itself, as it tended to do in the case of the Treasury. Custom may yet establish "parliamentary government" at Washington, as it did at Westminster in the eighteenth century. Already the institutions of 1787 have been so overlaid by custom that, in the words of Woodrow Wilson, "ours is, scarcely less than the British, a living and fecund system."

THE RISE OF WRITTEN CONSTITUTIONS

Down to a recent date—a century and a half ago—constitutions varied little from each other in form. There was a prevailing type—unwritten, dispersed, and flexible. What survives to-day, by way of exception, in Great Britain and Hungary represents an earlier norm. The premonitions of change manifested themselves in seventeenth-

[1] *The Government of England* (2 vols., 1909), vol. I, p. 1.

century England and determined the new constitutional pattern that was exemplified first in America, then in France. This pattern of written, codified, and rigid constitutions has become almost universal; and such conformity with a new type, so different from the old one, arouses our curiosity. What occasioned this departure from the common-law or evolved type to the statutory or enacted type—from the unwritten to the written, from the dispersed to the codified? Several explanations may be offered, all of them having a common factor, the necessity of providing for a new system of government: first, as with the American colonies, some portion of a State gained its independence; secondly, as with those former colonies or the Swiss cantons, several independent communities formed a union of some kind; thirdly, and of much more frequent occurrence, political control in a State passed from one class to another, above all when the so-called bourgeoisie limited or overthrew the monarchy. In most cases the early written constitutions emerged from a revolutionary background. It was otherwise, however, with the English colonial charters, which take first place among the original sources of the written type of constitution. Grants of land were made to companies or proprietors, and a frame of government was laid down in the original grant or formulated later by the grantees.

A change in the system of government implies a constitutional change; and, when the change comes suddenly, perhaps installing a new régime, the desirability of registering it in a formal instrument, may well seem obvious at the time. Every one recalls, from ancient as well as modern history, how often civil commotions have been brought to an end by written understandings or concessions. The seceding plebeians extorted the Twelve Tables from the aristocratic *gentes* of Rome; the barons extorted Magna Carta from King John. The Provisions of Oxford and the Ordinances of 1311 must be regarded, like Magna Carta, as fragmentary constitutions.[1] But, when Americans adopted the Articles of Confederation and, shortly afterwards, formed "a more perfect union," they were not simply responding to an impulse that has actuated men through the ages. They did what their political experience suggested. They had become thoroughly familiar with written constitutions in the

[1] These and other settlements of a similar kind, in continental countries as well as in England, deserve more attention than they have received as forerunners of our modern constitutional codes. Magna Carta is familiar to all historical students. The Provisions of Oxford (1258), which are more elaborate than the later Ordinances, put the royal power in commission. They set up three small bodies—one to fill the offices of state, a second to control the acts of the king by their advice, and a third to confer with the second three times a year and discuss public affairs.

form of colonial charters. They could look back to the abortive Albany Plan, which, in 1754, contemplated a union of all the colonies, and look back much farther to an actual confederation of four New England colonies. They had heard, too, of English constitutions in the period of the Commonwealth,[1] when the forefathers of many of them were already in the New World.

Seventeenth-century England furnished the precedents for both codified and rigid constitutions. The terms of a colonial charter bound the local assembly, and, in most colonies, bound it by legal as well as moral sanctions. Colonial courts asserted the right to hold void any act of assembly which was found, in the course of litigation, to violate the terms of the charter or the laws of England. According to Professor Haines, decisions of this nature, though rarely encountered, are conclusive.[2] Moreover, the Privy Council entertained appeals from the colonial courts, though its right to do so was not positively asserted till 1698.[3] During the next eighty years, it heard more than two hundred and sixty appeals, many of them involving (as we should now say) the question of constitutionality.[4] The Attorney General said in 1760 that "in some instances whole acts of assembly have been declared void . . . upon appeal from the plantations." There was another method of dealing with "unconstitutional" acts, simpler and more frequently applied. On the advice of the Privy Council the king exercised the veto power. In the eighteenth century he disallowed more than four hundred and sixty acts "on the ground that they conflicted with the charters or the laws of England, both of which together constituted the supreme law for the colonies."[5] It is not surprising that, after independence, state courts held legislative acts unconstitutional without waiting for any express authorization[6] and that the principle of judicial review or judicial control was accepted by the Fathers in

[1] These precedents, though of capital importance, are frequently overlooked. Addressing the House of Representatives in 1805, William Findley said: "Constitutions themselves are things of recent date. Before the American Revolution the word was never fully understood. Lexicographers who attempted to define it never could agree. There was no practice whereupon to try its meaning. No power on earth had a constitution before the American states." (Quoted by Charles Warren, *Congress, the Constitution, and the Supreme Court*, 1925, p. 120). Of course, every State must have a constitution. It is a written constitution that Findley had in mind.

[2] C. G. Haines, *The American Doctrine of Judicial Supremacy* (rev. ed., 2 vols., 1932), vol. I, pp. 47 and 56-58.

[3] *Ibid.*, vol. I, pp. 51 and 55 *et seq.*

[4] C. P. Patterson, *The Supreme Court and the Constitution* (Arnold Foundation Studies in Public Affairs, vol. IV, 1936), p. 3.

[5] *Ibid.*, p. 2.

[6] See Haines, *op. cit.*, vol. I, p. 58; and Patterson, *op. cit.*, pp. 8-11.

1787.[1] Fifteen years before the Revolutionary War began, colonial leaders applied American ideas to England: they spoke of an English constitution and of the dependence of Parliament upon it.[2] "An Act against the Constitution is void," James Otis contended in 1761;[3] "an Act against natural equity is void; and if an Act of Parliament should be made in the very words of this petition [regarding general warrants], it would be void. The Executive Courts must pass such an Act into disuse." In 1768 a resolution of the Massachusetts legislature declared that "the Supreme Legislature, in every free state, derives its power from the Constitution, by the fundamental rules of which it is bounded and circumstanced."

Similar language had been used by English judges in the seventeenth century. The conception of a fundamental law was then quite widely entertained.[4] It was a vague conception. "The general principle," says McIlwain[5] "was more important than its specific content. Men may not always have been clear as to what particular rights or liberties were guaranteed by the fundamental law, but as to the existence of such a law there was no doubt, and any act that violated it was in a true sense felt to be no law." In the reign of James I, Chief Justice

[1] The language of the constitution may seem to lack precision at this point; but in No. 78 of *The Federalist* Hamilton made it clear that the courts were intended to possess this power. Charles A. Beard, in *The Supreme Court and the Constitution* (1912), reaches the same conclusion by analyzing the opinions of the delegates who attended the convention of 1787. See also J. Hampden Dougherty, *Power of the Federal Judiciary over Legislation* (1912).

[2] The word constitution (L., *constitutio*) was applied to every official document that came from the Roman Emperor and created or modified law (Hadley, *Introduction to Roman Law*, p. 6). It had a similar significance in twelfth-century England (*e.g.*, Constitutions of Clarendon, 1164). A charter was officially styled "Frame of Government," "Charter of Privileges," "Concession and Agreement." My own search of the charters in Thorpe's collection shows that the word constitution, whenever used, had the old meaning of law or ordinance (second Virginia charter, Thorpe, pp. 3758 and 3801; also N. J. Charter of 1664, where the general assembly is empowered to make "laws, acts, and constitutions"). Such also is the meaning of the word when used, on two occasions, in the title: "The Fundamental Constitutions" of Carolina (1669) and of East N. J. (1683). But, according to Charles Warren (*op. cit.*, p. 12), the charters came to be known popularly as constitutions. The word that originally meant law now meant fundamental law. James Harrington, in his *Oceana* (1656), used "constitution" in that sense—a written document that would restrain the king and so establish "an Empire of Laws and not Men" (*Works*, p. 37); and this book had some vogue in the colonies.

[3] Charles Warren, *Congress, the Constitution, and the Supreme Court* (1925), p. 15.

[4] C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910), Chapter II, pp. 42-108. This conception, according to McIlwain, goes back to the time of Bracton and was clearly expressed by Fleta in the reign of Edward I. In 1368 Parliament resolved that any statute conflicting with the Great Charter or the Charter of the Forest should be "holden for none."

[5] *Ibid.*, p. 63.

Coke became the champion of this doctrine. Coke was a remarkable man, who had a vast knowledge of the law and who combined great virtues with great defects. He was courageous and masterful, insistent and quarrelsome, narrow and stubborn, erudite and pedantic, and perhaps not altogether scrupulous in his methods of warfare. We have already witnessed his attempt to vindicate the common law against equity. He distinctly claimed for the common law a position above the royal prerogative and above parliamentary statutes.

The king was, he maintained, subject to the law. With the support of his colleagues, he denied that the judges were merely delegates of the king and that the latter could remove causes from the courts and decide them himself. The king in person could judge nobody. Instead of bending before the indignation of James, Coke kept to his guns. He professed to find in Bracton a maxim that "the king ought not to be under any man, but under God and the law." He was removed from the bench. Twenty years later, in the *Ship-Money Case* (1637), the common-law judges took a very different view of the royal prerogative.[1] It was Parliament, not the courts, that stripped the king of his actual power; and the assertion of parliamentary supremacy swept away the fundamental-law doctrine.

It was not only the royal prerogative that Coke sought to restrain. According to him, the courts could hold a statute invalid. "The surest construction of a statute," he said, "is by the rule of reason of the common law, and acts against this law are void." The competence of Parliament was limited by the common law and the law of nature, as well as by right and reason; limited by a law which, in the language

[1] Charles I submitted the ship-money question to the judges when protest arose over his practice of levying money, without parliamentary grant, for the purpose of building war-ships. Ten of his twelve judges supported the royal prerogative. They held that in time of danger the king might do what was necessary for the defence of the realm and that he was judge of the existence of danger. They shrank from ascribing full sovereignty to the king. They went no farther than to say, vaguely, that some royal rights lay beyond the reach of Parliament. "No act of parliament," said Chief Justice Finch, "can bar a king of his royalty, as that no land should hold of him; or bar him of his allegiance of his subjects; or the relative on his part as trust and power to defend his people; therefore acts of parliament to take away his royal power in the defence of the kingdom are void; they are void acts of parliament to bind the king not to command the subjects, their persons and goods, and I say their money too; for no acts of parliament make any difference." But Finch admitted that Parliament could override *some* of the prerogative powers. It could take away, not the Crown itself, but "the flowers and ornaments of the Crown." Apparently the courts alone could make the distinction between substantial rights and "flowers and ornaments." F. W. Maitland, *The Constitutional History of England* (1908), pp. 297-301.

of Maitland,[1] "had an existence of its own, independent of the will of man, even perhaps of the will of God." In *Bonham's Case* Coke said: [2] "And it appears in our books, that in many cases, the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such acts to be void." Coke was, of course, merely indulging in *obiter dicta*. He did not actually exercise the power of judicial review, but, searching the records for the past three hundred years, offered proof that the courts in the past had done so and could therefore do so now. As a shrewd lawyer Coke can scarcely have been satisfied with his precedents. Modern scholars have condemned them. Maitland says: [3] "He alleges precedents for this—cases in which statutes have been held void. I do not think that they bear him out. I do not think that the judges of the Middle Ages had considered themselves free to question the validity of a statute on the ground of its being against natural law." Pollock, whose authority in this matter ranks with Maitland's, holds the same opinion. "No case," he says,[4] "is known, in fact, in which an English court of justice has openly taken upon itself to overrule or disregard the plain meaning of an Act of Parliament." In another place, he says that Coke's doctrine, according to which statutes contrary to natural justice and common right might be held void, "was never a practical doctrine" in England.[5]

Coke's doctrine survived his own time. Thus, in the case of *Sheffield v. Ratcliffe*, Sir Henry Hobart referred to "that liberty and authority that judges have over laws, especially over Statute laws, according to reason and best convenience, to mould them to the truest and best use"; and, in the case of *Day v. Savadge*, he said that "even an act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself." [6] In one sense the doctrine still lives. It lives in "the rule of law," which colors the whole history of England. Every one is subject to the law. But who gives the law; who says the final word? In Coke's time the supremacy of Parliament was disputed; the strong monarchy of the Tudors had laid emphasis upon the royal

[1] *Op. cit.*, p. 301.
[2] McIlwain, *op. cit.*, pp. 286-287.
[3] *Op. cit.*, p. 301.
[4] *A First Book of Jurisprudence* (2nd ed., 1904), p. 264.
[5] *The Expansion of the Common Law* (1904), p. 122.
[6] McIlwain, *op. cit.*, pp. 260 and 306. Note also the favorable comment of Chief Justice Holt on Coke's *obiter dicta* in *Bonham's Case*, p. 307.

prerogative, which, like the Roman *imperium,* came down from a distant, autocratic era; and the common law edged in between these rivals and claimed superiority to both. It was the recognition of parliamentary omnipotence after the "Glorious Revolution" of 1688 that finally disposed of the doctrine of judicial review as far as statutes are concerned. Parliament became legal sovereign. Its commands were now clearly binding upon the courts; and for that reason the courts were bound to scrutinize the acts of every subordinate law-making body and make sure that they did not go beyond the scope of its statutory power. The rôles of the House of Lords, the highest court in Great Britain, and of the Supreme Court in the United States are the same. They seem to be different only because Congress and the state legislatures are subordinate law-making bodies.

During the Commonwealth the conception of a fundamental law took concrete shape in England. A series of written constitutions made their appearance: in 1647, before the final triumph of the parliamentary cause, The Heads of the Proposals and The Agreement of the People, both still-born; in 1653, The Instrument of Government, under which the Protectorate functioned for some years; and in 1657, the Humble Petition and Advice, which restored the House of Lords and deprived the Protector of certain powers.[1] Under the Instrument of Government the Lord Protector took the place of the king, but with somewhat reduced powers; he had no veto and could take no important step without the advice of a Council of State, whose members were named in the Instrument and held office for life. The constituencies were reformed at the expense of the rotten boroughs, and active royalists deprived of the suffrage. The unicameral Parliament had no power "to alter the Government as now settled in one Single Person and a Parliament." This, however, the first Parliament of the Protectorate insisted upon doing. Cromwell dissolved it. But, before doing so, he sought to make clear the difference between "fundamental" things and "circumstantial" things.[2] As to fundamentals: "There may *not* be parted with; but will, I trust, be delivered over to Posterity, as the

[1] The Heads of the Proposals drafted by Ireton (Cromwell's son-in-law), provided for equal electoral districts, biennial parliaments, divided control over official appointments, religious liberty (except for Roman Catholics), etc. Neither royalists nor parliamentarians would accept it. The Agreement of the People, drafted by the council of officers, was likewise a compromise measure, designed (according to the preamble) "to take the best care we can for the future, to avoid both the danger of returning into a slavish condition and the chargeable remedy of another war."

[2] Thomas Carlyle, *Oliver Cromwell's Letters and Speeches,* Cromwell's speech of September 12, 1654.

fruits of our blood and travail.... In every Government there must be Somewhat Fundamental.... That Parliaments should not make themselves perpetual is a Fundamental. Of what assurance is a *Law* to prevent so great an evil, if it be in the same Legislature to *un*law it again? Is such a Law like to be lasting? It will be a rope of sand; it will give no security; for the same men may unbuild what they have built." After a period of military rule, a second parliament was convened. It drew up The Humble Petition and Advice.

England did not part with "the Fundamentals," however different Cromwell's conception of them might be. They came back with the Restoration and were reaffirmed by the Revolution of 1688 and by the Bill of Rights. The revolutionary period had ended.[1] The Bill of Rights, which registers its end, is not concerned with philosophical principles or the axioms of natural law, but with traditional rights—the true, ancient, and undoubted rights of the subject, which the Act of Settlement, a few years later, called the "birthrights" of Englishmen. The nation demands these traditional rights like a landed proprietor going into court with ancient title deeds.[2] "If proof were required of the unwritten nature of the English Constitution," says D. J. Medley,[3] "there could be none better than that afforded by the Bill of Rights. There was no attempt to define the fundamental bases of the constitution. It seemed to take for granted that these were sufficiently known; and the Bill limited itself to a declaration of the various points in which they had been violated by the action of the late king. ... The importance, then, of the Bill of Rights must not be sought so much in its individual provisions, as in the change of situation to which it bore witness. It marks the end of the struggle between the executive and the legislature which had lasted for just a century: and it signalises the victory of the latter by stamping as illegal many of those modes of action by which the executive had striven to ignore or override its wishes. But there was nothing in the Bill of Rights itself to prevent the recurrence of all those modes of unconstitutional action which had caused the struggle."

[1] Sir Henry Campbell-Bannerman contrasted the English and French Revolutions in this way: "When we make a Revolution, we do not destroy our house. With care we preserve the façade and, behind that façade, reconstruct a new house. You Frenchmen act differently: you pull down the old building and reconstruct the same house with another façade and a different name." K. C. Wheare, *The Statute of Westminster* (1933), p. 9.

[2] Émile Boutmy, *Studies in Constitutional Law* (1891), pp. 38-40.

[3] *A Student's Manual of English Constitutional History* (6th ed., 1925), pp. 335-336.

The old unwritten constitution had been restored. It gave full scope to the conflict of forces,—now freed from artificial canalization and damming,—which were to determine the future course of the political stream. England became herself again, the home of precedent and tradition. Still, the first American constitutions—those of the individual states, when they became independent, and of the union, when it was afterwards formed—had their source in the colonial charters and republican constitutions of revolutionary England; and written and rigid constitutions, everywhere, have their roots in these American prototypes. Perhaps there was one exception. It is sometimes maintained that the distinction between constitutional and ordinary laws developed independently in France. It was not from America that the National Assembly borrowed the idea, Léon Duguit writes; [1] "it was from French traditions, originating long before; from French public opinion, which, for the last half-century in particular, had insisted that the French constitution should be at last solemnly proclaimed...."

"In the old régime," Duguit tells us,[2] "the king is the ordinary legislator, and there are laws superior to him, laws which have been imposed upon him and which he can neither modify nor abrogate." Ordinary laws were known as *lois du roi;* fundamental laws, which the king could not touch without the concurrence of the States-General, as *lois du royaume.* By the end of the sixteenth century the distinction between them had become precise.[3] However, the States-General, which had at times sought to limit the monarchy, dropped from the picture; it was never convened between 1614 and 1789. Aside from public opinion, only one check upon the royal power remained—the *Parlement* of Paris, a law court whose judges held their places by hereditary tenure or purchase. It had evolved from the medieval *Curia Regis* and, as a remnant of its original advisory powers, could criticize or even refuse

[1] *Traité de droit constitutionnel* (rev. ed., 5 vols.), vol. III (1923), p. 642. Duguit admits, however, that "American ideas certainly had a strong effect upon the constitution-makers of 1789. They happened to mingle with the traditional French conception...." Indeed, the very terms used by American revolutionists became current in France. As soon as the first state constitutions had been adopted they were translated and, in 1778, published in France. J. S. Schapiro, *Condorcet* (1934), p. 219.

[2] *Ibid.,* p. 642. See also Max Radin, "The Judicial Review of Statutes in Continental Europe," *West Virginia Law Quarterly,* vol. XLI (1935), p. 115.

[3] In *The Spirit of Laws* (Book ii, chapter 4) Montesquieu shows the influence of this doctrine: "The intermediate, subordinate, and dependable powers constitute the nature of monarchical government; I mean of that in which a single person governs by fundamental laws.... These fundamental laws necessarily support the intermediate channels through which power flows; for if there be only the momentary and capricious will of a single person to govern the state, nothing can be fixed."

to register royal edicts.[1] In order to compel registration the king must appear before the *Parlement* and hold a *lit de justice*. This he hesitated to do, because it tended to concentrate attention upon dubious measures. Conflicts between Louis XV and the *Parlement* were numerous. At the end of his reign he abolished it; [2] Louis XVI, having revived it, abolished it once again, in the spring of 1788.

DISPERSED AND CODIFIED CONSTITUTIONS

While England, unstable and revolutionary in the seventeenth century, set the precedents for modern codified and rigid constitutions, she has herself, recovering her normal temper, adhered to the evolutionary method. In the political field the originative genius of the English people is universally recognized. England is something more than the "mother of parliaments." She has given to the world the cabinet system,—a means of responsive popular government whose perfection no theorist could have even approached,—the modern party system, the system of relations between amateur and expert in government (the latter always on tap, and never on top), the wonderful system of the common law, methods of governing vast backward populations, and much besides. Her political genius has been rivaled only by the Romans. It can hardly be a matter of accident that she has kept clear of the modern tendency to break loose from historical tradition and recast her institutions according to some philosophic plan.

Sir Sidney Low has imagined the burial of English civilization, after the manner of the Assyrian and Chaldean, and the errors into which some intrepid archeological excavator might fall.[3] Would he be able to distinguish between the present century and the eighteenth, or even seventeenth? The statutes of Edward VII would resemble those of Charles II and Henry VIII. Fragments of Blackstone and Delolme, Hallam and Courtney, would reveal the frequent use of the same forms, names, and authorities, apparently in the same relation and meaning the same things. But how could the investigator penetrate to the springs of English political action, and realize that "the efficient factors were for the most part not those he found in his books, and not those of which the Acts of Parliament, and the decisions of the law-courts, took cognisance?" The truth is that fictions play a great part

[1] In 1648 the *Parlement* energetically affirmed the existence of the somewhat vague fundamental laws and secured the consent of the king to a decree which, Duguit insists (p. 643), was "truly a constitution."

[2] It was on this occasion that Chancellor Maupeou made the famous statement that judges of the new court would be, like their predecessors, irremovable.

[3] *The Governance of England* (1914), pp. 6-7.

in English government and that custom strangely alters legal dispositions.[1] Old forms remain, but a new spirit animates them.

Bagehot and Mill, Freeman and Dicey, have drawn our attention to the rôle of conventions or understandings in the English constitution. These rules of political behavior or of positive political morality (Mill's phrase) do not override the law. They have no legal validity; the courts will not enforce them. Thus, we say that the veto is as dead as Queen Anne, she having been the last to employ it (1707); but, although a constitutional understanding has deprived the monarch of his veto power and so made the positive act of giving assent seem superfluous, the courts would refuse to recognize a statute which had not received the royal assent. Legally the king bears some resemblance to a semi-divine despot. The army, the navy, the air force are his; so is the "royal mail;" criminals are prosecuted in his name; the ministers are all servants of the Crown; he convenes, adjourns, prorogues, and dissolves Parliament; the session opens with the King's Speech in which, using the personal pronoun, he sketches the program of legislation. In reality, and by virtue of the constitutional understandings, the king has largely been stripped of actual power, as certain ancient seaports in Kent have been deserted by the seas. He represents what Walter Bagehot called the "dignified" part of the constitution.[2] The prime minister, representing the "efficient" part, is the real ruler, although his office received legal recognition only in 1937.[3] It is he who

[1] So it was in Rome. "The most skilful classifiers," says Bryce (*op. cit.*, vol. I, pp. 134-135), "could not draw up a list that would bear criticism of Roman or British statutes embodying the Constitution of either State: and even if such a list were prepared, the statutes so classified would fail to contain some cardinal doctrines and rules." In Rome "it would seem that no statute defined the power of the consuls, nor their relation to the Senate, nor set limits to the quasi-legislative authority of that great magistrate, the Praetor. So far from being clearly ascertained were the powers of the Senate, that in Cicero's time it was a matter of constitutional debate whether its decrees had or had not the full force of law; and men took one view or the other according to their political proclivities." It was largely through understandings or conventions "that the extremely complicated machinery of the Roman Republic, in its legal aspect a mass of apparent contradictions, was worked." Bryce, *Modern Democracies* (2 vols., 1921), vol. I, p. 441.

[2] *The English Constitution* (2nd ed., 1900), p. 72.

[3] When Palmerston made a voyage to Scotland on a war vessel, the commander, looking through the naval regulations, found that a mere prime minister was entitled to no salute. But Palmerston, it appeared, was more than prime minister. He held the ancient and august honorific office of Warden of the Cinque Ports and should therefore be greeted by a splendid salvo of guns. In *The Old Order Changeth* (1911), Frank Dilnot describes the gorgeous robes worn by peers and great officers of state at the coronation of Edward VII, as well as the public attention excited by these grandees; and he then tells how the prime minister, Mr. Asquith, wearing a black morning coat, was unnoticed as he joined the assemblage.

nominates the other ministers of the Crown, writes the King's Speech, and regulates the proceedings of Parliament. The King must accept him, if, after a general election, he enjoys the support of a majority in the House of Commons; the King cannot get rid of him, even if the House withdraws its support; for the prime minister may then insist upon a dissolution of the House and a fresh appeal to the people. According to law, the king selects his own chief adviser; but according to the conventions, it is the voters who appoint and depose him and who, through him, control the king.

The conventions are numerous. They can be discovered only by observing political practice and searching for precedents. It must also be kept in mind that practice is always fluid and changeful. Bagehot, writing seventy years ago, was correct in saying that the cabinet must resign whenever the House voted want of confidence. But the rule has changed. Instead of resigning, the prime minister, nowadays, may appeal to the electorate against the decision of the House. Government has become more responsive to the popular will. This shows that, while the conventions may vary in importance,[1] some of them are truly fundamental. They determine the spirit in which the whole political apparatus works. "These unwritten rules, which limit the use of lawful powers," says John Stuart Mill,[2] "are, however, only effectual and maintain themselves in existence, on condition of harmonizing with the actual distribution of real political strength. There is in every constitution a strongest power—one which would gain the victory if the compromises by which the Constitution habitually works were suspended and there came a trial of strength. Constitutional maxims are adhered to, and are practically operative, so long as they give the predominance in the Constitution to that one of the powers which has preponderance of active power out of doors. This, in England, is the popular power." The main purpose of the conventions is to secure the supremacy of the electorate.

[1] It is of little importance that parliamentary sessions open on Tuesday because Puritans objected to travel on Sunday or that they are still interrupted before August 12 in the interests of grouse-shooting; or that, since there was once a general anxiety to escape from the onerous burdens of membership, M. P.'s are not allowed to resign, but may disqualify themselves by accepting momentary appointment to certain offices which are maintained for that purpose. But other conventions have more significance. For example, the powerful Speaker is completely non-partisan, his constituency being uncontested and successive Houses reelecting him in spite of changes in party control. Again, the House of Lords, when acting as highest court of appeal, is attended only by those members who hold or who have held high judicial office.

[2] *Representative Government* (Everyman's Library), p. 229.

It must be acknowledged that constitutional conventions are not peculiar to England. "All human societies," as Sir Sidney Low observes,[1] "live largely on legal and historical fictions. An institution, or an office, is maintained for centuries after its true meaning has departed, and when its operative function is being performed by other agencies. The 'ceremonial' part of government is conserved, and may often continue to attract reverence and regard, though it is virtually atrophied; while by its side is a more or less unnoticed 'efficient' element which is doing the actual work. This is the usual tendency." Nevertheless, the tendency is much more pronounced in England than anywhere else. While other countries have, within fairly recent times, cleared away the accumulated débris of past generations (or some of it), harmonizing legal with conventional arrangements, England has shown reluctance to change the formal structure of her institutions. New elements have steadily been introduced without expelling the old and traditional. Custom affects the working of all constitutions, but by no means in the same degree. Half a century ago, in his *Congressional Government,* Woodrow Wilson declared that the constitution was now "only the sap-centre of a system of government vastly larger than the stock from which it has branched." [2] Since that time attention has frequently been directed to the play of custom in American politics.[3] According to Lindsay Rogers, the conventions and customs are "of such importance as to challenge the primacy of the written word. . . . They profoundly influence, if indeed they do not determine, the character of our political life." [4] Impressive as they are in the aggregate,[5] it still remains true, as Woodrow Wilson said, that the British constitution finds its rootage more widely hidden in the soil of the unwritten law.

[1] *Op. cit.,* p. 3.

[2] "Ours is, scarcely less than the British, a living and fecund system. It does not, indeed, find its rootage so widely hidden in the soil of unwritten law; its taproot at least is the Constitution; but the Constitution is now, like Magna Carta and the Bill of Rights, only the sap-centre of a system of government vastly larger than the stock from which it has branched,—a system some of whose forms have only indistinct and rudimental beginnings in the simple substance of the Constitution, and which exercises many functions apparently foreign to the primitive properties contained in the fundamental law." (P. 8.)

[3] Especially by an English writer, H. W. Horwill, in *The Usages of the American Constitution* (1925).

[4] *The American Senate* (1926), pp. 214-215.

[5] They have to do with the election of the President, the functions of the Vice-President, the cabinet, parties, appointments and removals, congressional committees, courtesy of the Senate, senatorial investigations, etc. Curiously enough, the lists seem to ignore the two outstanding effects of custom—the increase of presidential power at the expense of Congress and the increase of central power at the expense of the states. Custom has been the source of such changes; the Supreme Court, influenced by public opinion, has accepted them.

It would have been a truer statement if Wilson had said "far" more widely hidden.

So-called written constitutions, like that of the United States, have been overlaid by custom. Conversely, the English constitution includes a considerable statutory element. Statutes regulate the succession to the Crown, the executive departments, the suffrage, elections, the duration of Parliament, the relations between the two houses, the judiciary, and much besides. Some of these matters have been subject to parliamentary action for centuries. Others were formerly left to custom. It was the conflict over the budget of 1909 that led to the passage of the Parliament Act, which gives the House of Commons exclusive control over money bills and a means of enacting other measures without the consent of the Lords. The statutory element seems to be gaining in relative strength. Bryce concludes, therefore, that the terms "written" and "unwritten" are not happily chosen, "although the distinction they aim at expressing is a real distinction."[1] Horwill denounces "the employment in an esoteric sense of words that have a fixed and clear meaning in the popular mind. Every science must have its own technical vocabulary, but it is unfortunate when, for that purpose, the simple, everyday language of the common man is conscripted for this special end and diverted from its proper signification."[2] Lawyers, it is true, use the word "unwritten" to describe the common law, which is composed of recorded judicial decisions. But there is no authority for the use of the word in connection with statutes; and the English constitution has a very large statutory element. It seems advisable, for these reasons, to substitute terms that will express the intended distinction more accurately. The English constitution, we may say, is *dispersed* or scattered; the American, *codified,* its main features being outlined in a single document. These terms are suggested by the language which Émile Boutmy employs in contrasting the French and English constitutions.

French constitutions, he says,[3] have been "like mathematical demonstrations or scientific classifications starting with an axiom as a heading; they are all works of art and logic." The English do not like that method. "They have clearly felt its inconveniences and its dangers.... So the English have left the different parts of their constitution just where the wave of history has deposited them; they have not at-

[1] *Studies in History and Jurisprudence,* vol. I, p. 127.
[2] *The Usages of the American Constitution* (1925), p. 2.
[3] *Studies in Constitutional Law* (1891), pp. 5-7.

tempted to bring them together, to classify or complete them, or to make a consistent or coherent whole. This scattered constitution gives no hold to sifters of texts and seekers after difficulties. It need not fear critics anxious to point out an omission, or theorists ready to denounce an antinomy. The necessities of politics are so complex; so many different interests are mixed up in them, so many opposing forces run counter to each other, that it is impossible to get together all the essential elements of a stable fabric and put them in their proper places, if the work is carried on under the eyes of a people whose taste is for homogeneous materials and a regular form. The way to meet the difficulty is to arrange so that an ordinary spectator shall not be able to have any general view, such as would be given by codification. By this means only can you preserve the happy incoherences, the useful incongruities, the protective contradictions, which have such good reason for existing in institutions, viz., that they exist in the nature of things, and which, while they allow free play to all social forces, never allow any one of these forces to work out to its allotted line, or to shake the foundations and walls of the whole fabric. This is the result which the English flatter themselves they have arrived at by the extraordinary dispersion of their constitutional texts, and they have always taken good care not to compromise the result in any way by attempting to form a code." [1]

FLEXIBLE AND RIGID CONSTITUTIONS

Not only did Émile Boutmy point out the contrast between dispersed and codified constitutions. By emphasizing flexibility as a character-

[1] I cannot refrain from quoting from this admirable writer, two further passages. Boutmy says (p. 2) that any enlightened student of constitutional law must have an exhaustive knowledge of this capital example. But he cannot acquire that knowledge by following any ordinary path, "and especially not the broad highway which the French jurists have laid out by rule and line in the domain of their law." His course "ought rather to be compared in the words of Pascal to *un chemin qui marche,* or to a river whose moving surface glides away at one's feet, meandering in and out in endless curves, now seeming to disappear in a whirlpool, now almost lost to sight in verdure. Before venturing upon this river you must be sure to take in the whole of its course from a distance, you must study the chain of mountains in which it rises, the affluents which swell its waters, the valleys in which it widens out, the sharp turns where it gets choked with sand, and the alluvial soil which it deposits on its banks." Again (p. 12): The English constitution "does not recognize any such ideals as simplicity and uniformity. Indeed, it seems as if its authors had deliberately avoided, as a dangerous extreme, any attempt at unity, or at laying down general principles, or at assimilation and fusion of the different parts of the constitution. They certainly carefully guarded against all the generalizations and simplifications which the creators of the French public law were always striving for with the greatest faith and ardour, not to say passion."

istic of the English system,[1] he seems to have suggested to Bryce a new scheme of classification.[2] Under this scheme constitutions are of two types, flexible and rigid. The flexible constitution places constitutional law and ordinary law on the same level, in the sense that both are enacted in the same way and both proceed from the same source. The rigid constitution possesses a special and higher status, standing above the ordinary law and being more difficult to change. On this basis, flexible constitutions were almost the only kind known to the ancient world.[3] The situation is now reversed. Flexible constitutions are found only in Great Britain and Hungary, where the constitutions are also dispersed, and in four other countries having codified constitutions—New Zealand, South Africa, the Irish Free State, and Finland.

Down to 1928, Italy fell within this category. The Fascist Grand Council, hitherto an organ of the party, was then incorporated in the government and given the exclusive right of initiating "constitutional" changes. It was not the Charter as a whole that was placed under its guardianship, but certain matters, such as the succession to the Crown and the appointment of a prime minister, which were now listed as constitutional. Parliament can act only upon changes which the Grand Council has proposed. Otherwise the law courts are required to hold parliamentary action void.

The situation in the Union of South Africa and in the Irish Free State requires some comment. In the South Africa Act (1909) Parliament was limited in two ways. For a period of ten years it could not reduce the size of the House of Assembly or change the organization of the Senate. These restrictions have lapsed. Some provisions of the Constitution (regarding, for example, the existence and powers of

[1] *Op. cit.*, p. 24. "The truth is that this constitution is always, so to say, in a state of motion or oscillation, and that it lends itself in an extraordinary manner to the play of its different parts. *Its solidity comes from its flexibility* [my italics]. It bends but does not break. It stands not by the strength of its affirmatives, but by the studied vagueness of its reservations."

[2] *Studies in History and Jurisprudence*, vol. I, Essay 3, "Flexible and Rigid Constitutions."

[3] There was at least one exception. The Athenians did develop a distinction between permanent laws (*νόμοι*) and ordinary laws (*ψηφίσματα*), resembling the distinction once made in France, as noted *supra*, between *lois du royaume* and *lois du roi*. Once a year the assembly might authorize changes in the fundamental laws; and, if it did so, final action was taken by a large commission, its members being chosen by lot and numbering, perhaps, a thousand. The amendments went into effect without ratification by the assembly. Any one who proposed amendments at other times laid himself open to an "indictment for illegality," which might entail a fine or death. Bryce, *Modern Democracies* (2 vols., 1921), vol. I, p. 174. See also Max Radin, "The Judicial Review of Statutes in Continental Europe," *West Virginia Law Quarterly*, vol. XLI (1935), pp. 112-114.

the provincial councils) were protected by a possible royal veto. Certain other provisions (the official equality of the English and Dutch languages, provincial representation in the Assembly, and native suffrage in Cape Colony) could be changed only by two-thirds of all the members in a joint meeting of Senate and Assembly. But by the same vote all such limitations on the power of Parliament could be dropped from the constitution. "Legally, therefore, the only limitation on the complete power of Parliament over the Constitution," says R. H. Brand,[1] "is the requirement of a two-thirds majority in certain particular cases. If the South African Parliament, in the exercise of its legislative power, ignored the requirement, any law so passed, being in conflict with the Constitution, must be declared by the courts null and void." This is no longer true. The Statute of Westminster (1931), which recognized the legal independence of the Dominions, removed all restrictions; for the constitution is a British statute, and such statutes no longer bind the Dominions. By ordinary statute the South African Parliament can do what it likes with the constitution, even to the point of repealing it altogether. Legally it can do so; actually assurance has been given that Parliament will observe the pre-existing constitutional restrictions.[2] By virtue of exceptional provisions, which were inserted at the request of Canada and Australia, the Statute of Westminster does not affect those Dominions in the same way. The process of amending their constitutions remains just as it was before the passage of the Statute. If no such exception had been made, the central parliaments could have wrecked both federal systems. The Union of South Africa is and always has been a unitary State.

The first constitution of the Irish Free State (1922-1937) provided for two methods of amendment. One was intended to be temporary.[3] It was felt that, since the constitution had been drafted somewhat hastily and since it contained so many novel or experimental provisions, the need of change would arise at an early stage. During the first eight years the ordinary process of legislation would suffice for amendments. After the end of that period they must be referred to the people. The constitutional referendum differed from the ordinary referendum (which was abolished by amendment). It was more exacting. An amendment would not carry unless a majority of the registered voters participated and unless it was supported by a majority

[1] *The Union of South Africa* (1909), p. 45.
[2] K. C. Wheare, *The Statute of Westminster* (1933), pp. 106-109.
[3] Nicholas Mansergh, *The Irish Free State* (1934), p. 48; Leo Kohn, *The Constitution of the Irish Free State* (1932), p. 252.

of the registered voters or two-thirds of the participants. Such severe requirements discouraged constitutional change and afforded protection to minorities. But the referendum was never employed. In 1929 the constitution was amended so as to extend the temporary method over a second period of eight years, or down to December 1938. However dubious such a step may have been, the courts did not hold it void. The constitution became, in practice, flexible. Civil liberty now lay at the mercy of legislative majorities. One commentator expressed the fear that "a position of grave insecurity" might arise.[1]

Turning to rigid constitutions, we find the process of amendment varying a good deal, especially as between unitary and federal States. In the former it is entrusted to the legislature which, for this purpose, acts under special rules of procedure. Thus, in France, according to article 8 of the Constitutional Law of February 25, 1875: "The chambers shall have the right, by separate resolutions, taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic [in practice, the prime minister], to declare a revision of the constitutional laws necessary. After each of the chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision. The acts effecting revision of the constitutional laws, in whole or part, shall be passed by an absolute majority of the members composing the National assembly." When once convoked, that body is sovereign, not being limited to the preliminary agreement made between the two chambers.[2] In federations, as one would naturally expect, some protec-

[1] Kohn, *op. cit.*, p. 254. Kohn adds (p. 259): "In the Irish Free State, where both the contingency and the risk of change are far greater than in communities of more conservative political tradition, the problem is of particular moment. It is the more acute as the existing machinery of amendment is at once too cumbrous in its permanent shape and too pliable in its temporary form. The effect of a repeated extension of the initial period of amendment by legislation must inevitably be to derogate from the authoritative status of the constitution. On the other hand, it is unavoidable that as long as a procedure so complicated and so costly as that of the Referendum is retained as the normal mode of amendment, the temptation to postpone indefinitely the date of its coming into force should prove irresistible."

[2] E. M. Sait, *Government and Politics of France* (1920), pp. 27-29. In Belgium (Art. 131 of the Constitution) the two chambers, having specified which articles are to be amended, but without formulating the amendments, are dissolved. After the election the amendments may be adopted by a two-thirds vote in each chamber, a quorum of two-thirds being present. The use of this method is infrequent, because legislative bodies do not like to decree their own dissolution. But, when once the decision is made, numerous proposals are offered: In 1892 ten and in 1919 twenty-five articles were involved.—In Norway (Art. 112) a proposed amendment is brought before the whole Storthing at its opening session and voted upon just before the expiration of its three-year mandate. To be adopted the proposal must be passed again, on this occasion by the new Storthing and by a two-thirds vote.

tion is given to members of the union. Thus, in the United States (Constitution, Article V), while the initiative is taken by Congress (a two-thirds vote in each house), ratification requires approval by the legislatures or conventions in three-fourths of the states. Thirteen of the forty-eight states have the power of veto. Australia (Section 128) makes use of the referendum.[1] An amendment, when proposed by absolute majority in both House of Representatives and Senate,[2] is ratified by popular vote; but there must be a favorable majority not only in the Commonwealth as a whole, but in a majority of the states.

The federal constitution of Canada is a British statute; so is the federal constitution of Australia. In the latter case it was provided that amendments should be made locally, in the manner just described. But in the case of Canada, there being no similar provision, the authority that passed the British North America Act could alone alter or repeal it. From the outset there was an unwritten understanding or convention that the British parliament would not exercise this power unless (1) the Dominion parliament requested it to do so *and* (2) the provincial governments acquiesced whenever proposed amendments affected local autonomy. In race, language, and religion Quebec has most at stake and therefore is most insistent upon maintaining a provincial veto; but some other provinces view with deep misgiving the tendency towards centralization.[3] Now, under the Statute of Westminster

[1] She borrowed it from Switzerland, but did not borrow the many complicated arrangements that are associated with it in that country. See Robert C. Brooks, *Government and Politics of Switzerland* (1918), Chapter vi; William E. Rappard, *The Government of Switzerland* (1936), Chapter iv.

[2] Under certain circumstances the collaboration of the two houses is not necessary. The governor-general *may* submit to popular vote an amendment which one house alone has passed a second time after an interval of three months. It is now established that, in such a case, the governor-general shall act only on the advice of his ministers; Sir Roland Munro-Ferguson took that position in 1913 when the Senate had twice proposed six amendments. The Senate may be, and then was, controlled by the Opposition; and it is desirable that the constitutional referendum should be invoked on the responsibility of the government, which always reflects the opinion of the lower house.

[3] "Quebec stands fairly solid for the *status quo*," says W. P. M. Kennedy (*Cambridge History of the British Empire*, vol. VI, 1930, p. 688), "and many who view with misgivings the development of Canadian autonomy would support Quebec. Sober realism seems to say that the granting of full constituent powers at present would be an exceedingly dangerous experiment. No one who can think of the Dominion as a whole and apart from the pressure, often extreme in a vast territory, of his own local needs and aspirations, can soberly urge comprehensive imperial legislation." Kennedy says in another place (R. M. Dawson, *Constitutional Issues in Canada*, 1933, p. 57) that Quebec as a whole, and strong public opinion in other provinces, would oppose the giving of constituent powers to Canada. "Indeed, no political party would be prepared to father such a proposal unless accompanied by legal guarantees for provincial agreement in relation to proposed changes." At the Dominion-provincial conference of 1927 the minister of justice

(1931), as originally drafted, the Dominion parliament would have gained absolute power over the constitution and so over the whole federal scheme. Quebec and other provinces took alarm. At the instance of Canada the Statute was amended so as to continue the old status of the British North America Act.[1] Legally the process of amendment is exceedingly simple. In practice it is the most difficult that exists. Australia gives any three of her six states a veto; the United States gives it to any thirteen of her forty-eight states; but Canada gives it to any one of her nine provinces. We are reminded of the *liberum veto* in the Polish diets of the seventeenth and eighteenth centuries.

In measuring the rigidity of a particular constitution it is necessary to look beyond the language of the amendment clause. Two other points should be considered. In the first place, the question arises as to whether the legislature is judge of its own powers under the constitution—thus being only morally bound—or whether its acts may be set aside by the courts on the ground of excess of power. Judicial review[2] tends to prevent legislative usurpation.[3] Undoubtedly, judges respond to changing circumstances and changing public opinion, though they do so more slowly than the legislature. They are sometimes criticized because, lagging behind public opinion, they cling too closely to the language of the constitution and perform their function of guardianship too conscientiously. They are sometimes criticized for the opposite reason. In particular, judges who have been trained in the common law are skilful in the art of interpretation (or "evasion," as Bryce styles it);[4] they know how to create new doctrines by a series of minor adjustments, how to permit the growing political foot to reshape the old stiff constitutional shoe.[5] While applying a brake to a precipitancy, they do connive with the legislature in making a rigid

(Lapointe) proposed that the power be given to the Dominion parliament with the proviso that no change whatever could be made without the approval of a majority of the provinces and that no change of provincial and other enumerated rights could be made without unanimous approval. Dawson, *op. cit.*, p. 22. Neither this conference nor one held in 1935-36 reached any conclusion. On the whole subject see also A. Brady, *Canada* (1932), pp. 38 *et seq.*

[1] K. C. Wheare, *The Statute of Westminster* (1933), p. 89.

[2] The subject of judicial review, or judicial control, which receives here only incidental treatment, will be discussed in another volume dealing with the organs of government.

[3] In one way it has the opposite effect (much like the second chamber). It divests the legislature of a sense of responsibility. Laws are passed, irrespective of their constitutionality, in the knowledge that the court will settle the question.

[4] *Studies in History and Jurisprudence,* vol. I, p. 194.

[5] Walter E. Weyl, *The New Democracy* (1912), p. 109.

instrument more flexible. Thus the twenty-one amendments to the constitution of the United States have very little to do with the most striking phenomenon of American political history—the growth of federal power, centralization. That growth has taken place gradually, as, at each forward step taken by Congress, the Supreme Court has reëxamined the old words of the constitution and by degrees given them a new meaning. "No doctrinal confession in the history of the Church," says an English commentator, Horwill,[1] "has suffered a more startling metamorphosis in meaning, combined with an unimpaired respect for the letter, than the Fundamental Law of the American Constitution."

Judicial control is English in origin. "As a constitutional instrument is a law, distinguished from other laws only by its higher rank, principle suggests that it should, like other laws, be interpreted by the legal tribunals.... This principle of referring to the Courts all questions of legal interpretation may be said to be inherent in the English Common Law, and holds the field in all countries whose systems are built upon the foundation of the Common Law." [2] The United States, Canada, and Australia—all three of them federations—are the chief examples. In the Union of South Africa and in the Irish Free State a peculiar situation exists, apparently nullifying the former supremacy of the courts. The Statute of Westminster frees the legislatures of both countries from all subordination to the British parliament and gives them any power that the latter formerly had to change their constitutions. The South African constitution has, therefore, become altogether flexible, a matter of small moment because the restrictions had hitherto been so slight. Under the first Irish constitution the Dáil (which took the place of the original two-chambered Oireachtas) had the power to amend the constitution by the ordinary legislative process. Whether or not the courts would accept a statutory amendment which was not definitely labeled as an amendment never was decided.[3] In continental Europe, which follows the Roman law, the courts usually have no right to question legislative enactments. There

[1] *The Usages of the American Constitution* (1925), p. 223.

[2] Bryce, *op. cit.*, vol. I, p. 194. In Great Britain there is no law-making authority superior to parliament; parliament is sovereign. That explains why its statutes bind the courts, and at the same time why subordinate law-making bodies (colonial legislatures, borough councils, etc.) are subject to judicial review and kept within the power granted to them by statute.

[3] Under the Weimar constitution of the German Republic the courts held that, since the *Reichstag* could amend the constitution by a two-thirds vote, any statute passed by such a vote should be accepted as a constitutional amendment if it were such in substance. Max Radin, *op. cit.*, p. 128.

appear to be a few exceptions: [1] Norway, Greece, Rumania, Italy, and Czechoslovakia. In the first three cases the courts asserted the power, without express warrant in the constitution; and the Greek precedent, going back to 1905, seems to have been abandoned. In Czechoslovakia this function is confined to a special Constitutional Court.[2] A certain number of Latin-American States have borrowed the practice of judicial review from the United States. The most notable instances are those of Brazil and Argentina.

The second consideration is of a different nature. The actual effect of a different system of amendment depends upon the content of the formal constitution—how far the process of codification has been carried, how much has been left to the free action of custom and legislation. Some constitutions are short, others long; some limited to general provisions, others replete with detail; some willing to leave civil liberty in the hands of the legislature, others just the reverse. Here federal and unitary states are likely to differ. One great difference is due to the necessity of distributing the powers of government in a federal system, a matter that vitally concerns the members of the union and demands detailed and precise phrasing. But the constitutions of unitary States diverge widely among themselves, as might be seen by comparing those of France and, say, Czechoslovakia. The formal French constitution of 1875 is fragmentary and incomplete. There is not a word about the rights of man, the separation of powers, administration, local government, judicial power. The Chamber of Deputies is to be elected by universal suffrage; but the meaning of that phrase, the method of election, and the duration of the mandate are not mentioned. In fact, the French constitution must be sought mainly, not in these Constitutional Laws of 1875, but in a mass of precedents and in the legislation of earlier and later times. It is not surprising that the National Assembly has been convoked only three times and that so few formal amendments have been made. The one change that may be described as important reduced the scope of the codified part of the constitution by giving the organization of the Senate a merely statutory character.

The distinction between flexible and rigid constitutions has been

[1] In Switzerland the courts may set aside cantonal legislation; and German courts had a similar power during the Empire and Republic both. In 1925 the highest German court asserted the right to determine the validity of national laws. But down to the fall of the Republic only two such laws had been held unconstitutional, these being of a technical nature and of minor importance. Radin, *op. cit.*, p. 127.

[2] Introductory Law, articles I to III.

criticized. President Lowell admits that it is "highly important," but thinks that, because of the appearance of intermediate forms, it "has ceased to mark a contrast between widely separated groups" and should be regarded as a distinction of degree rather than kind.[1] For a similar reason men might reject the contrast between truth and falsehood, free will and predestination, liberty and order; or refuse to distinguish between plants and animals, because Francis Darwin's ivy feels, and acts in response to its feeling. Sometimes the flexible-rigid classification has been misunderstood or misrepresented. Recently Professor McBain and Professor Munro have condemned it on the ground that the American Constitution has been in practice, from the standpoint of actual change, as flexible as the British.[2] But this may be only another way of saying that the British people are more conservative than the American people. Perhaps the latter would have experimented much more boldly except for the restraint of the amendment clause and of the Supreme Court; legislation and judicial decisions during the period of the New Deal suggest something of the kind. Bryce was quite aware that constitutional forms may mean much, little, or even nothing at all, according to the temper of the people; and that custom encrusts institutions everywhere. However, he was classifying constitutions, not peoples; and he was classifying them as to form. Classification according to the sort of institutions set up would be a different matter. We are not asking now whether the government is federal or unitary, whether it is aristocratic or democratic, whether the powers are separated or fused, or whether the system of law is Roman or English. McBain and Munro regard the distinction between flexible and rigid constitutions as utterly superficial. It is, according to Wheare, "unprofitable" and "far from satisfying";[3] and, according to Horwill, "unsatisfactory because it is based on accidentals rather than essentials" and "distorts one's whole perspective" by laying chief stress on a secondary feature.[4] But actual experience and the opinion of those who are concerned has shown that this really is no secondary matter. Why did the proposal to pack the Supreme Court of the United States and so free Congress from constitutional restraints arouse such antagonism in 1937? Why did the Australian states and the Canadian provinces insist, when the Statute of Westminster was adopted, that existing

[1] *The Government of England* (2 vols., 1909), vol. I, pp. 2-5.
[2] Harold L. McBain, *The Living Constitution* (1927), pp. 16-25; W. B. Munro, *The Government of the United States* (4th ed., 1936), p. 74.
[3] *The Statute of Westminster* (1933), p. 12.
[4] *The Usages of the American Constitution* (1925), p. 214.

restrictions on constitutional amendment should not be removed? Why does Western Australia, even with such safeguards, wish to secede from the Commonwealth? We may safely assume that the recent curtailment of Dominion power by the judicial committee of the privy council was influenced by opinion in the Canadian provinces and that the rigidity of the Irish constitution, (as originally planned, was meant as a re-assurance to minorities.) There is plenty of evidence of this kind. Are we to suppose that the men who sought such safeguards were wholly deluded? The delusion may be on the side of those who fail to appreciate the danger of mere majority action, more especially in countries of wide expanse and diverse interests. Where fundamental rights are concerned, minorities cannot be expected to give way or to accept the continuance of a situation in which those rights are imperiled. They cannot usually, as in Great Britain, trust to a long historic tradition of fair play and compromise.

It is interesting to find how generally eminent writers of the last half-century have endorsed the advantages of a rigid constitution. To them such safeguards are by no means negligible. They provide "the first sedative for an over-excited state of the popular mind," says Theodore E. Woolsey.[1] "It is, therefore, an act of self-preservation for a society to make a constitution somewhat difficult to alter." W. E. H. Lecky holds that "placing serious obstacles in the way of organic changes" is absolutely essential to the safe working of democracy.[2] Harold J. Laski, a socialist, entertains the same view. "It may be added," he says,[3] "that an age which, like our own, has seen the classic safeguards of representative government thwarted on every side needs to reinforce its conviction of their urgency." Alluding to the situation under the late German Republic, Max Radin says: [4] "This facility of amendment had a deleterious effect. The heaping up of constitutional changes by simple votes of the *Reichstag* destroyed what Professor Lowenstein of Yale aptly calls the 'Constitutional conscience' of the nation, and rendered far-reaching and revolutionary changes by ordinance and *coup d'état* less shocking." Can it be, then, that as McBain and Munro seem to insist, there is no difference between flexible and rigid constitutions?

[1] *Political Science* (2 vols., 1893), vol. II, p. 108.

[2] *Democracy and Liberty* (2 vols., 1896), vol. I, p. 136. For his praise of the American Supreme Court, which places "all rights that men value the most" out of the reach of a tyrannical majority, see *ibid.*, p. 116.

[3] *A Grammar of Politics* (1925), p. 305.

[4] *Op cit.*, p. 129.

There is some obvious advantage in classifying constitutions on the basis of form. For the purpose of classification the most serviceable categories are those which have been discussed—dispersed or codified; flexible or rigid. No more illuminating tests have been devised. While using them, however, we need not suppose that they plumb social realities or determine social conduct. The rigid constitution of the United States did not cause secession and civil war; the flexible constitution of Great Britain did not prevent the arming of Ulster or the general strike. Political practice takes shape through man's reaction to tradition and environment; and a constitution, whether flexible or rigid in form, will somehow be adjusted to meet the needs of the community. If the words remain the same, their meaning alters. It is so with theology. Hamish Hendry's beadle finds God sadly changed:

> A God wha wadna fricht the craws;
> A God wha never lifts the taws;
> Wha never heard o' Moses' laws,
> On stane or paper:
> A kind o' thowless Great First Cause,
> Skinklin' thro' vapour.

CHAPTER XVI

NATIONAL STATES

THE State, as we have seen, embraces people, territory, and government. It is the government that actually wields the sovereignty of the State; the government is the seat of final authority—law-giver and law-enforcer—and has the means of compelling obedience to its commands. Government looms so large that when we speak of the "constitution" of the State, we commonly ignore people and territory except as these relate to the exercise of governmental power. The constitution may be viewed in two ways. In the last chapter it was viewed externally, as it were, the purpose being to find out, not the nature of the various political institutions, but how they are described and what means, if any, have been taken to protect the more fundamental of them from precipitate change. From that standpoint the constitution of the State is dispersed or codified, flexible or rigid.

In the second place, we look to the constitution for the forms of governmental organization. We can then proceed to classify States on a more realistic basis.[1] What are the more significant differences? We should not begin with superficial characteristics, any more than the ornithologist begins with the color of plumage or the botanist with

[1] It was the practice of German and American writers in the latter part of the nineteenth century—and many American writers still adhere to it—to make a capital distinction between sovereign State and subordinate government. This distinction is both arbitrary and false. The State, apart from its three elements, is a mere abstraction. Its government possesses the sovereignty (as already contended in the chapter on that subject); and government is organized hierarchically, with the sovereign agency at the top. The British parliament is an organ of government which can make or unmake any law, whether called a constitutional law or not. The national assembly of France, consisting of the two chambers of the legislature and convened at their instance, is an organ of government. The same thing is true of the legislatures and conventions used in amending the constitution of the United States; the process of amending the constitution or fundamental law is part of the machinery of government. Those who persist in a different view (which they call "scientific," but which seems quite theoretical and misguided) always get enmeshed in practical difficulties. Thus Professor J. W. Garner has to apologize for abandoning in practice his cherished distinction between State and government. He says (*Political Science and Government*, 1928, p. 241): "If that principle is departed from in the treatment of the subject here, it is in consequence of the desire to conform to popular usage, and is not to be understood as an admission that such usage is scientifically correct."

the size of leaves. Aristotle made no such error. He fastened upon a criterion which, properly applied, strikes deep into the realities of politics. He classified States as monarchies, aristocracies, and democracies, on the basis of the number of persons participating in the government. A second fundamental distinction has developed only in modern times: the distinction between unitary and federal States. It is based on the extent of local autonomy. Besides these two, the list should probably include: the relation of the executive to legislature and electorate; the relation of the civil service to the executive, of expert to amateur; and the relation of the judiciary to executive, legislature, and electorate.

So far, government alone has been considered for the purposes of classification. But the State also includes people and territory; and neither can be ignored in comparing, say, Siam and Russia, Belgium and Great Britain. Forms of government may seem to occupy a subordinate place beside other concerns: fighting strength; economic resources and activities; area, configuration, soil, climate, outlying dependencies; the size and density of the population, its energy, level of civilization, homogeneity. All these are attributes of the State, although commonly assigned to the field of the economist, the sociologist, or other specialist. Nor are differences of size and power and prosperity negligible; in a treatise on international relations they would occupy a prominent place. That they receive here only a passing mention is not simply a matter of tradition. Such criteria are difficult to apply as a basis of classification. While States can easily be grouped as monarchical or republican, unitary or federal, how many can be forced into the alternative molds of rich or poor soil, high or low death rate, mountain or prairie, literate or illiterate? By the application of these criteria information of great value would be obtained, but it would take the form of complicated tables of statistics.

One aspect of the population, nevertheless, cannot be overlooked—its homogeneity or heterogeneity; and in this, as we shall see, geography has played a part. When a population is homogeneous and animated by a strong sense of unity, it is commonly regarded as forming a nation. Here we have a significant basis for classification. Is the State a national State? Do the people within it belong overwhelmingly to a single nation or nationality, and is the whole of that nation included within the boundaries of the one State? The importance of nationalism is not disputed. Its beneficence is. Some eulogize, others excoriate it. During the past century and more it has been preached as

a gospel of justice and peace. Mazzini held it to be a necessary stage along the pathway to universal brotherhood. According to John Stuart Mill—who was, however, careful to make reservations [1]—"it is in general a necessary condition of free institutions that the boundaries of government should coincide in the main with those of nationalities." And again: [2] "There is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. Free institutions are next to impossible in a country made up of different nationalities." Many believe, like Mill, that nationalism has been closely connected with free institutions. "It has prepared the way," says Robert M. MacIver,[3] "for our modern democracies, since the demand for self-government expands into the demand that the nation really govern itself. The spirit of nationality has broadened the basis of the state." Woodrow Wilson was a complete partisan of self-determination. He held "that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development," and that "peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action." [4] Eight of his famous "Fourteen Points" dealt with this same principle.[5] Unlike Mill, he made no cautious reservations, and seemed oblivious to the manifold difficulties that would confront the application of so rigid a theory.

Others regard nationalism with the deepest aversion. To it they attribute the antipathies and wars of the last hundred years and the strained relations which endanger the peace of the world to-day.[6]

[1] *Representative Government* (Everyman's edition), p. 362. Mill adds: "But several considerations are liable to conflict with this general principle." He mentions geographical hindrances, where the population within a given territory is mixed or heterogeneous; and situations in which an inferior and more backward national group may be absorbed by another—to its own advantage. He says (p. 364): "Whatever really tends to the admixture of nationalities and the blending of their attributes and peculiarities in a common union, is a benefit to the human race." From the standpoint of nationalists this is the rankest heresy. Anthony M. Ludovici (*A Defense of Aristocracy*, 1915) advances a very interesting argument against such admixtures. He seeks to show that it weakens what we call will-power.

[2] *Ibid.*, p. 361.

[3] *Society: Its Structure and Changes* (1931), p. 69.

[4] Addresses of January, 1917, and February, 1918.

[5] Address of January 8, 1918.

[6] "But the guns would not go off..., if the people of the several countries were not thoroughly imbued with the sentiment and creed of nationalism, with the conviction that therein they are the champions of a lofty and transcendent

Nationalism does not, they say, find satisfaction in the achievement of nationhood. The aggressive spirit that has been generated during the preliminary agitation and uprisings persists—and, in fact, increases—after independence has been won. The new national State displays pride and arrogance, and a susceptibility to the slightest real or imagined affront. Economic quarrels ensue and lead to a policy of economic nationalism, which may make some approach toward self-sufficiency and isolation. Imperialism—the acquisition of dependencies and the exploitation of backward peoples—is likely to follow. In the meantime, the discovery is made that fragments of the nation still lie outside the State and that there are territories to be "redeemed." These fragments, instead of dominating the area in which they live, may be mingled with other people and outnumbered by them; or they may entertain no national aspirations, being contented with things as they are. Nevertheless, irredentism finds plausible grounds for intervention. If the plea of rescuing oppressed members of the nationality cannot stand alone, it will be supplemented with arguments of a military or economic order—perhaps the need of a more defensible frontier or of an outlet to the sea. Nationalism, the critics say, arouses sympathy at the outset by its aspirations for freedom, and later, moving round the circle, tries its hand at subjugating others.[1]

These are by no means the only grounds of criticism. Lord Acton holds that "the progress of society depends on the mixture of races under the same government."[2] On the one hand, nationalism, "overrules the rights and wishes of the inhabitants, absorbs their divergent

idealism. The masses, now as ever, must bear the brunt of fighting, and it is improbable now as ever that the masses in any country, if they were appealed to only on economic grounds, could be persuaded to fight the masses of another country.... Nationalism, unless it be rendered critical instead of ignorant, humble instead of proud, does not promise, despite its proved modernity, despite its admitted idealism, to promote real human progress. It promises not to unify, but to disintegrate, the world; not to preserve and create, but to destroy civilization." C. J. H. Hayes, *Essays on Nationalism* (1926), pp. 132-133. On page 137 Professor Hayes says: "But a close scrutiny of the nationalist wars of the nineteenth and twentieth centuries is hardly calculated to reassure us; it is more likely to engender in our minds serious doubts whether the recasting of political geography on national lines has actually promoted either humanity or justice and whether nationalism is a reliable harbinger of a quieter and better world in the immediate future."

[1] "Thus, nationalist warfare, beginning as a struggle for human freedom, may soon lead on to a struggle for conquest and domination of dissident nationalities. And invariably such domination is excused on the grounds that the conquered regions were once inhabited wholly by persons of like nationality with the conquerors or that the conquerors represent a higher civilization or that the regions are needful for the military safety or economic security of the conquering state." Hayes, *op. cit.*, p. 140.

[2] *The History of Freedom and Other Essays* (1907), p. 295.

interests in a fictitious unity, sacrifices their several inclinations and duties to the higher claim of nationality, and crushes all natural rights and established liberties for the purpose of vindicating itself." [1] On the other hand: "The combination of different nations in one state is as necessary a condition of civilised life as the combination of men in society. Inferior races are raised by living in political union with races intellectually superior.... The fertilising and regenerating process can only be obtained by living under one government. It is in the cauldron of the State that the fusion takes place by which the vigour, the knowledge, and the capacity, of one portion of mankind may be communicated to another." [2]

WHAT IS A NATION?

No matter what may be said for it or against it, nationalism has played a foremost part in modern history. The literature dealing with it, in English alone, has grown to formidable proportions. That growth was greatly accelerated by certain questions bound up with the World War and the settlement at Paris. During the last twenty years the character and history of nationalism have been explored more frequently and thoroughly than ever before.[3] The word "nationalism" is used here to denote the spirit and feelings that animate a nation or nationality, the aspiration to achieve national unity and independence, and the desire to maintain these when they have been won. Such a definition will meet with general acceptance.[4] But in spite of all that has been written about nationalism, the meaning of the terms "nation" and "nationality" still remains controversial.

How shall we find out what a nation is? We know what a table is,

[1] *Ibid.*, p. 288.

[2] *Ibid.*, p. 290.

[3] Consult for example: Ernest Barker, *National Character* (1927); H. A. Gibbons, *Nationalism and Internationalism* (1930); G. P. Gooch, *Nationalism* (1920); C. J. H. Hayes, *Essays on Nationalism* (1926) and *The Historical Evolution of Modern Nationalism* (1931); S. Herbert, *Nationality and Its Problems* (1920); B. Joseph, *Nationality: Its Nature and Problems* (1928); Sir Arthur Keith, *Nationality and Race* (1920); Ramsay Muir, *Nationalism and Internationalism* (1917); W. B. Pillsbury, *The Psychology of Nationality and Internationalism;* J. H. Rose, *Nationality as a Factor in Modern History* (1916); A. E. Zimmern, *Nationality and Government* (2nd ed., 1919). The most serviceable of these, and among the highest in quality, are the books by Barker, Hayes, and Muir. Keith has a particular importance because he offers an ethnological explanation of the phenomena of nationalism.

[4] Professor Hayes accepts it (*Essays on Nationalism,* 1926, p. 6). He also defines "nationality" as "a group of people" united in a particular way (pp. 5 and 21). But, though careful in defining his terms, he is very careless in using them. He frequently uses "nationality" in the sense of "nationalism," referring to a condition of mind, not a group of people (for example, on pages 8, 12, 13).

because we have frequently looked at such an article of furniture and heard it called a table. We have learned to identify amethysts, pearls, and rubies by seeing them on ladies' hands or in jewelers' windows and hearing their names. We get our knowledge of lions and elephants from circus and zoo rather than dictionary or book on wild animals—from the thing itself rather than a description of it. Why not find out the characteristics of nations by inspecting a few of them? Perhaps we turn first to the Swiss, having heard many peoples (authorities like Mill and Muir included) [1] speak of them as a nation. Zimmern waves us away: [2] Switzerland, he contends, is a supra-national commonwealth. According to Hayes, "the real fact remains that the citizens of Switzerland differ in social consciousness and in certain elements of culture" as their language differs; "despite artificial attempts to promote a sense of solidarity, akin to nationality, among the Swiss," they do not form a nation.[3] Hayes regards a common language as an essential attribute of nationality. Ernest Barker, on the other hand, seeks to prove that linguistic unity is by no means an essential; and he does so on the ground that the Swiss, though falling into at least three groups on the basis of language, undoubtedly rank as a nation.[4] Similarly, with the Belgians, Hayes again opposing Mill and Muir.[5] Zimmern holds that the Jews constitute a nation, because, though scattered, they have a peculiar affection for Palestine; [6] Barker denies it, on the ground that "the true nation has a home"; [7] and MacIver denies it on the ground that a true nation seeks political autonomy.[8] As to the Scottish and Welsh, some call them nations; [9] Barker calls

[1] Mill, *op. cit.*, p. 360; Muir, *Nationalism and Internationalism* (1917), p. 44. Mill says: "Switzerland has a strong sentiment of nationality, though the cantons are of different races, different languages, and different religions."

[2] *Nationality and Government* (1919), p. 49.

[3] *Essays on Nationalism* (1926), p. 15.

[4] *National Character* (1927), p. 13.

[5] All three, *loc. cit.* Mill says: "The Flemish and Walloon provinces of Belgium, notwithstanding diversity of race and language, have a much greater feeling of common nationality, than the former have with Holland, or the latter with France." Recent dissension in Belgium would seem to vindicate Hayes.

[6] *Nationality and Government* (2nd ed., 1919), p. 52.

[7] *Op. cit.*, p. 15. "The Jews are not a nation, any more than they are a race; they are a church and a culture."

[8] *Society; Its Structure and Changes* (1931), p. 66. Yet five years earlier, in *The Modern State* (1926), p. 123, MacIver seems to take a different position: "In fact scarcely any two nationalities seem to find their positive support in the same objective factors. The Swiss have no common language, the Jews no common territory...." Thus, he appears to regard the Jews as a nation. Cf. Gilchrist, p. 27: "A nationality may be none the less real though it does not wish to become a complete organic state."

[9] Muir, p. 44; Zimmern, p. 54.

them nations of the first degree, forming part of a nation of the second degree (Great Britain); [1] Hayes calls them sub-nationalities.[2] Gilchrist says that they are in the process of losing their nationality and being fused in a greater whole.[3] From these considerations, it must be obvious that, in seeking the characteristics of nation and nationality, we cannot start with the thing itself. We must find out, first of all, whether the thing that we are looking at and preparing to analyze really is a nation. It is necessary to discover, if possible, what the terms mean according to the best usage.

Now, the word "nation" may be used correctly in a number of different ways. Inter*national* law, for example, is the equivalent of inter*state* law; the word "nation," as employed in that branch of politics, is the synonym for State, and has nothing to do with the character of the population.[4] The League of Nations is a league of States. This is a later or derived meaning of a term that originally implied, as its etymology suggests, relations of birth and kinship (*nasci,* to be born; *natus,* born; *natio*). Some writers deplore this ambiguity. They try to escape from it by using a newer word, "nationality," as a substitute for "nation" in its original sense. Thus, according to Hayes,[5] a nationality is a culturally homogeneous group; if it acquires political unity and sovereign independence, it becomes a nation, establishes a national State. By this arbitrary manipulation of the word, ambiguity is removed at one point—or, rather, as we shall see, mistakenly thought to be removed—only to reappear at another. The nation which the nationality forms is by no means the nation or State of international law. "It is," as Gilchrist, one of the manipulators, has to confess,[6] "the state *plus* something else, the state looked at from a certain point of view—viz., that of the unity of the people organized in one state." Why, then, use the word "nation" for this purpose? According to the best usage, we ought to say that a nation or nationality that forms a State sets up a *national State.*

[1] *Op. cit.,* p. 17.
[2] *Op. cit.,* p. 21.
[3] *The Principles of Political Science* (3rd ed., 1927), p. 27.
[4] A "national" according to the vocabulary of international law, is the subject or citizen of a State, or else a person who, lacking that character, is, nevertheless, protected by that State; and "nationality" is the condition of being a national —that is, belonging to a particular State.
[5] *Op. cit.,* p. 5. In his *Impressions of South America* (1913, p. 424), Bryce takes a similar position. A nation, he says, is "a nationality which has organized itself into a political body, either independent or desiring to be independent." Inconsistently, Hayes uses the adjective "national" along with "nationality," creating a new confusion. In earlier works he used the term "nation."
[6] *Op. cit.,* p. 26.

If we did arbitrarily abandon and forget the original meaning of "nation" and take similar liberties in other directions, what confusion would result! How strange the phrasing of yesterday would seem! Durham's Report would require a glossary of obsolete terms. "I expected to find a contest between a Government and a people," he wrote. "I found *two nations warring in the bosom of a single State;* I found a struggle, not of principles, but of races." Israel Zangwill entitled his Conway Lecture *The Principle of Nationalities* and, except in two or three instances, avoided the word "nation." But Percy Alden, the eminent chairman who introduced him, gave "nation" and "nationality" the same import and mourned the looseness of speech which confused nation and State. The Finland and Poland of 1917 were, he said, nations but not States; Austria-Hungary was a State, but not a nation.[1] Was Percy Alden conforming with good usage? Any serious examination of the literature of nationalism will show that relatively very few writers of high reputation support the position of Professor Hayes. Some writers use "nation" and "nationality" as convertible terms; but the preference for "nation" is beyond any question, and no less clear at the present time than in the past. Barker, Muir, and Zimmern may be offered as examples.[2] French writers show the same inclination. Half a century ago Ernest Rénan lectured at the Sorbonne in answer to the question, "What is a nation?"[3] To-day Léon Duguit insists that Italy was a nation before achieving political unity and that Poland did not cease to be a nation when politically dismembered or become a nation when politically reunited and given sovereign independence in 1919.[4]

The conclusion is that "nation" and "nationality" are interchangeable terms, the former being of earlier origin and generally preferred. Both connote a homogeneous group aspiring to set up an independent State or having done so. The State which it establishes is a "national State," a State coterminous with a nation. Now, the use of the word "nationality" in place of the word "nation" has been urged as a means of avoiding conflict with the terminology of international law. But the only effect of compliance would be to exchange one conflict for another: international law uses the word "nationality"—British nationality, Turkish nationality—to indicate the condition of membership in a State. This has led to misunderstanding and confusion. A few writers have

[1] *The Principle of Nationalities* (1917), p. 5.
[2] See, for instance, *op. cit.*, Barker, p. 17; Muir, p. 38; Zimmern, p. 52.
[3] *Qu'est-ce qu' une nation?* (1882).
[4] *Traité de droit constitutionnel* (2nd ed., 5 vols.), vol. II (1923), p. 5.

fallen into the strange error of applying the term "nationality," not to a group of persons, but to a peculiar principle or sentiment that actuates the group. Nationality is to J. Holland Rose "an instinct, a spiritual conception;" [1] to MacIver "a sense of community," "a type of community sentiment, a sense of belonging together"; [2] to Gilchrist "a spiritual sentiment or principle;" [3] to Harry Elmer Barnes "the collective name given to that complex of psychological and cultural forces which furnishes the cohesive principle uniting a nation;" [4] to Zimmern "a form of corporate sentiment." [5] There is no authority for such usage. The spiritual conception or complex of forces already has a name. That name is "nationalism." It is interesting to note that the authors just quoted do not agree among themselves. Barnes and Zimmern maintain that nationality is the principle that holds nations together.[6] The others, forgetting their definitions, afterwards refer to nationalities as groups, not as principles or sentiments.[7] All these writers overlook the fact that, in the latter sense, "nationalism" is the correct word to use. It should be noted that "nationality" may be used to indicate the condition of being a nation, as in the phrase "the Poles never lost their nationality;" or the condition of belonging to a nation—"a man of Italian nationality." It may also refer to a part of a nation that forms a minority group in any State—"the Magyar nationality in Jugoslavia." [8]

For the purposes in hand "nation" and "nationality" will be used as synonyms, the terminology of international law not being apposite. How do the writers define a nation? It is, says *Mill*,[9] a portion of mankind "united among themselves by common sympathies which do not exist between them and any others—which make them coöperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively." Beside Mill, whose definition dates back to 1861, the student should place at least a dozen others for purposes of comparison. Here it is perhaps sufficient to quote a few contemporaries. (1) *Muir:* "a body of people who feel

[1] *Nationality as a Factor in Modern History* (1916), p. 147.
[2] *The Modern State*, p. 123; *Society: Its Structure and Changes*, p. 66.
[3] *The Principles of Political Science*, p. 26.
[4] *World Politics in Modern Civilization* (1930), p. 7.
[5] *Nationality and Government* (2nd ed., 1919), p. 52.
[6] Barnes, p. 8; Zimmern, p. 52.
[7] See, for example, Gilchrist, p. 27; or MacIver (*The Modern State*), p. 123.
[8] See J. W. Burgess, *Political Science and Comparative Constitutional Law*, vol. I, p. 5.
[9] *Representative Government* (Everyman's ed.), pp. 359-360.

themselves to be naturally linked together by certain affinities which are so strong and real for them that they can live happily together, are dissatisfied when disunited, and cannot tolerate subjection to peoples who do not share their ties."[1] (2) *Barker:* "a body of men, inhabiting a definite territory, who normally are drawn from different races, but possess a common stock of thoughts and feelings acquired and transmitted during the course of a common history; who on the whole and in the main, though more in the past than in the present, include in that common stock a common religious belief; who generally and as a rule use a common language as the vehicle of their thoughts and feelings; and who, besides thoughts and feelings, also cherish a common will, and accordingly form, or tend to form, a separate state for the expression and realization of that will."[2] (3) *Hayes:* "a group of persons who speak a common language, who cherish common historical traditions, and who constitute, or think they constitute, a distinct cultural society in which, among other factors, religion and politics may have played important though not necessarily continuous rôles."[3] (4) *Zimmern:* "a body of people united by a corporate sentiment of intensity, intimacy and dignity, related to a definite home country."[4]

These definitions, which may be accepted as representative of the great mass, show a good deal of similarity. They emphasize "common sympathies," "a corporate sentiment," "certain affinities"—in fact, a sense of solidarity as opposed to other groups. At first sight, they seem to bear out Muir's statement that "a nation is a nation because its members passionately believe it to be so."[5] Zimmern uses almost the same words.[6] Muir himself adds, however, that people can hold such a belief only "if there exist among them real and strong affinities"; and he tells us what the ties of affinity should be.[7] We have already seen that, on the basis of the definitions alone, different views are taken of the status of the Swiss, the Belgians, and the Jews. But it is when details are brought forward, when the definitions are amplified and then applied to concrete cases, that disagreement becomes manifest. The situation may fairly be expressed like this: while the sentiment of separate identity is the key to nationalism, the existence and strength of the sentiment rests on certain ties of affinity; and, when the more

[1] *Op. cit.*, p. 38.
[2] *National Character*, p. 17.
[3] *Essays on Nationalism*, p. 21. On page 5 he gives a slightly different definition.
[4] *Op. cit.*, p. 52.
[5] *Op. cit.*, p. 51.
[6] *Op. cit.*, p. 54.
[7] *Op. cit.*, pp. 38-49.

powerful of these ties are lacking, nationalism is correspondingly weakened and its permanence rendered uncertain.

THE BACKGROUND OF NATIONALISM: KINSHIP

To understand nationalism, therefore, it is necessary to look for the factors in its growth. Mill's enumeration of them may be taken as a starting point. "This feeling of nationality," he says,[1] "may have been generated by various causes. Sometimes it is the effect of identity of race or descent. Community of language, and community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents of the past. None of these circumstances however, are either indispensable, or necessarily sufficient by themselves." [2] Thus, the elements of homogeneity that make for nationalism are; (1) common race or descent, (2) common language, (3) common religion, (4) occupation of a geographical unity, and (5) common memories of the past. Mill probably meant to include no more than this last under "common political antecedents;" but it is customary, nowadays, to note the influence of the State, which in some cases played a great part in assimilating diverse groups. We must add, therefore, (6) common government. Finally, a place must be given to (7) common economic interest, even if it rarely acts as a causal factor and, on the other hand, is frequently sacrificed to national aspirations.

(1) In place of Mill's identity of race and descent, "kinship" will be used here. Any one who speaks of race lays himself open to the imputation of ignorance or to charges of heresy if he deviates at all from the rigid doctrine of the anthropologists; for their creed, being relatively new and rather obscure, is recited as fervently as if it contained the Athanasian formula—"which faith unless a man do keep whole and undefiled, without doubt he shall perish everlastingly." But throughout most of the nineteenth century a different faith prevailed. It was the gospel according to the philologists. They classified languages and the people who spoke them. There were the Romance languages, the Celtic, the Teutonic, the Slavonic, all of them being related and grouped

[1] *Op. cit.*, p. 360.

[2] Cf. MacIver, *The Modern State*, p. 123: "No one of the social possessions of mankind, whether language or distinctive customs or religion or territory or race-consciousness or economic interest, nor even the traditions of political life, is inseparable from it. In fact scarcely any two nationalities seem to find their positive support in the same factor."

together as Aryan or Indo-European languages. It was assumed that ties of language implied ties of blood. They commonly referred to the Semitic race or the Celtic race or the Aryan race; and, to the profound irritation of anthropologists, many scholars still do so.[1] This linking of language with race can find very little justification. What linguistic affinity indicates is contact between the peoples concerned. The degree of affinity should reflect the intimacy of contact. When peoples who are living apart speak the same language, it seems to follow that their ancestors lived together and consequently intermarried. Kinship of language would then mean kinship of blood. But it may mean nothing of the sort, as demonstrated by the case of the American negro. This is one capital objection to Max Müller's philological system of races. There is another: the son does not inherit familiarity with his father's language. How can a classification of races be stable if it is based on mere experience as contrasted with heredity? [2]

[1] Aside from the broadest divisions—the whites and blacks, for example—the races of the anthropologists do not figure as such in history. The books do not tell us about a Nordic invasion of this country or an Alpine invasion of that. But all of us recall the conquest of the Iberians by the Celts, and of the Celts by the Teutonic Angles and Saxons. It is all very well to master the lingo of the anthropologists. How can it be applied in every-day matters? So we find an eminent biologist, like S. J. Holmes, distinguishing between the Latin "races" and the Teutonic and Slavic "races" (*The Trend of the Race*, p. 218); or an eminent historian, like Ernest Barker, taking a chapter to show that there is no Teutonic or Slavonic race and then, forgetful of head-measurements and hair-texture, talking about Celtic Britain and Saxon England (*National Character*, p. 56). Ramsay Muir alludes to the Teutonic and Celtic "races" (*Nationalism and Internationalism*, p. 39). These scholars are not guilty of the "blissful ignorance" which Professor Hayes attributes to such heresy (*Essays on Nationalism*, p. 66).

[2] That language is a poor test of blood-relationship is now acknowledged. But there is no ground whatever for thinking that a people who possess linguistic unity may not exhibit peculiar qualities, utterly unrelated to race. Indeed, there is ample proof to the contrary. Compare the Greeks and the Romans, the French and the English. On the other hand, no correlation exists between head-measurements or pigmentation or hair-texture and mental character; people belonging to the same race have afforded a sharp contrast in mentality. Now, Hippolyte Taine, over seventy years ago, when race was generally defined in philological terms, advanced the hypothesis that the mingling of Celt and Saxon had given a peculiar quality to English literature. Such an hypothesis is "quite untenable," declares Professor Hayes (*Essays on Nationalism*, pp. 66-67). Why? Because Taine "was confusing a linguistic group with a biological one." That is a strange logic. Taine was right or wrong in ascribing certain qualities to these peoples. The qualities were there or not there. It does not change Celts and Saxons to give or withhold the title of race. Hayes continues, however: "But literary historians, and littérateurs in general, have gone on in blissful ignorance of scientific anthropology." He should not have specified *literary* historians; for his own two-volume work—*A Political and Social History of Modern Europe*—exhibits just that same "blissful ignorance." He tells us there about the "numerous races" of the Dual Monarchy; the "social animosities" between Magyars, Rumans, and Serbo-Croats in Hungary, and the "racial antipathies" in Switzerland. In 1916 he had not yet become acquainted with "scientific anthropology."

A sound classification should depend upon factors that are at once constant and transmissible. Zoölogy and botany, which are branches of biology, make use of physical marks of difference; and anthropology, as a branch of zoölogy, has imitated that method. It ignores mental and cultural traits.[1] The chief anthropological criteria relate to the skin, the hair, and the skull. Skin-color or pigmentation and hair-texture, both of which must have had a climatic origin, have been recognized as tests of race from time immemorial. They remain to-day the most obvious and convenient means of distinguishing the broadest divisions of mankind, sometimes known as Caucasian, Mongoloid, Negroid, and Australoid. Hair may be straight and round (leiotrichous), wavy and elliptical (cymotrichous), woolly and flat or ribbon-like (ulotrichous).[2] The head or skull, as it appears when inspected from above, is measured in order to get the cephalic or cranial index, which shows the ratio of breadth to length. The latter is taken as 100. Heads are narrow (dolichocephalic) when the ratio falls below 75, broad (brachycephalic) when it exceeds 80, and otherwise medium (mesocephalic). Head-measurement has become the chief tool of the anthropologists because of its applicability to dead and living alike and because of its alleged constancy. Other well-known tests relate to stature, face, forehead, eyes, and nose. The nasal index is obtained by comparing the breadth (across the nostrils) with the length (from the root to the junction with the upper lip).

One might suppose that, with this apparatus of criteria and the zeal of the field-workers, controversy must have been set at rest. Not at all. Some authorities insist that the Jews constitute a race; others deny it utterly. A scheme of classification that finds a place for an Alpine race and none for a Jewish race naturally comes under suspicion. The layman cannot distinguish the Alpine type; but for thousands of years he has been able to identify Jews, however widely they have been dispersed.[3] The anthropological tests give such dubious results—results

[1] "A classification based on culture may be of interest to the sociologist, but it is obviously one which can have no prime importance in regard to genetic relationship, though it may indicate the influence of peoples upon one another. There is no such thing as racial culture. The culture of any given people is primarily dependent upon their mode of life, which is in itself largely an expression of geographical conditions." A. C. Haddon, *The Races of Man and Their Distribution* (rev. ed., 1924), p. 2.

[2] As to the color of the hair, there is the greatest diversity in Europe, though black predominates, especially in the south and center. Outside of Europe and parts of northern Asia, it is black, often with a brownish or reddish tinge.

[3] In ninety per cent of the Jews, says Arthur Keith (*Nationality and Race*, 1920, p. 19), the physical or semitic characters are apparent to the eye even of the uninitiated gentile.

of such slight significance in human affairs—that they may eventually share the fate of the philological tests. After all, while physical characters may serve well enough in classifying poultry or cats, they may not be appropriate in classifying men; at all events the particular ones that the anthropologists have selected are not sufficiently revealing. Moreover, the physical characters are much less constant than they were once supposed to be. They change under the influence of environment. Augustus Keane established the fact that, in two generations, German settlers in the region of Tiflis, acquired brown eyes in the place of blue and dark hair in the place of light, although they did not intermarry with the natives. Thomson and Buxton correlated the nasal index with climate; the index is high where the air is moist and hot, low where the air is cool and dry. Hence Haddon's comment that "the nasal index loses much of its significance as a purely ethnic character." [1] Even the much-vaunted cephalic index has been under fire. When they emigrate to the United States, Boas found, Russian Jews become markedly more dolichocephalic, and Italians less so, within a single generation. Such revelations have led to a loss of confidence. Anthropologists are searching for more reliable tests. They begin to talk about the reactions of blood sera and the effect of the ductless glands upon anatomical characters.

There is at least room for suspicion that most of the anthropological criteria are related to the effects of environment. In this respect the nasal index is not peculiar. In the Old World skin-color tends to vary with distance from the equator; and the more numerous exceptions in the New World may, perhaps, be explained by migration and the time-element. Gradations in color have a protective value, white keeping the heat in the body, black resisting the rays of the sun. Resistance to these rays is also offered by flat, woolly hair. Unless conditions are severe, an open, wandering life increases stature. The prominent jaw—anthropologists distinguish between prognathous and orthognathus types—may result from the mastication of certain foods. Is environment responsible for broad nostrils, black skin, and other physical traits? There is, says Professor Haddon,[2] "good evidence that climatic conditions have indirectly become impressed on the germ-plasm so that definite responses have become heritable."

Everyone admits that such adaptations have occurred. Can we assign them to a remote time when the human breed was more variable, the

[1] *Op. cit.*, p. 145.
[2] *Op. cit.*, p. 139.

tissue more plastic and susceptible? Can we suppose, for example, that the dark skin, which, for generation after generation, each individual acquired through exposure to the sun, in the end became transmissible? Biologists overwhelmingly reject the theory of the inheritance of acquired characters.[1] But they admit that in another way environment may affect heredity through natural selection. For some unknown reason —perhaps chemical changes in the germ-cells or the mating of unlike persons—sports or mutations appear, sometimes representing a wide divergence of type. If, by spontaneous variation, fair-skinned parents, who have migrated towards the equator, give birth to a dark-skinned offspring, his pigmentation will have survival value as better fitted to sustain the solar heat. But, while mutations may give a partial answer, they do not meet the question raised by Boas' measurement of Jewish and Italian heads in the United States. Such phenomena explain the strange persistence of a theory that expert opinion has condemned. "The common-place assertion is," says Jennings,[2] "that the inheritance of acquired characters is disproved; that no competent investigation harbors the doctrine; that the matter is out of court, no more to be considered. Yet the recent and present technical literature of zoölogy abounds in experimental investigations devoted to this question. Eminent authorities have been heard to assert that most biologists incline toward belief in the inheritance of acquired characters. Investigators summing up the evidence have affirmed that almost all experimentation directed on the matter supports the inheritance of acquired characters. Opposition to the doctrine, it is sometimes asserted, is due, not to scientific evidence, but to a reactionary desire to hold back social progress."

We now understand what race is, in the anthropological sense. It seems to have little significance except as to the broad divisions of mankind, which have always been familiar. No fresh light would be shed upon history if we did know the cephalic and nasal indexes of the Scythians, the Carthaginians, and the Moors who followed Tarik to Spain. Race has nothing to do with the mental endowments of a people or with their culture. But it is an error to suppose that race has nothing to do with nationalism. "A myth likewise," says Hayes,[3] "is the notion ... that nationality is determined by race"; "every modern nationality

[1] For example, H. S. Jennings, *The Biological Basis of Human Nature* (1930), pp. 342-347; E. M. East, *Heredity and Human Affairs* (1929), pp. 124-133; E. G. Conklin, *The Direction of Human Evolution* (1921), p. 14.

[2] *The Biological Basis of Human Nature* (1930), p. 342.

[3] *Op. cit.*, p. 8.

consists of racial mixtures." What Hayes overlooks is that these mixtures do not bring together white and black and yellow people, that is, races that are obviously quite distinct. There is a "color line"; but no scandal occurs when a prognathous man marries an orthognathous woman. Members of the Nordic, Alpine, and Mediterranean races (if such really exist) might easily combine into a nation; but equal parts of white or black could not do so, and the millions of negroes in the United States weaken national solidarity. Therein lies the importance of race to nationalism. Muir is correct in saying that "some degree of racial unity is almost indispensable for nationhood."[1]

We keep hearing that all races are mixed. Broad heads and narrow heads, blue eyes and brown eyes, yellow hair and black hair are found in the same English community. Does this imply absence of kinship? The same variations appear in a single family and among cousins, second cousins, etc. Yet all these are related in blood. In the nation at large, through centuries of intermarriage, a kinship-group exists; it exists unless really distinct races have been brought together (say Caucasian and Negroid), or unless there are other bars to social intercourse and marriage, such as a different language or a different religion, or a long tradition of hostility.[2] The millions of French-Canadians are all of one blood. They have descended from some six thousand colonists, mostly Normans and Bretons, and kept their stock free from infiltration of English blood.[3] Their passionate nationalism has produced a national literature, a national holiday, a national flag (the lily flag of the Old Régime with a bleeding sacred heart in the center), and a stirring national anthem—"O Canada, terre de nos aïeux." No doubt, the inhabitants of Sussex are more closely related to each other than to the inhabitants of Cornwall or Lancashire; and the inhabitants of England more closely related to each other than to the inhabitants of Scotland. But there is a large measure of consanguinity throughout the British nation, no feeling of repugnance to its continuous growth, and a popular belief that the nation is one big family. Professor Barker forgets this when he says: [4] "A nation is not a physical fact of one blood, but a mental fact of one tradition. A gulf is fixed between the race and the nation. The one is a common physical

[1] *Op. cit.*, p. 39.

[2] On Pitcairn Island the mutineers of the *Bounty* mated with the women they had brought from Tahiti. These diverse races have produced a uniform stock, it is said, which breeds true to type. What has happened on Pitcairn Island is happening on a larger scale on the island of Great Britain.

[3] E. M. Sait, *Clerical Control in Quebec* (1911), chapter II.

[4] *National Character*, p. 12.

type: the other is a common mental content." Like everything that Professor Barker has written, this is finely expressed; but it betrays his tendency to subordinate the historical record to theoretical assumptions. Kinship was the chief binding force in primitive society and a necessary precedent to the origin of the State.[1] To-day it is one of the main elements in nationalism and, as will be explained later on, likely to be more significant in the future.

LANGUAGE, RELIGION, GEOGRAPHY

(2) Common language, on theoretical grounds, must be given a foremost place in developing national sentiment. It makes possible the exchange of thoughts and feelings and the growth of tradition, at first through folk-songs and folk-tales and later through a written or printed literature. Experience confirms theory. "There is," says Muir,[2] "nothing that will so readily give unity to divergent races as the use of a common tongue, and in very many cases unity of language and the community of ideas which it brings, have proved the main binding force in a nation." Thus, between the north and south of Italy there is scarcely any racial affinity; but the two are bound together by a common language, standardized by a great literature. Ernest Barker finds "the closest of affinities between nation and language. Language is not mere words. Each word is charged with associations that touch feeling and evoke thoughts. You cannot share their feelings and thoughts unless you can unlock their associations by having the key of language. You cannot enter the heart and know the mind of a nation unless you know its speech. Conversely, once you have learned that speech you find that with it and by it you imbibe a deep and pervasive spiritual force."[3] Hayes gives language a clear preëminence over all other factors.[4]

According to Hayes, as has been shown, neither Swiss nor Belgians constitute a nation.[5] Barker argues that, because the three linguistic groups in Switzerland form a nation, common language is by no means

[1] See Chapters VII and VIII. Herodotus somewhere defines a nation as being constituted by common blood, customs, and religion.

[2] *Op. cit.*, p. 43.

[3] *Op. cit.*, p. 13.

[4] *Op. cit.*, pp. 13-14.

[5] In his desire to dissociate race from nation, Hayes observes (p. 8) that "the peoples of India, who of late have been developing a consciousness of nationality, are a veritable hodge-podge of racial strains." He overlooks the fact that India is still more a hodge-podge of languages and dialects. Indian representatives at the Paris peace conference had to use English as a means of communication. The same difficulty is experienced at the National Congress.

indispensable. The general, and doubtless the correct, view is that diversity in language greatly weakens nationalism. It is not language alone that creates a French-Canadian nation in Canada, but race, religion, and traditions as well. Otherwise, when greatly outnumbered, the French-Canadians would have adopted the language of their conquerors. Still more would that have been true of the little remnant of Acadians, now grown powerful in numbers and solidarity.[1] It seems not impossible that in the future Quebec, with part of Ontario, the Maritime Provinces, and even a part of New England will form a national State of one blood, one speech, one religion, and one history. Even now Canada can hardly be called a national State. But if diversity of language, like diversity of blood, weakens nationalism, linguistic unity does not always bring national unity. It has not united the Irish with the British, the Walloons with the French, the Austrians with the Germans, not to speak of the Swiss of French and German speech. Spanish Americans show no disposition to join the Spaniards or even to consolidate in South America. English speech has not prevented the growth of an American nation. In this connection, Professor Hayes observes that "the use of the English language in the United States tends to link American thought and action with that of England and at the same time to obstruct the growth of an absolutely American nationality.... Time alone will tell whether the American nationality is truly distinct from the English, and the French-Canadian from the French."[2] But three thousand miles of ocean apparently do not enter into his calculations, for he denounces the geographical factor as a "myth."[3] From the standpoint of the French-Canadians, religion also enters in. It is the literature and flag of the old régime that Quebec cherishes.[4] Zola and the tri-color are identified with atheism.

Language is important, not conclusive, as a factor in nation-building. Its importance is seen in education, in business, in social intercourse, in military organization, and much besides. Hence the frequent efforts to

[1] In 1755 the Acadians were dispersed, many being taken to Louisiana. So few remained in their old homes that Longfellow could say, when he wrote "Evangeline":

"Only along the shore of the mournful and mystic Atlantic
"Linger a few Acadian peasants."

Strengthened by some immigration from Quebec, they formed a quarter of the population of New Brunswick by 1901. E. M. Sait, *Clerical Control in Quebec* (1911), p. 65. Before the middle of the century they will control the province by a considerable majority. Race, religion, and tradition have played a larger part than language.

[2] *Op. cit.*, p. 15.

[3] *Ibid.*, p. 8.

[4] E. M. Sait, *Clerical Control in Quebec* (1911), chapter V.

assimilate linguistic minorities.[1] Hence, too, the frequent efforts to revive among a people with nationalistic inclinations a drooping language that is peculiarly its own. We recall the revival of the Greek and Czech languages in the early part of the last century. French-Canadians have long been employed in purifying their seventeenth-century language and expelling anglicisms. The attempt of the Irish Free State to make Erse or Gaelic once more the vehicle of Irish speech and literature seems to be a hopeless enterprise, like reanimating a corpse; it is also quixotic, since it will narrow the national horizon, impede business, and further alienate Ulster.[2] However, nationalism is always ready to face red entries in its ledger.

(3) Writers are inclined to lay little stress on religion as a contemporary factor. "Sameness of religion was once a most potent factor in national development," says J. W. Burgess,[3] "but the modern principle of freedom of religion has greatly modified its influence." He should have combined with the modern principle of religious freedom the modern decline in religious faith. In remote times, if kinship was the chief binding-force of society, religion was closely identified with it. Religion, as well as kinship, welded together the ancient nations. "One of the national perquisites of the Jew," says Professor Pillsbury,[4] "was to walk and talk with God, part of his pride was in having a just God as almost his own peculiar privilege. As in many other cases, it is difficult to determine whether nation or religion comes first. Sometimes one obtains the impression that God was just because he was the God of the Jews rather than that the Jews were a marked and peculiar people because of their relation to God. If one were to trace the feeling to its origin, it is probable that we would find that God had grown into the affection and respect of the race because He was the God of the ancestors.... Religion and race were closely connected."

The rise of the so-called world religions was inimical to nationalism.[5] The Catholic Church, for example, transcended national frontiers and

[1] Such was the policy of the German imperial government in Posen, Schleswig-Holstein, and Alsace-Lorraine.

[2] Here, as in other cases, the revival of a language is preceded by the rise of nationalism. Yet Professor Hayes says (p. 14): "The formation of most modern nationalities has been historically dependent upon the development of particular languages." The formation of a British nation has been partly dependent on the *loss* of a particular language by the Scottish and Welsh.

[3] *Political Science and Comparative Constitutional Law* (2 vols., 1890), vol. I, p. 2. Barker says (*op. cit.*, p. 14): "None the less, if we take any large view of history, we must also recognize that nations long drew for their national unity on some common fund of religious ideas...."

[4] *The Psychology of Nationalism and Internationalism* (1919), pp. 92-93.

[5] Hayes, *op. cit.*, p. 19.

inculcated cosmopolitanism. It was the rise of nationalism that opened the way to the Protestant Revolt.[1] Especially beyond the frontier of the old Roman Empire and in England, which had never been effectively Romanized, loyalty to the great ecclesiastical empire had long been declining. In the second half of the fourteenth century we find the English parliament declaring against the payment of tribute to the Pope and passing laws against papal presentations to English benefices and the carrying of suits to papal courts. The Duke of Lancaster headed a party that wished to seize the wealth of the church. John Wycliffe was an anachronistic Protestant. But this was the period of national pride in the glorious victories at Sluys, Crécy, and Poitiers; of Langland's "Piers the Ploughman" and Chaucer's "Canterbury Tales"; and of the use of the vernacular language at the opening of parliament and in the law-courts. Nationalism, instead of being fomented by religion, developed an antagonism to it. The church was a "universal" church. In the sixteenth century, however, organized religion was, to a considerable extent, nationalized. It once more became the ally of kinship, language, and other factors.

Religion cannot be ignored to-day as an element in nationalism. Cardinal Vanutelli, as he passed up the St. Lawrence to represent the Pope at the eucharistic congress in 1910, received from every parish on its shores a welcome which could have been equaled in no other country.[2] He said that it reminded him of a day in the Middle Ages. No better description could have been given of the spirit that animates Catholic Quebec. There, as in the France of the Old Régime, the church has been rewarded for services against the barbarians—the Protestant English. The church has protected the purity of the race, especially in the pronouncements of ecclesiastical courts against the validity of "mixed" marriages. In this case it is impossible to fix the relative importance of religion and language, though both are subordinate to kinship. A particular dislike of the Irish is due to the fact that, since the Irish also are Catholics, and therefore one of the formal

[1] Historians have rejected a former notion that the Protestant Revolt and the Reformation created nationalism. Curious survivals still appear, however. "The territorial and omnipotent State," says Laski (*A Grammar of Politics*, 1925, p. 45), "is the offspring of the religious struggles of the sixteenth century. Before that time western civilization was regarded as a simple Commonwealth in which sovereignty, in the modern sense, had no existence. Ultimate power was, at least in theory, the possession of a view of right which found embodiment in Pope and Emperor." The qualification—"at least in theory"—saves this from being utter rubbish. Note also Nicholas Berdyaev, *The End of Our Time* (1933), p. 95: "Nationalist movements and separation in the west are found to have been the result of the Reformation and Protestant particularism."

[2] E. M. Sait, *Clerical Control in Quebec* (1911), p. 11.

bars to intermarriage is wanting, the race instinctively recoils from the danger of dilution. Yet Murray's Highlanders, having been disbanded after the Conquest and settled along the St. Lawrence, were soon assimilated. Those Highlanders belonged to the Roman Catholic Church.

Other modern illustrations are not hard to find. Why did Belgium break away, in 1830, from the imposed union with Holland? There were several reasons, but not the least was diversity of religion, the population of one country being Catholic and that of the other Protestant. If language is weighed against religion, we find that half the Belgians speak Flemish, which should have inclined them to union with the Dutch rather than with the French-speaking Walloons. Again, Ulster remains stubbornly aloof from the Irish Free State because of divergence, not in language, but in religion, blood, and traditions. Any one who has witnessed a twelfth-of-July parade in Belfast, or even in Toronto, knows that the shamrock will never supplant the lily and that the memory of Protestant William of Orange and the Battle of the Boyne will never be expunged. Germany is half Protestant, half Catholic. The identification of Catholicism with the geographical areas of the Rhineland and the South has often been reflected in political life and in a varying degree of national sentiment.

In France, national solidarity has been menaced by the growth of anticlericalism and atheism. Part of the people remain devoutly attached to the church; part glory, with Viviani, in having extinguished lights in heaven that never will be relit. The coming to power, in 1936, of a Jewish prime minister, with a socialist and communist entourage, greatly accentuated the cleavage. In Belgium, the Flemish Catholics resent the "liberal" ideas which the Walloons have imported from France. One section of the Spanish people has got to the point of murdering priests and destroying churches. As Catholicism declines elsewhere, the Pope becomes more definitely Italian and associates the church closely with Mussolini. Russia has found something like a national religion in aggressive atheism and proletarian dominance. The Nazi government of Germany is trying to find one and impose it. Nationalism will be the religion of the future, according to Israel Zangwill.[1] "It will, of course, be centuries before national religions can

[1] *The Principle of Nationalities* (1917), pp. 86-87. "The dominant religion," he says (p. 81), "has always regarded the others as interlopers and done its best to crush them; sometimes socially despising them. Logical and pious minds, like Torquemada in Spain, Pobiedonostev in Russia, Drumont in France, and Mr. Belloc in England, have always felt that a nation should have oneness of religion. . . ."

oust the present vested interests," he says, "but ultimately we may look to see our rudimentary state-religion of birth and marriage registrations and death certificates expressing itself with the same exalted symbolism as baptism, church marriage, and burial...." The United States "will doubtless fuse its 186 Denominations and its countless crank creeds into a single American religion.... It will be 'America.'

'America, 'tis of thee,
Sweet land of liberty,
Of thee I sing.' "

(4) Geographical environment includes frontiers, configuration (relief), soil, resources (including flora and fauna), and climate.[1] From early times, even before Aristotle, its effect upon man and his institutions has been recognized. Bodin and Montesquieu were particularly interested in climate, both laying stress upon the "relativity" of laws. In one way or another, as we have seen, race depends upon climate. So does national character, although it too is based on biological inheritance. The variable English weather, according to Émile Boutmy and Ellsworth Huntington, stimulates energy and, as the Greeks observed long ago, increases vitality. Ernest Barker concludes that it may produce, or at least encourage, certain qualities of mind. "For long centuries," he says,[2] "we were an agricultural people. To practice agriculture in uncertain weather is to learn not to make plans ahead, but to seize the occasion with a ready initiative, and to improvise for the emergency the measures which it demands. To distrust foresight (perhaps unduly) and to cultivate insight (perhaps with too large a temerity)—this will be a natural tendency."

What we are now considering, however, is the development of nationalism rather than of peculiar national traits. Mill refers to geographical limits as a factor in its development. What has been the influence of frontiers and configuration? Undoubtedly, says Ramsay Muir,[3] "the most clearly marked nations have commonly enjoyed a geographical unity, and have often owed their nationhood in part to this fact...." Hayes has a quite different opinion: [4] "When we consider that some four nationalities—Portuguese, Castilian, Catalan, and Basque—coëxist in the geographic unit known as the Iberian Peninsula..., we must conclude that the idea of natural frontiers

[1] Ernest Barker is particularly illuminating on this subject, *op. cit.*, pp. 48-82.
[2] *Ibid.*, p. 79.
[3] *Op. cit.*, p. 38.
[4] *Essays on Nationalism*, p. 70.

between nationalities is a myth." But in actual fact the Iberian Peninsula points in the opposite direction. If it appears to be a "geographic unit" on a political map, a relief map at once dispels such an illusion.

What does a study of the peninsula's geographical configuration reveal? Says the *Encyclopaedia Britannica:* [1] "To the physical character of the peninsula is due likewise the separation of Portugal from Spain and the 700-year separation of the kingdoms of Castile and Aragon. So sharply defined are the natural regions occupied by these two states that even now, though they have been united since the fifteenth century, their peoples differ sharply in physical type, customs, and social organization." There is even a linguistic difference. Isaiah Bowman tells us that "there are geographical conditions that make it difficult to maintain the territorial integrity of Spain. The Spanish peninsula is broken up into a number of natural regions separated by formidable barriers which, in the past, exercised a strong influence upon the local inhabitants, and later, upon their social and judicial systems. The great extent of the interior plateau, the broken character of its borders, and the ruggedness of the most prominent sierras, have made it more difficult to diminish these diversities of speech, political thought, and social character which for a long time kept the populations of Spain apart and which still threaten to turn the country back into the state of division that has repeatedly prevailed." [2] It is precisely the absence of geographical unity that has prevented the development of a single nation on the Iberian Peninsula, whose physical boundaries, nevertheless, encourage it.

Geographical factors have had similar effects elsewhere. Those who scoff at mountains and rivers as obstacles to national unity should remember that in ancient days they counted enormously and that their effects in isolating peoples and so inducing homogeneity and heterogeneity are what we reckon with now. The Apennines delayed the rise of a nation in the Italian peninsula. The configuration of the Balkan

[1] Fourteenth ed., vol. XXI, p. 109.

[2] *The New World* (rev. ed., 1926), p. 148. Bowman points out further (p. 151) that "patriotism in Spain is a local thing that reflects the geographical division of the country: a man says he is a Galician, an Asturian, a Castilian, an Andalusian; he rarely thinks of himself as a Spaniard. While Castilian is the literary language of Spain, the people of each great region have a distinctive speech. In Aragon they speak a dialect of Castilian; the people of Catalonia speak a dialect similar to that of southern France; the Basques have a distinct language of their own, and both Catalan and Castilian have several important dialects. Locally, Spaniard is separated from Spaniard by mountain barriers, by traditions, by language, by social customs, by grades of society."

peninsula played its part in fragmenting the ancient Greeks.[1] German nationalism is still affected by the fact that the Rhine and Danube once formed a frontier of the Roman Empire. The Atlantic Ocean has sundered peoples who are related in speech and, to a lesser extent, in blood. It has been the misfortune of Ireland, which was once joined to England (as the latter also was joined to the Continent), that she became an island without floating farther away. She is at once too near and too far—too near to be left alone by the occupants of the neighboring island, and too far for assimilation to follow conquest. There the Romans built no roads, established no camps. Some years ago an Irish novelist suggested a solution: since it seemed impossible for the biggest steamships to tow Ireland into the mid-Atlantic, he would have rented windmills from Holland, dyked the two channels, and drained the Irish Sea.[2] However, the experiment was not tried. Ireland became independent, although physical closeness to Britain will always encourage close economic relations between the two countries and has left its heritage in an aloof Ulster. Insularity protected England—"this precious stone set in the silver sea"—from invasion after the Norman Conquest and facilitated the growth of the first national State in modern Europe. Even from the anthropological standpoint her stock is relatively homogeneous; "as regards physical type," says Sir Arthur Keith,[3] "the inhabitants of the British Isles are the most uniform of all the large nationalities of Europe." But, as Muir points out, the geographical factor can easily be overemphasized. The Poles, while occupying no clearly demarcated area, have clung passionately to their national aspirations; and, on the other hand, no single nation inhabits the Hungarian plain, with its ring of encircling mountains.

[1] "There seems to have been a feeling of solidarity with other Greeks as opposed to the barbarians, but only at times of great danger did this become pronounced enough to lead to effective combination. It was at its best during the Persian war, but quickly broke down under the influence of rivalry between Athens and Sparta. When it develops again in the [Macedonian] empire, the real national solidarity is gone." W. B. Pillsbury, *The Psychology of Nationality and Internationalism* (1919), pp. 95-96.

[2] Another Irish novelist, ignoring the geographical factor, proposed to require every Englishman to marry an Irishwoman and every Irishman to marry an Englishwoman. Then, he said, some stability would be introduced into Ireland and some intelligence into England.

[3] *Op. cit.*, p. 24.

OTHER FACTORS IN NATIONALISM

(5) A common historical tradition, which Mill places first and which Hayes places second only to language,[1] is regarded by Muir as "the one indispensable factor." Such a tradition, Muir says,[2] embraces "a memory of sufferings endured and victories won in common, expressed in song and legend, in the dear names of great personalities that seem to embody in themselves the character and ideals of the nation, in the names also of sacred places wherein the national memory is enshrined.... Here is the source of that paradox of nationality, that it is only intensified by sufferings, and, like the giant Antaeus in the Greek fable, rises with redoubled strength every time it is beaten down into the bosom of its mother earth. Heroic achievements, agonies heroically endured, these are the sublime food by which the spirit of nationhood is nourished; from these are born the sacred and imperishable traditions that make the soul of nations."

It was so with the Jews, many centuries ago: and so with the Romans. The Swiss legend of William Tell, which Schiller made more lasting than bronze, is a national asset of priceless worth.[3] English nationalism fed in its infancy upon military triumphs at Crécy, Poitiers, and Agincourt, as it did at a later time upon those of Marlborough at Blenheim, Oudenarde, Ramillies, and Malplaquet, and of Wellington at Salamanca and Waterloo. It fed still more, perhaps, upon victories at sea:

> The spirits of your fathers
> Shall start from every wave!—
> For the deck it was their field of fame,
> And Ocean was their grave:
> Where Blake and mighty Nelson fell
> Your manly hearts shall glow,
> As ye sweep through the deep,
> And the stormy winds do blow;
> While the battle rages loud and long,
> And the stormy winds do blow.

[1] "Language, too, is the medium in which is expressed the memory of successful achievement and distressing hardship shared in common, and thereby it acquires cementing value for a nationality. It is the bridge between the present and the past.... And this brings us to the second distinguishing attribute of nationality—the cherishing of common historical traditions." *Esasys on Nationalism*, p. 16.

[2] *Op. cit.*, pp. 48-49.

[3] J. H. Rose, *Nationality as a Factor in Modern History* (1916), p. 46.

Scots find their title deeds in Bannockburn and Flodden, Bothwell Bridge and Culloden. But the Sassenach is hated no longer. In fact, the intermittent conflict between England and Scotland, from the Battle of the Standard (1138) down, was something that happened between the two, created a fund of common experiences, and gave each a sense of respect or even comradeship for the other, as "when two strong men stand face to face, though they come from the ends of the earth." Resistance to oppression or to arbitrary alien rule has frequently seemed to create national patriotism. Many instances come to mind: Spanish rule in the Netherlands, Austrian rule in Northern Italy, Turkish rule in the Balkans, English rule in Ireland. But why was the revolt confined to one part of the Netherlands and one part of Ireland? Some elements of nationalism were there already—perhaps kinship or race, perhaps language or religion or geography. National spirit was more than an embryo when the Dutch fought under William the Silent and the Serbs under Karageorge.

While thinking in terms of national tradition, in which war figures so prominently, we must not overlook the relationships which tend to produce a supra-national tradition. Each European nation has precious memories of its own; but frequently these merge in a possession shared by all. Gustavus Adolphus and Wallenstein, Marlborough and Eugene, Frederick the Great, Napoleon—these belong to a European pantheon. So do many great statesmen, great ecclesiastics, great scholars, great painters, great musicians, great scientists, great surgeons, great inventors, great explorers. A common heritage comes down from Greece and Rome. Fragmented though Europe may be—Balkanized by nationalism—there is such a thing as a European civilization, and a European culture. The frank recognition of national units does not preclude the formation, at some future time, of a United States of Europe.

(6) A common government, although by itself incapable of creating a nation, has often overcome obstacles to nationalism. "What real force is it," asks Ortega,[1] "which has produced this living in common of millions of men under a sovereignty of public authority which we know as France, England, Spain, Italy, or Germany? It was not previous common blood, for each of these collective bodies has been filled from most heterogeneous blood-streams. Neither was it linguistic unity, for the people to-day brought together under one State spoke, or still speak, different languages. The relative homogeneousness of race and tongue

[1] José Ortega y Gasset, *The Revolt of the Masses* (1932) pp. 179-180.

which they to-day enjoy—if it is a matter of enjoyment—is the result of this previous political unification. Consequently neither blood nor language gives birth to the national State, rather it is the national State which levels down the differences arising from the red globule and the articulated sound. And so it has always happened. Rarely, if ever, has the State coincided with a previous identity of blood and language. Spain is not a national State to-day *because* Spanish is spoken throughout the country, nor were Aragon and Catalonia national States *because* at a certain period, arbitrarily chosen, the territorial bounds of their sovereignty coincided with those of Aragonese or Catalan speech. We should be nearer the truth if, adapting ourselves to the casuistry which every reality offers scope for, we were to incline to this presumption: *every linguistic unity which embraces a territory of any extent is almost sure to be a precipitate of some previous political unification. The State has always been the great dragoman.*"[1] Ernest Barker uses similar language:[2] "Historically the State precedes the nation. It is not nations which make States; it is States which make nations."

Ortega and Barker would have some difficulty in sustaining so rigid a thesis. No State has ever created a nation. What the State has done, in varying degrees, is to apply the bellows to an existing fire. Sometimes they served merely to raise a high temperature still higher; sometimes they converted a feeble flame into a blaze. Who will say that nationalism does not precede the erection of a German or Italian, Dutch or Rumanian national State? The cases of England and France are different. But there the very boundaries of the State were determined by the existence of factors that have been considered—geography, language, kinship. There was a French language before there was a France. In 842, when Charles the Bald and Louis the German conspired against their brother, Lothair, the famous Oaths of Strasburg had to be framed in the vernaculars of the two armies, French and German. The French, though odd to modern readers, is intelligible. Next year the three brothers agreed on a tripartite division of their father's empire. Lotharingia stood between the French lands of Charles and the German lands of Louis—a debatable territory without natural frontiers, where men of French and German speech mingled, a battleground of France and Germany for the next thousand years.

But common government helped the factors of nationalism to grow

[1] My italics.
[2] *Op. cit.*, p. 15.

strong. French kings, in alliance with the townsmen, who were ready to fight for peace and order, broke the power of turbulent feudalism and converted suzerainty into sovereignty. A centralized administration overrode local autonomy. Despotism tended to produce uniformity among a diverse people. From Versailles, where the royal court set the tone of good form, the *langue d'oil* spread to the provincial towns and became the language of France. Racine and Molière set the standard. Long before this, in the Hundred Years' War, Frenchmen had begun to feel as such the humiliation of subjection to Englishmen; and pride had been awakened by the deliverance of the country under Joan of Arc. Pride grew immeasurably in the reign of Louis XIV, cynosure of European eyes, whose soldiers never lost a battle between Rocroi in 1643 and Blenheim in 1704. Similarly, but earlier, the Plantagenets gave the English people uniform administration and uniform law—the common law, which accorded with the national temperament. In India, the situation is peculiar: among a heterogeneous people, of many races and many languages, dislike of the British Raj has stirred the upper classes to a desire for self-government, something akin to nationalism, yet falling short of it.

(7) Economic interest has always affected human affairs profoundly.[1] When confronted with a phenomenon as important and fateful as nationalism, we survey it with the expectation of tracing its origin to some economic factor.[2] No one has succeeded in doing so. Dr. F. L. Schuman professes to find bourgeois rapacity at the source. "From the point of view of a broad historical perspective," he says,[3] "the epoch of nationalism is the epoch of the ascendancy of the bourgeoisie in the western nations. Those who engage in commerce and industry, who become the entrepreneurs of capitalistic industrialism, who acquire vast wealth and economic power enabling them to secure control of governments and bend them to their desires, have ever been the most ardent devotees of the cult of the nation-state. That cult became universal and won over to itself other social classes—nobles, peasants, and workers—only when the bourgeoisie became the dominant group in western society, both economically and politically. Nationalism is the political philosophy of the bourgeois nation-states. While it has permeated other types of States and spread from the western world to other cultures and civilizations, its historical development is intelligible only in terms of the rise

[1] The subject has been discussed in chapter IV.

[2] C. J. H. Hayes, *The Historical Evolution of Modern Nationalism* (1931), chapter VII (pp. 232-287), "Economic Factors in Nationalism."

[3] *International Politics* (2nd ed., 1937), p. 264.

of the bourgeoisie to political power." Schuman's "broad historical perspective" seems to include a distortion of history. When nationalism rose, spontaneously and gradually, in England and along the western coast of Europe, the day of the bourgeoisie had not dawned.[1] No capitalists of vast wealth and economic power controlled the government and bent it to their will. The absurdity of this socialist theory is still more apparent in recent times. No distortion of history can make the theory apply to the Irish, the Serbs, the Magyars, or the Rumanians. A curious fact about modern nationalism is its oblivion to economic interests, as in the case of the French-Canadians, the Irish, or the peoples of the succession States. This sentiment—a weak word to use—transcends economic welfare. Men willingly sacrifice their lives to it.

No one will deny that economic interest may intensify an existing national consciousness. The *Zollverein,* bringing Germans together in a customs union, laid the foundation of the Confederation of 1867. Economic advantage reconciled Scotland to union with England, a union which had been foreshadowed by a century of looser association and by geographical, linguistic, and other affinities. Where the nation has assumed State-form, various means of regulating commerce—such as tariffs, bounties, prohibitions—erect a material wall against other States and, through interest and isolation, may accentuate spiritual bonds.[2] Such a wall will, however, be the cause of dissension when the welfare of some part of the people is prejudicially affected by it; and in non-national States common economic interest does not seem to soften antagonisms between the various national groups. Canada and the United States illustrate the potentialities of commerce. Homogeneity of population (aside from French-Canadians and negroes), language, literature, religion, and geography suggest the ultimate development of a North American nation. What stands in the way? Chiefly a century and a half of separate political organization and separate traditions.[3] But commerce has been working, quietly and insidiously, like "muffled hammers of decay," to weaken the resistance of this masonry; it has

[1] "The doctrines themselves were originally crystallized in an agricultural society...." Hayes, *The Historical Evolution of Modern Nationalism,* p. 233.

[2] Harry Elmer Barnes means no more than this when he speaks of the economic basis of nationalism (*World Politics in Modern Civilization,* 1930, p. 22): "The narrow and selfish commercial policy, known as 'mercantilism,'... operated strongly in the way of increasing national consciousness, self-interest, and jealousy, and was a potent stimulant to international friction. Commerce during this period became little better than collective or national piracy."

[3] Also, of course, the French-Canadians, who constitute thirty per cent of the Dominion population, fear that, as a part of the United States, their nation would be engulfed in a vast Anglo-Saxon tide.

been creating and enlarging crevices, even cracking and pulverizing rocks. Largely because the natural flow of commerce is to north and south, Goldwin Smith assigned to Canada a manifest destiny like Scotland's.[1] "The penetration of the United States," says Alexander Brady,[2] "might be illustrated in a dozen different ways and with reference to a multitude of things. A country that leads in machine production and contains a population eleven times greater than that of Canada must naturally give more than it receives. Throughout the realm of consumable goods and services, from tooth paste to musical comedies, the Canadian is heavily indebted. However keen his resistance, he cannot avoid immersion in a mighty stream of influences, for the genius of America is in overwhelming salesmanship."

Commercial relationships with the United States imperil Canadian nationalism only because so many other bonds exist. No one supposes that Mexico presents an analogous case. Economic forces must take a subordinate place among the influences making for nationalism; they may strengthen the sentiment, but they cannot create it. Aside from the fiscal or commercial policy of the government, it is not easy to find a nation that is bound together by a real community of economic interests. Is the Dorset peasant so bound to the Lancashire factory-hand; the wine-grower of Provence, to the collier at Lille? "On the contrary," says Muir,[3] "in the economic aspect the Lillelois has more affinity with the Germans of Westphalia than with the Provençal; the agriculturist of East Prussia is economically nearer akin to his unrecognized kinsman in Poland than to the operatives of Saxony." But, if economic interest cannot make, it can (temporarily at least) wreck, a nation. Civil wars commonly have an economic basis. To-day a class-quarrel, between the so-called bourgeois and proletarian interests, threatens to break down consensus, throw democracy on the scrap heap, and disrupt nations. The answer is monarchy, which we instinctively dislike and which, in the hope that it will soon pass, we entitle dictatorship. It resembles the Roman dictatorship far less than the Greek tyranny—of the post-democratic, not the pre-democratic, type. Whatever name is used, it reimposes discipline and seems to do more than restore the old spirit. Russia, Italy, and Germany have never been so nationalistic.

[1] *Canada and the Canadian Question* (1891).

[2] *Canada* (1932), p. 29. From the standpoint of nationalism the details that Brady gives are highly significant.

[3] *Op. cit.*, p. 47.

NATIONS AS THE CRADLES OF NEW RACES

There has long been a disposition to regard Mill's list of contributing factors as an insufficient explanation of nationalism. They are based, no doubt, mainly upon an analysis of the growth of the English and French nations, an unconscious and spontaneous growth. But in the nineteenth century, long after the *thing* had become familiar, men began to think and write about the *idea*. Nationalism entered upon a period of conscious growth. When the seeds were present, propaganda was employed to make them germinate. In the first stage nations had come into being by the process of parallel development (convergence, independent invention); in the later stage they appeared rather by the process of diffusion. Nationalism, having been identified and found good, was copied. It made use of the catch-word "self-determination" and set the East as well as the West afire. Surely there must be at work stronger medicine than could be found in Mill's pharmacopoeia! Socialists named it confidently: their analysis identified it as economic determinism, which we have just rejected. With equal confidence, liberals attributed nationalism to democracy. They, likewise, ignored the historical facts. In the western part of Europe nations had taken shape centuries before modern democracy raised its head. At the present time nationalism seems to attain its greatest stature and robustness under autocracy. Hayes offers the hypothesis "that altruistic longing for human peace and betterment is the explanation of the modern vogue of nationalism." [1] His argument, however, does not seem at all convincing, quite apart from the fact that it seems to explain the phenomenon only in its latest phase.

Twenty years ago the eminent anthropologist, Sir Arthur Keith, brought forward the hypothesis that is favored here. He expressed the opinion that nationalism is part of Nature's machinery of evolution and "the incipient stage in the process which leads on to racial differentiation." [2] His discovery of the function of nationalism was incidental to a larger inquiry, commenced forty-five years ago—an inquiry into the origin of races.[3] "As so often happens in scientific inquiries,"

[1] *The Historical Evolution of Modern Nationalism* (1931), p. 303. In earlier passages (pp. 299-301) he says: An underlying tendency "which may (and in our opinion, does most plausibly) explain the vogue of nationalism in modern times is the growth of a belief that the state, particularly the national state, can and should promote human progress.... In this altruistic environment, it was probably natural that leading intellectuals and many a middle-class 'friend of the people' should evince nationalism."

[2] *Nationality and Race* (1920), p. 9.

[3] Keith, N. Y. *Times Magazine*, Oct. 2, 1932.

he says, "that which I found was not the object of my search." An analogy between primitive tribes and modern nations forced itself upon his attention.

Primitive peoples like the Australians—whom anthropologists recognize as belonging to a distinct race—live apart. Tribal instincts have above all an isolating effect. "The tribal instincts surround the community with a frontier, across which there is no peaceful traffic, only robbery and plunder, or at best covert enmity. The tribal frontier is a blood barrier; across it the tribal instinct forbids any form of peaceful matrimonial exchange or tribal intermixture.... At first sight we are tempted to regard this tribal spirit as a part of a machinery evolved for the protection and survival of a primitive community, but to any one who has searched for conditions which will explain the origin of separate races of mankind, the conviction grows that the tribal spirit is a necessary part of Nature's evolutionary machinery.... Under modern civilization Nature's cradles have been smashed to bits, but the tribal instincts which Nature intended for the propagation of new breeds of humanity have come down to modern man in undiminished force. Hence our present national and racial troubles." [1] New breeds of mankind are cradled in small, isolated communities. With the long continuance of isolation, physical and mental characters become more pronounced. At last differentiation reaches a point at which the breed must be regarded as a race. "We cannot account for the differentiation ..., unless we postulate in man the existence of a deeply rooted tribal mechanism." [2] Modern nations show the same inclination to live apart, to isolate themselves. Through that isolation and inbreeding new races will be brought forth.

"The creation of diverse races is an essential part of Nature's scheme. Race competes against race; some go under, others prosper. It was by pitting race against race that Nature brought man up the rungs of the evolutionary ladder to his present lofty eminence. Her scheme would have failed if her races had freely intermingled. They had to be kept apart. Nationalism, which is first cousin to race prejudice, is part of Nature's provision for securing separation of her competing teams or races. Nationalism is an essential part of the machinery of human evolution.... Nature has so ordered things that ultimately mankind must carry out her scheme, which is the production of manhood. For this reason she demands that the world should be broken up into a

[1] *Nationality and Race,* pp. 32-33.
[2] *Ibid.,* p. 34.

multitude of separate, self-contained nationalities. She demands courage, sacrifice, and competition: she refuses to give security, even of life, to her competing teams. Danger keeps them alert. Nature scoffs at the laws of economics. Nationalism is Nature's call. . . ." [1]

[1] Sir Arthur Keith, N. Y. *Times Magazine,* Oct. 2, 1932.

CHAPTER XVII

FEDERAL AND UNITARY STATES

In classifying States, on the basis of fundamental characteristics, a distinction has already been made between national States and what may be called hybrid States. The World War effected territorial readjustments along the lines of nationalism—in particular restoring Poland, setting up four new Baltic States, and dissolving the Ottoman and Austro-Hungarian empires. Nowadays, the hybrid type is much less frequently encountered. It exists, however, not only in Russia, which embraces many nationalities, but also in Canada (Quebec), Spain (Catalonia); the "succession" States, and elsewhere; [1] and it is not impossible that the type will become more prevalent through irredentist wars of conquest, subjugating nations in the name of nationalism, or through federal movements dictated by economic or military interests. A second classification rests upon a contrast in the organization of government—the contrast between federal and unitary States.

BIOLOGICAL SUCCESSION OF STATE FORMS

The federal State and the unitary State form the last two stages in a biological series. At the beginning of the series, as at the end, we have the unitary State. A unitary State may assume obligations towards another State by entering an alliance for mutual defense. Finding a mere alliance inadequate, it may take the next step and enter a confederacy,[2] there now being some common organ, which acts for all the

[1] In round numbers there are 2,000,000 Germans and 3,000,000 Rumanians in Hungary; 4,000,000 Germans, 750,000 Magyars, and 400,000 Ruthenians in Czechoslovakia; 450,000 Germans and a like number of Magyars in Yugoslavia. To take a single case, Germany may well plan to absorb these German minorities, even when they are mingled with other nationalities, to bring Austria into the Reich, and to recover Danzig and the Polish "corridor." She may also entertain designs against Lithuania, Latvia, and Estonia. In a war with Russia, on the other hand, the chief prize would be the Ukraine, a rich agricultural land inhabited mainly by Ruthenians.

[2] Two other forms of association besides a confederacy may be noted: (1) A *personal union* exists when two States, accidentally and temporarily, have the same monarch, even though he be only a titular monarch. So England and Scotland were joined, 1603-1707; Great Britain and Hanover, 1714-1837. (2)

members in the conduct not only of war, but also of foreign relations. Even such a loose association accustoms the confederates to act together, gives them a sense of solidarity, prepares the way for a more perfect union. Federalism, as the next stage, implies the disappearance of local sovereignty. One State takes the place of several, but a vestige of the old relationship survives in a peculiar balance between central and local authority in the State. Finally, the federal balance gives way before complete unification.

States move forward from alliance to confederacy, from confederacy to federation, from federation to complete union; that is, from lower to higher forms. These successive forms, therefore, may be regarded as a biological series. It is by no means of universal application; what we have here is a tendency, not a law.[1] That such a tendency exists can be shown by numerous examples. In America thirteen independent States, after coöperating as allies in war, organized under the Articles of Confederation, which were legally in effect from 1781 to 1789; then they federated; and under cover of the new system centripetal forces have been so active that the United States has been described as "a nation [unitary State] concealed under the form of a federation."[2] Similarly, before the coming of Napoleon, hundreds of independent German States had been associated loosely in the Holy Roman Empire, which was really no more than a name or a ghost. Napoleon abolished the Empire, reduced the number of States, by consolidation, to thirty-nine, and provoked a feeling of German patriotism, the consequence of his dictatorial intervention. After his downfall, a confederation appeared (1815). This gave way to a federation (1867, 1871). The

Under a *real union* the States are united perpetually by formal agreement under the same dynasty, so that different rules of succession (as in the case of Great Britain and Hanover) could not dissolve the union. When this is the only bond, some writers maintain that the union is still only "personal." There must also be, they say, certain common organs of government. Thus, under the "Compromise" of 1867 Austria and Hungary had common ministries of war, finance, and foreign affairs; a common army, diplomatic service, and tariff; and an embryonic common legislature. Norway and Sweden (1815-1905) had no apparatus of that kind, although the foreign secretary of Sweden managed at the same time the foreign affairs of Norway.

[1] In a rough way the tendency may be observed even in the process by which countries like England and France and Spain were unified; although varying degrees of particularism were not indicated by such terms as "confederacy" or "federation." Scotland and England were joined for a century in a personal union, which carried with it common nationality. In 1707 they became a single State; but in actual practice, the union has a quasi-federal nature, since parliament does not interfere with Scotch institutions (such as the legal system, local government, and the Church) except with the approval of a majority of the members from Scotland.

[2] A. V. Dicey, *Law of the Constitution* (8th ed., 1915), p. lxxvi.

Weimar constitution (1919) set up such a centralized system, so curtailed the powers of the "territories" (as the member-states were now styled), that, according to Preuss, the Republic might equally well be known as a centralized federation or a decentralized unitary State. When Hitler and his Nazis took control, all vestiges of federalism vanished. Here we have the completion of the cycle, passage through the whole of the biological series. The origins of the existing Swiss confederation go back to the thirteenth century. What existed at the outset was a mere defensive alliance, strengthened after a time by the holding of occasional diets or assemblies, with instructed delegates and with unanimity for decisions. Under the Confederacy of 1815 the diet became a permanent organ; but, notwithstanding the great disparities in population, each canton still had just one vote. The short, sharp civil war of 1847 led, next year, to federalism; and central power has been increased by the constitutional revision of 1874 and by subsequent changes. Again, in the case of the United Provinces of the Netherlands, which began as a weak confederacy in 1579, a unitary State at last emerged, although not without violent oscillations in the process.

The idea of a progression of political relationships, being derived from historical observation, has been entertained by many writers. "The confederate system is clearly a transient form," says J. W. Burgess.[1] "It does its proper work in the period of transition from the condition of several sovereignties to that of a single sovereignty over the combined territory or population. The federal system is not so clearly transient, although it can hardly be regarded as the ultimate form. Its natural place is in states having great territorial extent, inhabited by a population of tolerably high political development, either in class or in mass, but not of entirely homogeneous nationality in different sections. When these ethnical differences shall have been entirely overcome, something like the federal system may, indeed, conceivably remain, but the local governments will become more and more administrative bodies, and less and less law-making bodies. In fact, it looks now as if the whole political world, that part of it in which the centralized [unitary] form of government obtains as well as that part still subject to the federal form, were tending towards this system of centralized government in legislation and federal government in administration... History demonstrates that all states tend more or less

[1] *Political Science and Comparative Constitutional Law* (2 vols., 1890), vol. I, pp. 5-6.

towards the production of this [unitary] form in the course of their development into national states." Henry Sidgwick, surely among the very foremost of nineteenth-century authorities, expresses himself with customary caution.[1] He says that "it may be observed that federalism arising from historical causes is likely to be in many cases *a transitional stage through which a composite society passes* on its way to a completer union; since, as time goes on, and mutual intercourse grows, the narrower patriotic sentiments that were originally a bar to full political union tend to diminish, while the inconvenience of a diversity of laws is more keenly felt, especially in a continuous territory. Partly for the same reason, a confederation of states, if it holds together, has a tendency to pass into a federal state."

Of course, alliance or confederation does not bring a new State into being; it creates a new relationship between existing States. Since they are primarily concerned with State-forms, writers often limit the progression to federal and unitary States. That the former type is antecedent to the latter is generally conceded. "Federalism," says Marriott,[2] "must be regarded as a half-way house between entire independence and a compact and completely homogeneous national unity." According to Dicey,[3] "federalism, when successful, has generally been a stage towards unitary government. In other words, federalism tends to pass into nationalism.... Nor does experience countenance the idea that federalism, which certainly may be a closer step to national unity, can be used as a method for gradually bringing political unity to an end." Woodrow Wilson considers it uncertain whether federalism is more than a merely temporary phenomenon. "It is plain from the history of modern federal states," he says,[4] "—a history as yet extremely brief,—that the strong tendency of such organizations is towards the transmutation of the federal into a unitary state. After union is once firmly established, not in the interests only but also in the affections of the people, the drift would seem to be in all cases towards consolidation."

Unity, or at least formal unity, may be achieved without any stage of federalism. Everything depends upon circumstances. There could be no reason for federalism when Greeks, Serbs, Bulgarians, and Rumanians became independent of the Porte; but a Balkan union of these diverse people could only be based on a period of confederate

[1] *The Elements of Politics* (4th ed., 1919), p. 544. My italics.
[2] *The Mechanism of the Modern State* (2 vols., 1927), vol. II, p. 384.
[3] *Law of the Constitution* (8th ed., 1915), pp. lxxvi and lxxx.
[4] *The State* (1898), p. 567.

association, with federalism to follow it. For Jugoslavia and Czechoslovakia the unitary form was deliberately chosen as a means of domination by Serbs in the first case and by Czechs and Slovaks in the second; but it now appears that heterogeneous Jugoslavia can be held together only by autocratic government. Towards the middle of the nineteenth century federalism seemed to be an appropriate means of uniting Italy, divided as she had so long been among various principalities. Diplomatists were generally favorable to such a solution. But they had to reckon with Mazzini and the strength of Italian nationalism. Mazzini denounced every suggestion of that kind and commanded his followers "never to rise in any other name than that of Italy, and all of Italy." Nevertheless, a unitary Italian State lay beyond the reach of the Italians themselves; it came as a gift from France and Prussia; and the consciousness of dependence on foreign help subsequently had a depressing effect on the Italian spirit.

The unification of South Africa, in the face of great bitterness between two nationalities, will be explained later. The reasons for skipping the federal stage were cogent; and both Boer and Briton calculated upon an advantage, the Boer realizing that his people were now in the majority and the Briton hoping that in time immigration would redress the balance. Then, as now, British Natal was restive under the prospect of Boer domination. "But notwithstanding the hot opposition of critics in Natal, which the history and circumstances of that colony render natural," says R. H. Brand,[1] "there is little doubt that opinion in South Africa is overwhelmingly in favour of the unitary as opposed to the federal principle. The panegyrics which American writers have been accustomed to lavish on the Constitution of the United States, and the imitation of that Constitution by Canada and Australia, probably explain the widespread opinion that federalism is a form of government to be sought as an end in itself, and not one which should be accepted only when nothing better can be obtained. But federalism is, after all, a *pis aller*, a concession to human weakness. Alexander Hamilton saw its dangers and only acquiesced because by no other means was union possible. In Canada Sir John MacDonald[2] strongly favoured a legislative union, but was obliged to bow to the intense provincialism of Quebec. In Australia the narrow patriotism of the different states has imposed upon the Federal Government limitations which are generally admitted to be checking that

[1] *The Union of South Africa* (1909), pp. 46-47.
[2] The correct name is Macdonald.

country's advance. Federalism must be accepted where nothing better can be got, but its disadvantages are patent. It means division of power and consequent irritation and weakness in the organs of government, and it tends to stereotype and limit the development of a new country. South African statesmen have been wise to take advantage of the general sentiment in favour of a closer form of union. It is remarkable that South Africans should have succeeded where almost all other unions have failed, in subordinating local to national feeling, and that the people of each colony should have been ready to merge the identity of their state, of whose history and traditions they are in every case intensely proud, in a wider national union, which is still but a name to them. The truth, as has already been stated, is that bitter experience has taught them the evils of disunion. The lesson is confirmed for them by the difficulties in which Australian federalism is floundering. They agree with General Smuts in his emphatic expression of the immense advantages of a strong government, especially in a country faced, as South Africa is, with problems which may well appal the stoutest and most optimistic heart." [1]

South Africa is a unitary State. So is Germany, which previously passed through the confederate and federal stages.[2] But even statements of this kind may be challenged because of the notorious vagueness of political terminology. Professor Herman Finer calls the Union of South Africa a federation.[3] A very superficial reading of the con-

[1] *Cf.* H. D. Hall, The *British Commonwealth of Nations* (1920), p. 219. A federation, he says, "has to face also the difficulties arising from the division of the functions of government between a central and a number of local governments. The more rigidly defined the powers either of the central or local governments are, the greater is the likelihood that the social organism will be rent or stunted in growth, through the failure of the governments to adjust themselves to its rapidly changing needs. For example, in the United States, the most rigid of all federations, the greatest difficulty was experienced in adjusting the needs of the federation to the new conditions caused by the war. The Federal Government found the utmost difficulty in getting even a fraction of the control over trade and industry for war purposes which was found necessary in other European countries. The realisation of the danger of rigidity arising out of any attempt to make a hard and fast definition of powers, has led to the general tendency in the later federations formed by the English-speaking peoples towards elasticity, a tendency which culminated in the Constitution of the Union of South Africa in 1909."

[2] In a certain sense the four provinces of South Africa may be regarded, before the Union, as joined in a confederacy through common membership in the British Empire. So, too, the provinces of Canada and the states of Australia.

[3] Perhaps this mistake may be attributed to habitual carelessness rather than ignorance. Within three lines he gives the wrong date for Switzerland (1802 instead of 1803), for Australia (1902 instead of 1900), and for South Africa (1905 instead of 1909); and has Canada federating twice, in 1837 and 1867. What happened in 1837 was a rebellion; and rebellion was followed, three years

stitution, if it ignored the amending clause altogether, might create such an impression) for the provincial powers, though covering a narrower field, are listed very much as in the British North America Act. On the other hand, it is expressly provided (1) that no provincial ordinance shall have effect if it is repugnant to an act of parliament and (2) that parliament shall have power "to make laws for the peace, order, and good government of South Africa." This second provision, taking the place of any enumeration of powers, enables parliament to regulate provincial concerns. In fact, the provincial councils themselves could be abolished. What restrictions does the amendment clause impose? Certain provisions are safeguarded for a short period (which has now elapsed); the native franchise in Cape Colony and the equality of the Dutch and English languages cannot be touched except by a two-thirds vote at a joint sitting of senate and house. Otherwise "Parliament may by law repeal or alter any of the provisions of this Act." Even the few slight restrictions had ceased to apply before the publication of Professor Finer's volumes. The Statute of Westminster (1931) made the Union parliament completely sovereign.

UNITARY, FEDERAL, AND CONFEDERATE STATES

That the character of the South African union should be open to any question is astonishing. The unitary type can easily be recognized except in borderline cases, such as that of Republican Germany down to 1933. Perhaps Professor Finer was misled by his own definition, which identifies the unitary State as ("one in which all authority and power are lodged in a single centre, whose will and agents are legally omnipotent over the whole area.") Can legal omnipotence be the test? France and Belgium, Poland and Czechoslovakia are universally recognized as unitary States, yet, like most of that type, they do not give the legislature legal omnipotence. A rigid constitution stands in the way. No French law could permit the president to dissolve the Chamber of Deputies without the consent of the Senate. No Belgian law could deprive any one of his property without "a just compensation previously determined." The South African constitution imposed fewer restraints than any of these others. (What marks the unitary State is not omnipotence of the central legislature, but its control of local government.) That control need not be complete. It would be adequate

later, not by a federal, but by a legislative union. When calling South Africa a federation, Finer cites Brand (quoted above), who was at pains to show that federalism had been rejected. *The Theory and Practice of Modern Government* (2 vols., 1932), vol. I, p. 244.

if, for example, the constitution divided the country into local areas and provided that the inhabitants of each could exercise local option on the liquor traffic; or if it required all cities above a certain size to have elective councils. But the constitution cannot prescribe *substantial* local autonomy without stepping over the line into federalism. We are confronted by a question of degree.

Our categories—unitary State, federation, confederacy—are essentially relative. "Between the unitary state and the confederation of states," says René Brunet,[1] "lies a whole series of state types, one merging by imperceptible nuances into the others, types which differ one from another according to the extent to which the member states are called upon in the formation of the common will." As Hamilton says in *The Federalist*,[2] "there is no absolute rule on the subject." When devising a constitution, men do not follow, although they may be influenced by, recipes. They do not look over the models, as described in the books, select the one that is generally recommended, and then hold fast to an abstract formula. What goes into the constitution is dictated by experience—the experience of past and present—and by economic, social, and political pressures, and not by scholarly adherence to formal purity of design and distaste for deviations and anomalies. From the theoretical standpoint, no doubt, most States are hybrids. The finished product, not being designed for the show-room, escapes the necessity of conforming to a standard of perfection like a White Wyandotte or a Bearded Golden Polish. It is a good hen if it is a good egg-layer. Institutions should be judged, Bismarck said, by their working. Any rigid definition of the unitary State, proceeding from theoretical assumptions, is unworkable if it is rigidly applied. Either in framing it or in applying it consideration must be given to the fact that unitarism, like federalism, "may be realised in very various modes and degrees." [3]

Federalism is particularly hard to define, because it holds an intermediate position between the unitary and confederate types of organization. At each end of its scale of differences we encounter a twilight zone. What is the distinction between a federation and a confederacy? How have the terms been defined? We turn hopefully to the records of the American constitutional convention of 1787 only to find Randolph advocating a "national government" or "consolidated

[1] *The German Constitution* (1922), pp. 40-41.
[2] Number IX.
[3] H. Sidgwick, *The Elements of Politics*, p. 532.

union" in place of the "federal" system then in effect and Gouverneur Morris explaining that a "federal" plan implies a mere compact, resting on the faith of the parties.[1] The Fathers applied the term "federal" to a confederation as distinguished from a national government.[2] Nor does *The Federalist,* in its exhaustive commentary on the constitution, follow contemporary usage. In Number IX Hamilton says: "A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the States. The essential characteristic of the first is said to be the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor by precedent. It has indeed happened, that governments of this kind have generally operated in the manner which the distinction, taken notice of, supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject.... The definition of a *confederate republic* seems simply to be 'an assemblage of societies,' or an association of two or more states into one state. The extent, modification and objects of the federal authority, are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy." The three points which Hamilton dismisses as subtle and arbitrary might even now be applied to confederacies; the constitutional guarantee of separate local organization is regarded as a test of federalism.

We may turn now to Madison in Number XXXIX of *The Federalist.* Critics maintain, he says, that the framers of the Constitution should have "preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states; instead of which they have framed a *national* government, which regards the Union as a *consolidation* of

[1] Consult the index in Max Farrand, *Records of the Federal Convention of 1787* (3 vols., 1911).

[2] Max Farrand, *The Framing of the Constitution* (1913), note p. 69.

the States." Is such criticism justified? In the first place, the constitution is to be founded on ratification by the people of the several states. "The act, therefore, establishing the Constitution, will not be a *national,* but a *federal* act.... Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation of theirs, the new Constitution will, if established, be a *federal,* and not a *national,* constitution." Madison looks next at the houses of Congress and the presidency. "From this aspect of the government," he concludes, "it appears to be of a mixed character, presenting at least as many *federal* as *national* features. The difference between a federal and national government, as it relates to the *operation of the government,* is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national,* not the *federal* character, though perhaps not so completely as has been understood.... But if the government be national with regard to the *operation* of its powers, it changes its aspect in relation to the *extent* of its powers.... In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated subjects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.... If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*.... In requiring more than a majority, and particularly in computing the proportion by *States,* not by *citizens,* it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character. The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both."

Madison's observations are enlightening, but he confuses us by using "federal" instead of "confederate" and "national" instead of "federal." Nor does more recent practice always distinguish between federations and confederacies. Freeman wrote almost exclusively about the latter and yet called his book a history of federal government. Mill, writing at approximately the same time, tells us that "there are two different modes of organising a Federal Union. The federal authorities may

represent the Governments solely, and their acts may be obligatory only on the Governments as such; or they may have the power of enacting laws and issuing orders which are binding directly on individual citizens." [1] He calls the latter "the more perfect mode of federation" and the former "mere alliance." [2] Bryce likewise has said that "federations are of two kinds," one being a national as well as a federal state, the other being "really a mere League of States." [3] As late as 1915 Dicey uses federation and confederacy interchangeably, even in a single sentence.[4] In the Swiss constitution, as revised in 1874 the union is officially described as a confederation, and that term appears in 66 of the 123 articles. The same is true of the German imperial constitution of 1871, the term being repeated in thirteen articles. Yet both unions would be described as "more perfect modes of federation" by Mill, as "national" by Bryce, and as federal by those who nowadays put confederacies into a separate category. With the same perversity Canadians speak of the Confederation Act and the Fathers of Confederation.[5]

COMPARISON OF STATE-FORMS

Under the influence of the natural sciences, politics has latterly paid more attention to terminology. Definitions have lost some of their former vagueness. It is now generally held that States entering a confederacy preserve their full independence or sovereignty and that States entering a federation lose it.[6] According to the expressive German

[1] *Representative Government* (Everyman's ed.), p. 368.

[2] *Ibid.*, pp. 370 and 368.

[3] *Studies in History and Jurisprudence* (2 vols., 1901), vol. I, p. 408.

[4] *Law of the Constitution* (8th ed., 1915), pp. lxxv, lxxvi, lxxx. For example: "If one state of a federation ... greatly exceed the whole of the other Confederated States in population and in wealth, the confederacy will be threatened with two dangers."

[5] Consult the indexes to books on Canadian history or government. Or consider J. H. Gray's *Confederation of Canada* (1871), Sir Joseph Pope's *Confederation Papers* (1895), or M. O. Hammond's *Confederation and Its Leaders* (1917). Three quarters of a century ago (as we have seen in the case of Freeman and Mill) it was not customary to distinguish sharply between confederacies and federations. Apparently unaware of this, Professor W. P. M. Kennedy (*Essays on Constitutional Law*, 1934, p. 31) charges Sir John A. Macdonald with duplicity because he was not more exact than his contemporaries. It might be noticed, however, that the preamble in the British North America Act says: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into one Dominion. . . ."

[6] See, for example, Burgess, *op. cit.*, vol. II, pp. 5-6; Sidgwick, *The Elements of Politics*, p. 537; Willoughby and Rogers, *An Introduction to the Problem of Government* (1922), pp. 457 and 459, or Seeley, *Introduction to Political Science*, p. 97. Seeley says: "To English writers, then, the two kinds [of federation] are known by the names *Federal State* and *System of Confederate States*, by which it

term, the former is a *staatenbund* or league of States and the latter is a *bundesstaat* or united State. Through federation one State appears in the place of several; through confederation no such change occurs. A confederacy, in the words of Oppenheim, consists of "a number of full Sovereign States linked together for the maintenance of their external and internal independence by a recognized international treaty into a union with organs of its own, which are vested with a certain power over the Member-States, but not over the citizens of these States." [1] Power over the member-states may be of a shadowy sort. Under the Articles of Confederation, the American Congress could requisition the states for soldiers and money upon a fixed system of quotas and make treaties with foreign countries; but, while the states were bound by the constitution to honor the requisition and comply with the treaties, there were no means of compelling them to do so. The power was a power of recommendation.

The contrast between the confederate and federal types is clear enough in theory. But a situation may arise in which the observer is uncertain whether he is looking at several States or only one. What if the powers of the common government are gradually extended, asks Henry Sidgwick,[2] and the relative importance of the confederated members reduced proportionately? Can we "mark any definite point of transition at which unity predominates over plurality, and the 'confederation of states' passes into the 'federal state' "? That point would be reached, he thinks, when the right of secession has been lost and when the central government deals, not solely with the members of the union, but with the individual citizens as well. The former situation would be incompatible with sovereignty; the latter would deprive each member-state of the undivided allegiance of its citizens. Sidgwick's two fundamental tests of confederate states are generally accepted.[3] A third test should be included. It derives from the fact that a

is meant to convey that the first, though it allows very great independence to the component members, still deserves the name of a state, but that the second goes too far and cannot properly be called a state at all."

[1] *International Law*, vol. I (4th ed., 1928), p. 178. On the basis of this definition, Oppenheim holds that the League of Nations is not a confederacy, "because the Covenant gives the organs of the League no power whatever over the member-states" (*ibid.*, pp. 319-320). But Corbett finds that the League is a confederacy (*ibid.*, note p. 319); and he does so by accepting Jellinek's definition—"the permanent union of independent States, based on agreement and having for its object the protection of the territory of those States and the preservation of peace between them."

[2] *The Elements of Politics*, p. 538.

[3] J. W. Garner, *Political Science and Government* (1928), pp. 273-276; R. W. Gilchrist, *Principles of Political Science* (3rd ed., 1927), pp. 344-346.

confederacy originates in an agreement or treaty, which cannot be changed without the consent of all the parties. A confederate constitution must require unanimity for amendments. But this test differs from the other two in the fact that such an amending process would not be inconsistent with federalism, whereas the right of secession or the isolation of the central government from direct contact with the citizens of the member-states would be. It must be understood, further, that this equality of the member-states need not be applied to representation in the central council or legislature, although such has generally been the practice.[1]

Does the union become a federation when these characteristic marks of confederacy have disappeared? If the members can no longer withdraw from the union and if the central legislature, no longer limited to making requisitions upon the government, can enlist soldiers and collect customs duties, does a federation exist? Opinions differ. Some writers, by the terms of their definitions, answer yes; others, no; and others again qualify their affirmative response by calling the new federation inchoate, embryonic. They find themselves in a twilight zone where objects are not easily distinguishable one from another. At this end of the federal scale lies the confederate frontier; at the opposite end, the unitary frontier. As federalism emerges at this end it is recognized by the extent to which central powers have been enlarged; as it draws near the opposite end, by the extent to which local powers have been maintained. How extensive must the central powers be? Theodore Woolsey replies: [2] "In order to know to which of these two classes a given state belongs, we need to inquire only whether the political body in question has the essential qualities of a state or not. If it has the right to make war and peace, to send and receive ambassadors, to levy taxes, to hold courts, to protect and restrain its members so as to keep them within the fundamental law of the union, to interpret that law in the last resort, to have a legislature and executive of its own, with powers answering to such a constitution, it is a state formed by the union of political bodies which were either states, or dependencies of another state or of other states." Woolsey adds, however, that, since the rights belonging to a *bundesstaat* "may greatly vary between the extreme where the parts seem to be consolidated together, to

[1] Note Hamilton's remarks on the Lycian confederacy in Number IX of *The Federalist*.

[2] *Political Science* (2 vols., 1893), vol. II, p. 169. Woodrow Wilson is vague by comparison. He speaks of a national naturalization law, a special body of federal law, and the power "to act independently in matters of common interest," *The State* (1898), pp. 484 and 566.

the complete or almost complete destruction of the original parts, and the opposite extreme where the government of the union is in its power and influence exceedingly weak, it may evidently be difficult to decide whether a particular confederation belongs to this form or not. On the other hand, the *staatenbund* or league of states may approach very nearly to the state constructed by confederation [federation], or may approach the loose condition of a mere alliance for several purposes."

In the obscurity of the frontier regions caution must be observed in attaching the label of federalism. As against confederatism, these are the minimum requirements: that the right of secession has disappeared, that the central government does in some matters of importance act directly upon individuals, and that it possesses substantial powers which can be enforced against the member-states. At the opposite frontier the test is transferred from central to local government. In the first place, says McBain and Rogers,[1] "the powers that are conferred upon or reserved to the local units must be of some genuine political significance; and second, these powers cannot be withdrawn from the local units at the unrestricted will of the central government. A system that leaves only a negligible dross of powers to the component states is a federal system only in name. A system under which the central government is empowered to extend its own competence at pleasure is not a federal but a unitary system."

Away from the frontiers the federal type of State is easily recognized. No one could mistake the provinces of Canada or the cantons of Switzerland for independent sovereign States or, on the other hand, conclude that the central legislatures possess sovereign power. Sovereignty is expressed in the act of amending the constitution; and the principle of federalism requires for that act the coöperation of the whole and the several parts. Thus, the Australian constitution cannot be amended without the affirmative popular vote of a majority in the country as a whole and also in a majority of the member-states. Even if the central legislature were empowered to amend the constitution,—as was the case in the pre-war German Empire,—the parts would exercise some sort of veto through the upper house, especially if more than a simple majority were required. In actual federations the upper house has always reflected the particularism of local units, commonly by equal representation (the United States, Switzerland, Australia).[2]

[1] *The New Constitutions of Europe* (1922).

[2] The Canadian senate has 96 members—Ontario and Quebec have 24 each; the four western provinces, 6 each; New Brunswick and Nova Scotia, 10 each; Prince Edward Island, 4.

Under the imperial constitution of 1871 the German Bundesrath consisted of seventeen members from Prussia, two to six from seven other local units, and one each from seventeen others; but a constitutional amendment could be defeated by fourteen votes. It would be inconsistent with federalism to permit the amendment of the constitution by a legislature drawn from equal electoral districts unless by such a large majority that the local units would feel amply protected.

The existence of federalism depends upon the distribution of powers between central and local authorities. Two consequences seem to be involved: the arrangements must be embodied in a written constitution; and the constitution must be rigid, not alterable by the central legislature under the ordinary law-making procedure.[1] But legislatures are notorious for self-aggrandizement, for overlooking the difference between *meum* and *tuum*. How can their kleptomaniacal tendencies be restrained? How can the constitutional distribution of powers be protected? Mill's words have often been quoted or paraphrased. "It is evidently necessary," he says,[2] "not only that the constitutional limits of the authority of each [central and local governments alike] should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the Governments, or in any functionary subject to it, but in an umpire independent of both. There must be a Supreme Court of Justice, and a system of coördinate courts in every State of the union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final." We are all familiar with the operations of judicial control in the United States, Canada, and Australia. The situation in Switzerland is different. There the courts, while competent

[1] On the other hand, Woodrow Wilson says (*The State*, p. 566): "All modern federal states have written constitutions; but a written constitution is not an essential characteristic of federalism, it is only a feature of high convenience; such delicate coördinate rights and functions as are characteristic of federalism must be carefully defined; each set of authorities must have its definite commission." *Cf.* A. V. Dicey, *Law of the Constitution*, p. 142: "The constitution must almost necessarily be a written constitution.... To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. The constitution must be a written document." It must also be rigid or inexpansive. "The law of the constitution must either be immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution."

[2] *Representative Government* (Everyman's edition), p. 370. See also Dicey, *op. cit.*, pp. 153 *et seq.*; Sidgwick, *op. cit.*, pp. 539 *et seq.* Sidgwick says (p. 540) that "the more stability is given to the constitution by making the process of changing it difficult, the greater becomes the importance of this judicial function of interpreting its clauses."

to set aside cantonal laws as *ultra vires,* cannot question acts of the national assembly. "The reason why all acts of the Assembly must be treated as constitutional by the Federal Tribunal," Dicey explains,[1] "is that the Constitution itself almost precludes the possibility of encroachment upon the articles by the federal legislative body. No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the Cantons, and an ordinary law duly passed by the Federal Assembly may be legally annulled by a popular veto [that is, a referendum]." Strangely enough, Dicey fails to mention the German Empire in this connection. It was a federation. But neither had any court the right to restrain the central legislature, nor could a popular referendum be invoked. Indeed, it is seldom held that judicial control is a necessary appurtenance to federalism. It is "a completely developed federalism" that Dicey had in mind.[2]

This discussion has gone far enough to establish the broad characteristics of confederate, federal, and unitary States. It enables us to say that the federation is a very modern contrivance and that it was first exemplified in the American government of 1789. There were numerous leagues in Greece and Italy, such as the Peloponnesian league, dominated by Sparta; the Delian league, dominated by Athens; the Boeotian league, dominated by Thebes; and the Latin league, dominated by Rome. Not one of these could possibly be mistaken for a federation. It is necessary to look more carefully at the Lycian and Achaean leagues. Both had assemblies, the Lycian consisting of two delegates from each city (except in the case of the three largest cities, which each had three) and the Achaean admitting all citizens of the member-states who cared to attend, but giving each State only one vote. The Achaean apparatus of government was more highly developed: there was an upper house and a cabinet of sorts. Professor W. L. MacLeod asserts that both leagues were "true federal states," [3] and yet fails to show the existence of any federal characteristic. The member-

[1] *Law of the Constitution,* p. 166. Dicey continues: "The authority of the Swiss Assembly nominally exceeds the authority of Congress, because in reality the Swiss legislative body is weaker than Congress. For while in each case there lies in the background a legislative sovereign capable of controlling the actions of the ordinary legislature, the sovereign power is far more easily brought into play in Switzerland than in America. When the sovereign power can easily enforce its will, it may trust to its own actions for maintaining its rights; when, as in America, the same power acts but rarely and with difficulty, the Courts naturally become the guardian of the sovereign's will expressed in the articles of the Constitution."

[2] *Ibid.,* p. 140.

[3] *The Origin and History of Politics* (1931), pp. 365 and 368. But MacLeod also calls the Achaean league a true political *confederacy* (p. 367).

states could secede; it was with their government that the league officials were concerned. The troubles that the Achaean executive had in raising armies, in getting money, and in dealing with recalcitrant members remind us of a similar situation in the days of the American experiment with confederacy. Woodrow Wilson says of the Achaean league that its only constituent law was treaty, that the component States retained full sovereignty, and that "they simply agreed, as equals, to act in concert touching certain matters of common interest."[1] The internal affairs of the member-states lay entirely outside of the league's ambit.

FACTORS MAKING FOR UNITY

There is, we have seen, a tendency for States to move along a scale of biological forms. Alliance ripens into confederation, without loss of independence; the following stage of federalism implies consolidation into a single State, which, however, maintains a constitutional balance between local and central authority; and at last comes unitarism and the disappearance of guaranteed local autonomy. We can imagine the process being repeated until the whole world has united in Tennyson's "parliament of man." World-wide union, as suggested in vague outline by the League of Nations, lies in the far distance. Intermediate groupings must first appear, such as a European union, an English-speaking union, a Latin-American union. But what lies behind this tendency to combine? Why did Americans discard the Articles of Confederation "in order to form a more perfect Union"? Why did the Australian colonies federate and, in so doing, follow the American rather than the Canadian pattern? Why did the South African colonies reject the federal plan in favor of complete union?

One of the main incentives to closer association is a feeling of homogeneity—what Mill calls mutual sympathy among the populations. "The sympathies available for the purpose," he says,[2] "are those of race, language, religion, and above all, of political institutions, as conducing most to a feeling of identity of political interest." In his earlier enumeration of the factors making for nationalism Mill included geographical unity and common memories, that is, a common historical

[1] *The State*, p. 565. The failure of the Greeks to advance farther in the direction of federalism was doubtless due to their preference for the city-state. It was not blindness, says Ernest Barker (*Greek Political Theory*, 2nd ed., 1925, p. 21), but prepossession with a higher type, or with what was regarded as a higher type.

[2] *Representative Government* (Everyman's ed.), p. 36.

tradition. Obviously both should appear here; they help to create at the same time a sense of oneness and a desire to objectify it politically. But Mill also observes that, even without these cohesive factors, peoples may bind themselves together in resistance to oppression. The Swiss did so; and they continued to coöperate in spite of diversity of language and religion, at a time "when religion was the grand source of irreconcilable political enmity throughout Europe." Exposed frontiers and avaricious neighbors dictate union for the purposes of defense. The greater the menace, the closer will the union be. "The community," says Sir John Seeley,[1] "is under a pressure which calls for common action, and common action calls for government. It is reasonable, therefore, to conjecture that the degree of government will be directly proportional . . . to the degree of pressure. In other words, . . . given a community which has to maintain itself against great difficulties and in the midst of great dangers, you may expect to find in it little liberty and a great deal of government."

Intensive government is the reaction against intensive pressure. This explains why, in the stress of the late war, the President and Congress of the United States assumed powers that found little warrant in the Constitution and that were condoned because of the emergency. But pressure may be internal as well as external. President Roosevelt's New Deal, some features of which the Supreme Court condemned as unconstitutional, was devised, or said to be devised, as the means of combating a new emergency, the depression. A good part of it, however, pointed to the permanent regulation of matters that had hitherto rested with the states. Many Americans justified this usurpation on the ground that the pressure of certain economic and social problems could be borne effectively only by the federal government. As population grows more dense and industry is highly developed, the mechanism of life becomes so complicated, its parts so closely entwined, the activities in various areas so intimately bound together that local regulation will no longer suffice. Pressure of this kind, which is mainly economic, can be met only by centralization, accomplished either by amending the constitution or by reinterpreting and evading it in the familiar fashion. Thus, the federal State moves along towards the frontier of unitarism.

The operation of these factors can clearly be observed in America. The thirteen colonies were fundamentally homogeneous. They were

[1] *Introduction to Political Science*, p. 131. See also Sidgwick, *The Elements of Politics*, p. 542.

bound together by geographical contiguity and by common origin, language, religion, political institutions, and historical tradition. Shakespeare, Milton, Bunyan, the Bible; Dryden and Pope, Addison and Swift were their common property. They had all alike inherited from England representative institutions, civil liberty, and the common law. Before independence they had coöperated in defense against foreign enemies; and towards the end of the Revolutionary War, after some years of experience under the Continental Congress, they had subscribed to a compact known as the Articles of Confederation. At the time closer union was quite impracticable. Particularism fed on local pride and separate traditions, divergent economic interests, difficulties of inter-communication, and the contrast, say, between the small farmer of Massachusetts, with his rigid Puritanism and attachment to the town-meeting, and the slave-holding Virginian planter, of cavalier extraction and Episcopalian religion, who probably gambled, swore, and fought duels and who favored government by the best families. Rhode Island had no wish to merge her identity with that of South Carolina.

Why, then, did confederacy give way to federation? Experience proved a stern teacher. Within a few short years after the close of the war, the alternative had to be faced: disintegration of the union, which would invite foreign aggression, and acquiescence in the sacrifice of local sovereignty. The weakness of the confederate congress was leading to bankruptcy and commercial chaos. Congress could not levy taxes; it could only requisition money from the several states, the quotas being determined by the assessed value of land within each state. There was no limit to the amount that Congress could call for, but no way of forcing compliance. The states were so remiss in meeting their obligations that, in a period of four years before the revision of the constitution got under way, three quarters of the aggregate quotas had not been paid. Through failure to meet interest charges, the public debt grew portentously in size, and the credit of the confederacy was so damaged that further borrowings became impossible. Without a sufficient and assured revenue the central government could not survive. The new constitution of 1787 gave it the right to impose taxes directly on the people and to collect them through its own machinery.

Impending bankruptcy was not the sole threat to the union. Congress had no power to regulate commerce and so no means of preventing tariff wars between the states. "The different states, with their

different tariff and tonnage acts," says John Fiske,[1] "began to make commercial war upon one another. No sooner had the other three New England states virtually closed their ports to British shipping than Connecticut threw hers wide open, an act which she followed up by laying duties upon imports from Massachusetts. Pennsylvania discriminated against Delaware, and New Jersey, pillaged at once by both her great neighbors, was compared to a cask tapped at both ends." As Hamilton observes in *The Federalist* (Number XLII), the desire of the commercial states to collect an indirect revenue from their uncommercial neighbors was both impolitic and unfair. It stimulated the injured parties to direct their foreign trade through less convenient channels; it nourished unceasing animosities; and it involved an ultimate danger of armed conflict. The monetary system suffered from even worse disorder. The country had been flooded with paper money, which, like *assignats* in the time of the French Revolution, sank steadily in value. "Continental" bills (issued by Congress during the war) depreciated so far that Jefferson, in 1781, paid a physician $3000 for two visits. We still use the expressive phrase, "not worth a Continental." The states, too, had paper money. In Rhode Island it was issued to farmers on the security of mortgages; and, when merchants refused to accept it, the legislature tried to constrain them by means of a criminal statute. Such an unstable medium of exchange made all business transactions hazardous. What remedies did the Fathers apply in 1787? They forbade the states to emit bills of credit (paper money), to make anything but gold and silver coin legal tender in the payment of debts, or to pass any law impairing the obligation of contract.

It was economic pressure, as these illustrations are intended to suggest, that led to the meeting of the constitutional convention. It was economic prostration that made a more perfect union necessary. The union must be preserved if only from considerations of defense against possible foreign aggression; and the means of preserving it involved the abandonment of the confederate system.

The play of economic motives may be seen in Germany during the months that preceded the drafting of the Weimar constitution. Under the Empire, and especially at the time of the World War, centralization had greatly advanced; and the exigencies of post-war economic reconstruction seemed likely to sweep away all obstacles to unity. This movement suited the socialists, whose huge majorities were concentrated in certain parts of the Republic. Formerly the manufacturers

[1] *The Critical Period of American History* (1888), p. 144.

had given it their enthusiastic backing. "In days gone by," says Moritz J. Bonn,[1] "they had been the advocates of strong government, for it was a government which protected their interests. The old state had been *their* state.... The new state was in the hands of the working class, which many of them had never been willing to consider as their equals. Now they had become their superiors. This being so, the state was no longer a friendly power, entitled to one's support. It had become an enemy, rather, who had to be carefully watched."

Professor Bonn tells how the manufacturers turned from one solution to another. When Bolshevism seemed to be a real menace, there was a momentary inclination to separate the occupied areas from the Republic and rely on foreign troops to suppress Bolshevism. This gave way before a scheme of federalism that would give the member-states autonomy in all concerns of property and production. "The problems of economic administration were to be taken from the hands of the central government, which was controlled by socialists, and to be put into the hands of regional authorities which the propertied and landed classes could hope to control." [2] But still another solution was brought forward. Instead of being transferred from the central government to local governments, power was to be done away with completely. If an agreement could be reached between employers and organized workingmen, public services could be reduced to almost nothing. "A new creed of Cobdenism arose, aiming at a great revolution of the sphere of government action. Government was at its best a costly, superfluous luxury in which a poor country could scarcely indulge; at its worst a positive nuisance, for it was controlled by the opponents of business—the socialistic working class. Business could do very well without government.... A new Manchester school arose, demanding complete self-government for industry. All outstanding economic issues were to be settled by agreement between the employers and employees concerned, without the intervention of the government." [3] But the new Cobdenism was peculiar in the fact that it had no regard for consumers and no belief in free competition. While none of these schemes fructified at Weimar, they are full of significance as showing that the choice between confederacy and federation, or between federation and unitary State, may depend not only upon the interests of local units, but also upon the interests of classes throughout the whole area.

[1] *The Crisis of European Democracy* (1925), p. 54.
[2] *Ibid.*, p. 53.
[3] *Ibid.*, pp. 55-56.

The type of union is not a matter of abstract preference. In each case it is necessary to explain the preference by measuring the relative weight of centripetal and centrifugal influences. Why did the Australian colonies adopt a federal system in 1900 and the South African colonies a unitary system ten years later? The question is all the more pertinent in view of the fact that in the first instance the population was emphatically homogeneous, in the second instance emphatically diverse. Moreover, the Australians adhered rather to the American than to the Canadian plan. The Commonwealth government cannot appoint provincial lieutenant-governors and veto provincial statutes. The local units are called states, not provinces; they have governors, sent out from Great Britain, not lieutenant-governors. They possess all powers that were not expressly conferred upon the Commonwealth authorities and enumerated in the constitution. Union of some kind seemed to be imperative as a means of mutual defense against possible foreign enemies, of preserving a "white Australia" (which Alfred Deakin regarded as the chief incentive to federation),[1] of substituting one market for half a dozen, of administering a vast area of unoccupied land, of regulating industry and labor, and of ending intercolonial strife over railroads and rivers.

Yet union was not dictated by any immediate crisis. The colonies were not faced by any such economic prostration as had threatened the American confederation, or by any such civil conflict as had afflicted the Swiss confederation in 1847, or by such fear of a powerful neighbor as had disturbed Canada after the close of the American civil war. Japan had not yet whetted her appetite at Mukden and Tsushima. Germany, established in New Guinea since 1884, offered the sole foreign menace. On the other hand, there were serious obstacles to union. One was geographic: the size of the island (approximately 2,000 miles from north to south, 2,500 from east to west), and the great central wilderness holding the colonies apart.[2] Again, the little colonies feared domination by the big; three-fourths of all the Australian people lived in Victoria and New South Wales. These two colonies had long been engaged in a railroad rate-war, each being bent upon making its capital important as a center of trade; and Victoria had tapped a rich area of New South Wales by building several railroad lines to the border. New South Wales clung steadfastly to her régime

[1] Sir R. Garran in *The Cambridge History of the British Empire*, vol. VII (1933), p. 500.

[2] New Zealanders said that there were a thousand reasons against their joining the Commonwealth. It is 1280 miles from Wellington to Sydney.

of free trade; but, aside from Western Australia, which had a revenue tariff, the other colonies were wedded to protection. In another conflict, the two populous colonies found themselves aligned against South Australia; while the latter was interested in the navigation of the Murray River, they wanted its water and the water of its tributaries for purposes of irrigation.[1] The adjustment of these differences in the constitutional convention required delicate handling and frequent resort to compromise. Even so, and after a generation of experience with the Commonwealth, Western Australia has been trying to secede since the spring of 1933.[2]

How did it happen that the four South African colonies merged their identities in a union? They were faced by a number of economic problems that could not be solved except by means of common administration. Any one of these problems could be entrusted appropriately to a federal government; but in the aggregate they would require so much centralization that a nominal federalism would be hard to distinguish from unitarism. In all the colonies the revenue from the government-owned railways had a vital bearing upon financial stability. Conflict of interests may be seen in connection with the profitable traffic to the Rand.[3] The Cape ports competed with the Natal port of Durban; and in both cases the railways earned more by carrying goods to the Transvaal over a longer route than by connecting with the railways of the Orange River Colony and allowing them to share in the profits. The Transvaal itself lost money on every ton of goods that was imported over any other route than that from Delagoa Bay, a Portuguese possession. To the dismay of the other colonies, that port had

[1] For a brief discussion of these various matters, see Garran, *op. cit.*, pp. 446-448, and Bryce, *Studies in History and Jurisprudence*, vol. I, pp. 398 *et seq.*

[2] "The outlying states," says W. K. Hancock (*Australia*, 1930, p. 103), "complain that the safeguards have been inadequate. They do not deny the existence of natural inequalities, but they assert that Commonwealth policy has created new artificial inequalities which threaten the whole federal structure." The discontented states—Western Australia, South Australia, and Tasmania—contend that federal taxes inure to the benefit of the more highly developed states. Of the taxes collected in South Australia the Commonwealth paid over to that state an average of 80% in the first decade; 47% in 1911; 17% in 1927. In the first two decades half of the natural increase of the Tasmanian population migrated to the mainland; since that time the loss has exceeded the natural increase. This is attributed to "the incidence of federation." (Hancock, p. 107.) In giving evidence before a commission, Western Australians damned federation as "a very great mistake" and "a disastrous experiment." Nevertheless, a resident of New South Wales, A. P. Canaway, in *The Failure of Federalism in Australia* (1930) pleads ardently for a unitary system.

[3] *The Selborne Memorandum* (1925), pp. 9-11 and 48-94. This report on South African relations in 1907 should rank in importance with Durham's *Report* on the Canadas and Milner's *Report* on Egypt.

absorbed two-thirds of the Rand imports by 1908. "If the possibility of railway rates being made a weapon of international strife is a danger," Lord Selborne asked,[1] "what would be the danger of Customs war between the British South African Colonies? Imagine each of them with a separate tariff framed expressly with the object of fostering the trade of one Colony to the detriment of the trade of its neighbor! Imagine each Colony ringed round with a barrier of internal Customs Houses! The result would be the destruction of commercial stability, the stagnation of industrial enterprise, the creation of a permanent depression." Indeed, it was in part the rapacity of the two coastal colonies, pocketing the taxes paid on goods consigned to their inland neighbors, that made the Transvaal turn to Delagoa Bay.

Each colony had its own system of law. In the absence of any common court of appeal, there was a tendency towards discordant interpretation; and this added obstacles to industry and commerce.[2] The standard of weights and measures, the measuring of foot or ton, varied in all parts of the country.[3] Again: [4] "No race of farmers in the world have more natural difficulties to contend with than those of South Africa. Scab, rinderpest, East African coast fever, locusts, are each in their degree a constant menace to the farmer. The plagues of nature know no artificial boundaries between Colonies, and are impartial in their visitations; the farmers, however, in their warfare against these plagues are heavily handicapped by the multiplicity of authorities.... Any misunderstanding which resulted in want of coöperation might result in a new disease being let loose on a Colony." Both agriculture and the mining industry required an adequate supply of competent labor. But in many cases the demand for labor existed in one colony, and the supply in another. "Any attempt to bring the supply and the demand together can only be made by private individuals who are hampered by the existence of different laws regulating labor questions in the Colony of demand and the Colony of supply. What proportion the real supply bears to the demand can never be known until there is in South Africa one authority charged with the task of regulating the labor supply as a whole." [5]

[1] *Ibid.*, p. 11. See also pp. 94-107.
[2] *Ibid.*, p. 12.
[3] *Ibid.*, p. 135.
[4] *Ibid.*, pp. 13-14.
[5] *Ibid.*, pp. 14-15. On p. 118 Selborne says: "Imported laboures in the Transvaal are, under existing law, repatriated at the close of their contract. Those in Natal are free to remain and are in large numbers being incorporated in the social system of South Africa. In the Transvaal the coolies are limited by law to

All of these problems, taken together, were overshadowed by the native problem. The natives outnumbered the whites by considerably more than three to one and were increasing faster.[1] The future peril was accentuated by the existence of four different native administrations. "All experience goes to show," Lord Selborne observes,[2] "that those administrations will each of them differ, the one from the other, and that different policies applied at the same time in different parts of the same country, to the same races, the members of which are in constant communication with one another, must together defeat the object at which each severally aims. The general result is sure to be utterly unlike what any one of them was intended to produce, and proceeding from policies which are inconsistent and causes which are uncontrolled will be accidental if not disastrous in its effects. The situation is startling, because it is without precedent. No reasoning man can live in this country and doubt that the existence here of a white community must, from first to last, depend upon their success or failure in finding a right solution of the colored and native question, or, in other words upon the wisdom they can show in determining the relative places which the white, colored, and native populations are to fill." It was the native problem, more than all other factors in this situation, that reconciled Boer and Briton, in spite of cultural heterogeneity and mutual antipathies, to a unitary scheme. The two peoples spoke different languages and cherished different memories; but both realized that they shared the same stake in the destiny of South Africa and that they could not maintain white civilization without consolidating their separate interests.

Among the post-war unitary States Jugoslavia is particularly interesting.[3] A fairly close political association was suggested by the affinity of Serbs, Croats, and Slovenes and by the exposed frontiers, which touched seven different States. The Serbs insisted upon unification. They could then dominate a sort of enlarged Serbia by virtue of

unskilled labour. At the end of their indenture the Natal coolies are free to compete in occupations of all kinds.... The Rand mining industry is not a permanent industry. Compared with the whole future before this country its life will be as an incident in its history. But in Natal the most permanent and fundamental industry of the country is being established on the basis of Asiatic labour.... Every year that passes converts Natal more deeply to Asiatic labour."

[1] The population of the Union in 1911 was 5,973,394: Europeans 21.4%; natives, 67.3%; and Asiatics and mixed races, 11.3%.

[2] *Ibid.*, pp. 112-113.

[3] C. A. Beard and George Radin, *The Balkan Pivot: Jugoslavia* (1928); Count C. Sforza, *European Dictatorships* (1931), pp. 90-123; Isaiah Bowman, *The New World* (rev., 1926), pp. 250 *et seq.*

their superior numbers,[1] their superior political experience, and control of the existing civil service. Within a decade internal discord, proceeding chiefly from Croatian insistence on autonomy, made democratic government impossible. Quite aside from the minorities of Germans, Magyars, and others that in aggregate numbered over two millions, the Slavic peoples were far from being homogeneous. They had no common fund of memories and achievements; they had different degrees of political experience; they spoke different dialects. The Serbs belonged to the Orthodox church, used the Cyrillic alphabet, and devoted themselves almost exclusively to agriculture. The Croats and Slovenes belonged to the Roman Catholic church, used the Latin alphabet, and in some areas were highly industrialized. "As a rule," says Count Sforza,[2] "all the Jugoslavs, who until 1918 belonged to the Austrian Monarchy, had become Western Europeans, or at least they looked so. The Serbians of the Obrenovich and Karageorgevich Kingdom are still patriarchal.... It is natural enough that, the two parts of the nation being so different, the Croats should more and more say of the Serbians: 'They are Balkanics, they are Orientals'; while the Serbian, proud of the war record, looks with contempt on the Croat and calls him: 'Austrian!'" Under the circumstances the alternative was federalism or dictatorship. King Alexander became dictator in 1929. His attempt to disguise autocracy with a false front of bicameral parliamentarism—with *viva voce* voting at elections and a system (once tried by Mussolini) of giving two-thirds of the seats in the lower house to the most numerous party—seemed to meet with little success before his assassination in 1934, or after it. Premature political unification has retarded, perhaps wrecked, the growth of a Jugoslavian nationalism.

CONSTITUTIONAL CHANGE WITHOUT AMENDMENT

Even under a unitary system the Croats could be accorded in Jugoslavia, as the Scots actually have been accorded in Great Britain, an adequate measure of local autonomy. They would still lack a constitutional guarantee, having to depend upon a political compromise and good faith in adherence to it. But the federal guarantee may itself prove fragile. Americans have heard a good deal latterly about the vanished rights of the states. They have become familiar with the

[1] Bowman (p. 253) gives the following figures: Serbs, 6,000,000; Croats, 2,500,000; Slovenes, 1,000,000 Macedonian Slavs, 550,000; Magyars, 450,000; Germans, 450,000; Albanians, 250,000; Moslem Serbs, 625,000; Rumanians, 150,000.

[2] *Op. cit.*, p. 99.

process by which the language of the constitution, although changed by no formal amendment, comes to have a new meaning, utterly at variance with the intention of the Fathers. Circumstances never remain the same; in the United States they have moved rapidly towards economic consolidation. Reacting towards a transformed environment, the people shift their attitude, as they grapple with concrete abuses and find the state governments incapable of dealing with them. They recoil from tinkering with a revered and even sacrosanct constitution, and yet bring pressure to bear upon Congress to usurp authority. Then it is the business of the Supreme Court either to hold the new legislation invalid or to devise some ingenious doctrine that will apparently harmonize usurpation with the original grant of power. The ingenuity of the Court should not be excoriated. The Court does what American and British courts always did in the past. The common law is judge-made law; and, at innumerable points in its long evolution, it illustrates the tendency of the judges to recognize the fluidity of circumstances and public opinion by giving way when changes appear to be, not momentary, but more or less permanent.

The process of centralization in the United States has been so widely discussed that it needs no further comment here. The expansion of the power to regulate interstate commerce may serve as a single illustration. With the passage of the Interstate Commerce Act, fifty years ago, a new epoch began. After a time Congress advanced to the enactment of laws that, in practice, conflicted with the reserved rights of the states. Such laws were sustained by the Supreme Court. With respect to safety appliances the Court held (1903) that, when railway cars, operating only in local traffic, traversed a track used in interstate commerce, they became subject to federal regulation; and, with respect to laws of labor (1911), that the purpose of Congress "cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate commerce." Practically speaking, the safety-appliance law and the sixteen-hour law controlled commerce within the states. So did the Adamson Act of 1916, which established the eight-hour day and incidentally fixed wages. A series of rate cases further enlarged the powers of Congress. In the Shreveport case (1914) it was held that Texas could not lower local freight rates so as to discriminate against shipments from other states; and in the Burlington case (1922) that Wisconsin could not lower local passenger rates so as to obstruct a national plan for increasing the revenue of railways. This doctrine about ob-

structions to interstate commerce had already been developed in *United States v. Ferger* (1919). Obviously it could be employed to justify the invasion of any part of intrastate commerce or even the complete obliteration of state power over it. The New Dealers embraced the doctrine. Note the words used in the first section of the National Industrial Recovery Act of 1933: "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce, which tend to diminish the amount thereof." The depression itself, as a previous sentence shows, constituted the obstruction; therefore, any measure tending to mitigate economic distress would be constitutional under the Ferger case. True, the Supreme Court, in the Schechter case (1935), refused to approve this logical application of its doctrine; but judges prefer to go wherever they are going without indecent haste.

In Australia, likewise, a centralizing process has been sanctioned by the High Court. The constitution provides (section 107) that each state shall retain all powers which have not been exclusively vested in the Commonwealth or withdrawn from the state. This is equivalent to the Tenth Amendment to the American constitution. For a considerable time the High Court showed a disposition to keep the Commonwealth Parliament within its enumerated powers (section 51) and not to allow an abuse of the "elastic clause."[1] But in 1920 it laid down new rules of constitutional interpretation, which removed a chief obstacle to the advance of the central power. "The Australian states," says W. K. Hancock,[2] "have learned in bitterness that 'it is not always the residuary legatee who comes off best under a will. Sometimes the specific legatee takes the bulk of the estate and leaves him nothing but debts.'" It was in the *Engineers' Case* that the Commonwealth Arbitration Court was permitted to intervene between a state government and its employees, even in matters affecting remuneration and conditions of labor. Six years later, in the *Forty-four-hours-week Case,* it was held that an award of the Arbitration Court could override a state statute. "The decision," Hancock declares,[3] "cut at the very foundations of that self-government which the six members of the Federal body had enjoyed." However, while public opinion has not always succeeded in restraining the Commonwealth Parliament, it has steadily rejected proposed amendments that were devised to enlarge the central power; and

[1] "Matters incidental to the execution of any powers." See section 51, xxxix.
[2] *Australia* (1930), p. 117.
[3] *Ibid.*, p. 118.

it has done so with persistence and even undiscriminating obstinacy.[1]

In Australia, as in the United States, the residuary power was confided to the states, which are gradually being divested of it. In Canada it rightfully belongs to the Dominion. The British North America Act (section 91) gives the Dominion parliament the power "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to its provinces." The intention of the Fathers was well known; and at first the Judicial Committee of the Privy Council favored the historical facts. In *Russell v. the Queen* (1882) they upheld a statute prohibiting the liquor traffic throughout Canada, except under certain limitations. They upheld it under the residuary power. But soon afterwards, shifting ground, they began to deliver a series of decisions that rendered the residuary clause almost meaningless.[2] The new doctrine came to full maturity in the case of *The Toronto Electric Commissioners v. Snider* (1925).[3] In the words of Lord Haldane, *Russell v. the Queen* could not now be regarded "as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a want that is felt throughout the Dominion, renders it competent, if it cannot be brought under the heads enumerated specifically in section 91." The words "peace, order, and good government," his lordship said, confined the residuary power to cases arising out of some extraordinary national peril. To-day *Russell v. the Queen* could be supported only on the ground that the evil of intemperance at that time was "a menace to national life."

On this decision Professor Kennedy comments:[4] "The Dominion can only invade provincial powers in the valid exercise of its enumer-

[1] In 1929 a royal commission reported, four to three, against the proposal to set up a unitary system. The majority proposed to give the Commonwealth some few additional powers. The minority (reflecting the attitude of the Labor Party) proposed to give the Commonwealth parliament the power to amend the constitution, according to the practice in Great Britain, South Africa, and New Zealand. Two of the minority wished to require a referendum for any statute restricting the suffrage or trial by jury, extending the term of the lower house, exacting religious taxes, or imposing conscription for the armed forces or industrial service. *Cambridge History of the British Empire,* vol. VII (1933), pp. 486-490.

[2] W. P. M. Kennedy, *Essays in Constitutional Law* (1934), pp. 83-92; R. McK. Dawson, *Constitutional Issues in Canada* (1933), pp. 54-56 (republication of an article by Kennedy in the *Round Table*); and Alexander Brady, *Canada* (1930), pp. 44-49.

[3] The decision is given in Dawson, *op. cit.,* pp. 442-446. Next year the same doctrine was applied in *Fort Francis Pulp and Power Company v. Manitoba Free Press.*

[4] Dawson. *op. cit.,* p. 56.

ated powers, and the real residuum of powers, except in cases of national peril and calamity, either rests with the provinces under their exclusive power over 'property and civil rights in the province,' or is unprovided for in the Act." Alexander Brady complains that history has played ungracious tricks with the intentions of the Fathers.[1] Constitutional development has frustrated their designs "by greatly enlarging the content of provincial powers, until at the present day the legislatures of the provinces control more matter of vital social and industrial concern than the states of the American Union." In a word, constitutional development in the United States and Canada has proceeded along opposite lines—the states having been weakened to the profit of the Union, the provinces strengthened at the cost of the Dominion. Undoubtedly, the Judicial Committee must have been affected by the persistent particularism of Quebec, which on occasion found strong support in certain other provinces. The decline of central power in Canada cannot be attributed to the Judicial Committee alone. It is also seen in the rigid application of the federal idea in distributing cabinet officers and in the growing reluctance to disallow (veto) provincial legislation.[2]

The Judicial Committee, however, has recently gone farther than the Supreme Court of the United States in discarding its own doctrine. This appears in two momentous cases, one concerning the control of aërial navigation (1931) and the other concerning the control of radio communications (1932). In the first case their lordships, through Lord Chancellor Sankey, held that section 132 of the constitution,

[1] *Op. cit.*, p. 45.

[2] The federal veto is not limited in any way by the constitution. In the first quarter of a century it was freely employed against provincial acts on the ground that they were *ultra vires*, unjust, or confiscatory. "In other words," says Alexander Brady (*op. cit.*, p. 46), "the Minister of Justice at Ottawa, whose opinion in the Cabinet on such matters was dominant, undertook to correct what he might view as the injustices or illegalities of a provincial Government, clearly implying the subordinate and municipal character of the latter." There came a change, largely because of provincial protests. "The doctrine has gained ground that it is unfair for the federal executive to pass upon the justice or injustice of Acts of a legislative sovereign within its own field, and decision on the illegality of an Act had better be left to the courts." As Minister of Justice in 1909, Sir Allen Aylesworth supported this doctrine in urgent terms. It is true that the veto is not altogether obsolete. It was applied in 1918 to a statute of British Columbia which diminished the consideration of a contract and in 1923 to a statute of Nova Scotia which confiscated private property. "But increasingly it becomes difficult to justify in the face of the enhanced status obtained by the provinces through judicial interpretation and economic growth.... Only where broadly Canadian or Imperial interests are affected is federal disallowance justified. Only in such cases is it apt to be used." Brady, p. 47. The subject is discussed more in detail by Kennedy, *op. cit.*, pp. 31-73.

empowering the Dominion to perform all treaty obligations, authorized it to execute the treaty of 1919 which covered substantially the whole field of aërial navigation; but they held further that any remaining portion of the field "must necessarily belong to the Dominion under its power to make laws for the peace, order, and good government of Canada." More than that, they no longer limited the application of the residuary clause to "some extraordinary national peril," as in 1925; they broadened it to embrace matters "unquestionably of national interest and importance."[1] In a complete reversal of opinion they appear to have returned to the old doctrine of *Russell v. the Queen*. The second case still more clearly restored the residuary clause to its original significance. The control of radio communications, it was held,[2] "falls within the words in section 91 ... which assigns to the Government of the Dominion the power to make laws for the peace, order, and good government of Canada."

Local autonomy, supported by a constitutional guarantee is characteristic of federal systems. Its extent may vary greatly, however, from one federal system to another, and in the same system from one time to another. In the latter instance the variation often occurs in response to new circumstances and without any formal change in the constitution. Unitarism, on the other hand, does not necessarily imply a narrower range of local autonomy: it implies the absence of any constitutional power of local self-protection, the competence of the central government to revoke any concession that may have been granted. Centralization, we have seen, is generally a response to social pressure or foreign pressure. Sir John Seeley contrasted the United States and Great Britain with France from the standpoint of centralization.[3] He found that the American federal State and the British unitary State both possessed excellent frontiers (although the broad Atlantic Ocean afforded better security than the silver streak of the Channel) and that both inclined towards liberty or freedom from restraint by government. What explains the emphasis upon centralization in France? "Assuredly in Louis XIV's reign the dominant fact in France was the frontier. Louis XIV himself, as Ranke says, was regarded in his own time less as a great conqueror than as the fortifier of France, the man sent to give France a satisfactory frontier. But the more he strengthened the country against the foreign enemy, the more he con-

[1] *Attorney-General for Canada v. Attorney-General for Ontario, Times Law Reports*, vol. XLVIII, pp. 18-23.
[2] *Attorney-General of Quebec v. Attorney-General of Canada, ibid.*, pp. 235-238.
[3] *Introduction to Political Science*, pp. 131-132.

solidated his own authority, crushed liberty, and established absolutism."

France still has a frontier problem; and it remains a chief concern in her national life. Great Britain still has her Channel; but, without a predominant fleet, she cannot save her food imports from submarine attack; and the menace of attack through the air has, Stanley Baldwin acknowledges, shifted her frontier to the Rhine. In both countries, as in the United States, contemporary economic processes have made central authority more essential than it ever was before. Especially after the close of the World War, there was much talk of "devolution" in Great Britain and "regionalism" in France,[1] of setting up subordinate legislatures in local areas. Latterly the agitation has died down. It never had much substance. Such an approach to federalism—possibly appropriate as a solvent of animosities in Belgium, Jugoslavia, or Spain—does not find justification in any real sentiment of particularism in Great Britain or France. While French regionalists can cooperate in discussing the theory, they make strangely divergent maps: the regions have no natural existence. Moreover, the stream of modern life runs counter to decentralization. What services could be put into local hands without serious practical inconvenience and loss of efficiency? Nevertheless, the question deserves attention as showing how closely federalism and unitarism might resemble each other in the degree of actual local autonomy.

[1] F. A. Ogg, *English Government and Politics* (2nd ed., 1936), pp. 468-477; J. A. M. Macdonald and Lord Charnwood, *The Federal Solution* (1914); E. M. Sait and D. P. Barrows, *English Politics in Transition* (1925), pp. 245-265; W. H. Chiao, *Devolution in Great Britain* (1926); J. Hennessey, *La Réorganisation administrative de la France* (1919); R. K. Gooch, *Regionalism in France* (1931).

CHAPTER XVIII

MONARCHY, ARISTOCRACY, DEMOCRACY

STATES differ one from another in many respects; and, like plants or animals, they may be classified on the basis of such differences. Obviously, however, a sound method of classification should distinguish between fundamental and superficial characteristics. Here subjective judgment comes into play and produces a chaos of disharmonious criteria. For example, both Sir John Seeley [1] and Robert M. MacIver [2] recognize two primary classes; but their categories are quite dissimilar, referring, in the first case, to city and country States and, in the second, to dynastic and democratic States.[3] In this book the types that have been contrasted so far are national and non-national States, unitary and federal. Although far from being exhaustive, these distinctions are at least important.

In common speech it is the practice to contrast monarchies and republics. Thus, we read in the *Encyclopaedia Britannica* [4] that in a republic "the supreme power rests in the people, or in officers elected by them.... The head of the state is usually elected directly, and in modern usage this fact distinguishes a republic from a monarchy in which the head is hereditary." From the standpoint of the usage in question the first part of this statement is inaccurate in saying that supreme power must be vested in the "people"; the republic may be narrowly aristocratic or oligarchic. Léon Duguit expresses the usage more correctly: "When the head of the State is hereditary, the government is monarchical; otherwise, it is republican." [5] No matter how attenuated the power of the hereditary official may be, the State is

[1] *Introduction to Political Science* (1896), p. 100.
[2] *The Modern State* (1926), p. 363.
[3] In dynastic States "there is no general will co-extensive with the community embraced within the state," or else "the general will is merely acquiescent or subservient." In the democratic State the general will includes the whole of the community or most of it, and is "the conscious, direct, and active support of the form of government,"
[4] 14th ed., 1929, *s.v.* "Republic."
[5] *Traité de droit constitutionnel* (2nd ed., 5 vols.), vol. II (1923), p. 607.

called a monarchy; no matter how powerful the elective official may be, or how long his term, the State is called a republic. In order to make this point clear, we might observe, by way of contrast, the definition given by Sir George Cornewall Lewis a century ago: [1] "When the whole sovereign power over a community belongs to one person, the government is called a *monarchy;* when it belongs to several, it is called a *republic* or *commonwealth.*" Lewis is concerned, not with the tenure by which the head of the State holds office, but with the location of sovereign power.

Duguit's distinction between monarchy and republic accords with the language of diplomacy. Nevertheless, it does not reflect realities of any great consequence.[2] The effective head of the British government is the prime minister, not the titular king; and he is far more amenable to popular control than is the President of the United States. Why should the two countries be differentiated from each other, as a monarchy on the one side and a republic on the other? What value can we attach to a classification that rests on so unsubstantial a foundation? Difficulties are encountered in applying it. As a matter of fact, the British King holds office by virtue of a statute, which may be repealed or amended at any time. His position is not very different from that of the elective Stadtholder of the Dutch Republic, holding office for life and being succeeded normally by his heir. The Roman Empire, in which hereditary succession failed to take root, is never alluded to as a republic. The meaning attached to the word "republic" by Duguit may be disputed. In *The Federalist,* Madison held that the designation was improperly applied to Holland and Venice: to the first, because "no particle of the supreme authority is derived from the people"; and to the second, because "power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles." [3] A republican government, he contends,[4] "derives all its powers, directly or indirectly, from the great body of the people, and is administered by persons holding office during pleasure, for a limited period, or during good behavior." In two other passages, contrasting a republic with a democracy (by which he means a pure or direct democracy), he makes a special point of the fact that its government is

[1] *Remarks on the Use and Abuse of Some Political Terms* (1832; new ed., 1898), p. 53.

[2] MacIver (*op. cit.,* p. 356) contends that the extrinsic prestige of a powerless monarch has a psychological effect, making for "conservatism and the confirmation of certain characters of the class-state, such as gradations of rank and honour."

[3] Number XXXIX.

[4] *Ibid.*

conducted, not by the mass of the citizens, but by elected representatives.[1]

ARISTOTLE'S CLASSIFICATION

The practice of contrasting monarchy and republic in the manner of Duguit, although firmly established to-day, points to no fundamental divergence in type. Aristotle's famous classification serves our purpose much better. Aristotle may have been influenced by Herodotus, who had introduced the three classes of monarchy, oligarchy, and democracy.[2] According to Aristotle,[3] "every form of government must contain a supreme power over the whole state; and that supreme power must necessarily be lodged with one person, or a few, or many. We usually call a state that is governed for the common good by one person a monarchy; by more than one, but by only a few, an aristocracy"; and by the citizens at large a commonwealth. When the government pursues selfish ends, instead of serving the interests of the community, and when the three types are therefore perverted or corrupted, other terms are employed. "Now a tyranny is a monarchy in which the good of one man only is the object of government; and oligarchy considers only the rich; and a democracy only the poor. None of them has the common good in view."[4] Modern writers have tended to ignore the bifurcation into sound and perverted forms. A simpler formula now suffices: monarchy, or rule by one; aristocracy, or rule by a few; and democracy, or rule by the many (the "demos" or people).[5] It should be noted, however, that the term "oligarchy" (which means literally

[1] Numbers X and XIV. The definitions of republic that John Adams gave varied from time to time. Strictly speaking, he says, a government is republican when "the sovereignty resides in more than one man"—which is the view taken, as we have seen, by Sir George Lewis. On another occasion the requisite is that the people, "collectively or by representation," have an essential share in the sovereignty; at another, that all men are subject to the laws. Being a great admirer of the English government, he believes that it may properly be called republican, since one of its branches, the House of Commons, represents the people. See Correa M. Walsh, *The Political Science of John Adams* (1915), pp. 27 and 34.

[2] *History,* Book III, Chapters 80-82. In *The Republic* (Book VIII) Plato gives five classes: aristocracy (government of the best), timocracy (the government of honor), oligarchy ("in which the rich have power and the poor man is deprived of it"), democracy ("in which the magistrates are commonly elected by lot"), and tyranny.

[3] *Politics,* Book III, Chapter 7. See also *Ethics,* VIII, 12.

[4] The Aristotelian terminology was modified by Polybius (VI, 3), who regarded, for instance, ochlocracy (mob-rule) as the perverted form of democracy.

[5] Thomas Hobbes (*Leviathan,* Part II, Chapter 19) may be taken as an illustration: "Other kind of commonwealth there can be none; for either one or more or all must have the sovereign power entire."

rule by a few) is often employed in a somewhat derogatory sense to indicate that a small group actually controls the government. Many believe that all three forms of government degenerate into oligarchies.[1]

The Aristotelian classification has frequently been attacked. Von Mohl condemns it as resting on a principle that is arithmetical rather than organic, quantitative rather than qualitative, the distinction between aristocracy and democracy, for example, being merely numerical and the point at which the two merge being impossible to fix except in an arbitrary fashion.[2] Charles H. Cooley, regarding democracy as permanent and destined to be universal, believes that the consideration of any other type is a waste of time.[3] Woodrow Wilson suggests that there is no longer any space between monarchy and democracy for aristocracy, which has been crowded out.[4] "I must confess," says Sir John Seeley,[5] "that I cannot find that very obvious classification which comes down to us from Aristotle, and which is still assumed and accepted almost on all hands, at all satisfactory.... It seems to me strange that though everything in politics has altered since Aristotle's time, though the states we deal with are marvellously unlike the city communities he had in view, we should still think such a classification as this sufficient. And yet it seems to me that in all our political discussion we still use, and even confine ourselves to, these simple categories.... The truth is that though we continue to use the ancient words we do not use them in the ancient sense, but in a sort of metaphorical manner which is not admissible in any discussion which professes to be exact.... That classification was intended to be taken literally, and it referred to recognized institutions of the state, not to some hidden influences which we may be able to detect by looking below the surface.... But if we take those terms, as we ought to do, always in their literal sense, then I think we shall seldom find the old classification serviceable." Heinrich von Treitschke expresses himself in much the same way. "Nothing is achieved," he says,[6] "by the ancient trinitarian division derived from Aristotle. It brings home to us once more that his outlook on the universe was a narrow one and is no longer adequate for the study of the multifarious aspects of modern political

[1] Robert Michels, *Political Parties* (1915), esp. pp. 50-51 and 400-401; and Bryce, *Modern Democracies* (2 vols., 1921), vol. II, p. 548.
[2] J. W. Garner, *Political Science and Government* (1928), pp. 245-246.
[3] *Social Organization* (rev. ed., 1920), pp. 120 *et seq.*
[4] *The State* (rev. ed., 1898), p. 580.
[5] *Introduction to Political Science* (1896), pp. 45, 46, 48-49.
[6] *Politics* (2 vols., 1916), vol. II, pp. 8-9.

life." He substitutes a tripartite classification of his own: theocracy, monarchy, republic.[1]

In reply to the critics it should be said, first of all, that the Aristotelian scheme need not be—and is not here—retained as an exclusive test of governmental forms. In order to reveal fundamental analogies and contrasts, other tests must be applied. On the other hand, Aristotle does not deserve banishment simply because he falls short of meeting all our contemporary needs. A test may be very useful for some purposes without being adequate for all. Woodrow Wilson admits that Aristotle's enumeration, though not exhaustive, "still serves as a most excellent frame" on which to hang a modern exposition and that it facilitates the contrasting of modern with ancient States. He labors under the misapprehension that it "will not quite fit" the contemporary scene and so damns it with faint praise.[2] Others take a more favorable view. "Von Mohl," says John W. Burgess,[3] "criticizes the doctrine of Aristotle as being purely arithmetical, and containing no organic principle. ... I think it is not only an unjust, but a crude and careless, criticism. Forty-five years before von Mohl published the first edition of his noted treatise, Schleiermacher had demonstrated the spiritual and organic character of this Aristotelian principle of classification. The numbers and proportions are used simply to indicate how far the consciousness of the state has spread through the population, and to note the degree of intensity with which that consciousness is developed, and the principle is that no part of the population in which the consciousness of the state is strongly developed can be kept out of the organization of the state, and that, therefore, the number inspired with this consciousness and participating in this organization really does determine the organic character of the state."

Perhaps this statement is not altogether acceptable. It serves well enough up to a certain point. As we read the modern history of Europe, we discern, in the light of Aristotle's trinitarian scheme, a series of stages in the development of political consciousness from

[1] While the head of a republic, whether aristocratic or democratic, is both ruler and subject, possessing no self-derived power, a monarch is actually sovereign and can never subordinate his authority to another. *Ibid.*, p. 10. Theocracy is very important; it has dominated Asiatic nations for centuries. Treitschke says that Aristotle committed a "radical error" in overlooking it and in supposing that the Persian monarchy was a mere corruption of kingship. Seeley likewise complains of the omission of theocracy (*op. cit.*, p. 51). The truth may be, of course, that theocracy is only a form of monarchy.

[2] *The State* (rev. ed., 1898), p. 577.

[3] *Political Science and Comparative Constitutional Law* (2 vols., 1890), vol. I, p. 72.

monarchy to democracy. Aristotle himself defined the normal series of stages as follows: Monarchy, aristocracy, oligarchy, tyranny (a form of monarchy), and democracy. At the last of these stages the citizens as a whole have become politically conscious. But is this the final goal, the beginning of a permanent era, like Marx's dream of a classless society? How can it be? Nothing is immutable; nothing endures for ever. Democracy shrivels up, gives way to some sort of monarchy; and the whole Aristotelian cycle is repeated.[1] Professor Burgess saw no farther than democracy. He failed to realize that political consciousness, or the desire for active participation in the government, moves up and down like a piston; that popular interest waxes and wanes. This phenomenon, which was familiar to Aristotle, has not come within the myopic vision of many moderns. It was brought home to us at the very time when we were being told that democracy was conquering the whole world and that, once established, it could not be overthrown. Russia, Italy, and Germany afford three of numerous illustrations. In October, 1922, the populace of Rome decorated their city as for a great festival and went out to meet the Black Shirts as deliverers. The burden of self-government, the dread of responsibility, had been lifted from their weary shoulders.

A little later some attempt will be made to explain the contemporary decline of democracy. At the moment it may be sufficiently apposite to give Plato's reasons for the inevitable collapse of democracy into tyranny. "When a democracy that is thirsty for freedom," we read in *The Republic*,[2] "has evil cup-bearers presiding over the feast, and has drunk too deeply of the strong wine of freedom, then, unless her rulers are very amenable and give a plentiful draught, she calls them to account and punishes them, and says that they are cursed oligarchs.... By degrees the anarchy finds its way into private houses, and ends by getting among the animals and infecting them. I mean that the father grows accustomed to descend to the level of his sons and to fear them, and the son is on a level with his father, he having no respect or reverence for either of his parents; and this is his freedom, and the metic [resident alien] is equal with the citizen and the citizen with the metic, and the stranger is quite as good as either. In such a society the master fears and flatters his scholars, and the scholars despise their masters; young and old are all alike; and the young man is on a level

[1] Before Aristotle, Plato described a somewhat similar cycle (*Republic*, Book VIII), as did Polybius after him (VI, 4).

[2] Book VIII, Jowett's translation.

with the old, and is ready to compete with him in word or deed; the old men condescend to the young and are full of pleasantry and gaiety; they are loth to be thought morose and authoritative, and therefore they adopt the manners of the young....Nor must I forget to tell of the liberty and equality of the two sexes in relation to each other.... All things are just ready to burst with liberty. And above all, I said, and as a result of all, see how sensitive the citizens become; they chafe impatiently at the least touch of authority, and at length, as you know, they cease to care even for the laws, written or unwritten; they will have no one over them. Such is the fair and glorious beginning out of which springs tyranny." The excessive increase of anything often causes reaction in the opposite direction, especially in forms of government. "The Excess of liberty, whether in states or individuals, seems to pass into excess of slavery. And so tyranny naturally arises out of democracy, and the most aggravated form of tyranny and slavery out of the most extreme form of liberty." [1]

There are, according to Aristotle, several distinct types of government. But, since they succeed each other in a more or less fixed order, it is not surprising that relics of each successive stage persist, thus producing the appearance at least of a mixed type. That Aristotle was quite aware of this his descriptions of the Lacedemonian, Cretan, and Carthaginian governments make clear.[2] "The test by which to try whether democracy and oligarchy have been happily blended," he observes in one passage,[3] "is that the same government may be called by one name or the other. The perfection of the mixture is evidently the cause of the doubt, and the same is the case with regard to anything placed between two extremes, as it seems to partake of both. An instance of this uncertainty is offered by the Lacedemonian constitution, which some call a democracy, some an oligarchy." Aristotle then shows that the use of these two terms may be justified by the character of

[1] The people find a champion and protector. He deprives the rich of their estates, takes a large part himself, and divides the rest among the people. "The tale is that he who has tasted the entrails of a single human victim minced up with the entrails of other victims is destined to become a wolf. And the protector of the people is like him; having a mob entirely at his disposal, he is not restrained from shedding the blood of kinsmen; by the favourite method of false accusation he brings them into court and murders them, making the life of man to disappear, and with unholy tongue and lips tasting the blood of his fellow citizens; some he kills and others he banishes, at the same time hinting at the abolition of debts and the partition of lands: and after this, what will be his destiny? Must he not either perish at the hands of his enemies, or from being a man become a wolf—that is, a tyrant?"

[2] *Politics*, II, 9-11.

[3] *Ibid.*, IV, 9.

certain Spartan institutions. Elsewhere he alludes to the monarchical element, which is, he says, nothing more than an hereditary generalship.[1] Similarly, in Plato's *Laws*,[2] a Lacedemonian finds it impossible to say of his government whether it should be called a monarchy, an aristocracy, or a democracy. The Cretan makes the same remark about the constitution of Cnosus. Thereupon the Athenian says: "The truth is, my friends, that the governments of your two countries are severally made up of these different forms."

Under the circumstances, Sir John Seeley cannot be justified in one of his chief criticisms of the Aristotelian classification. He contends that the types are far less distinct in modern Europe than they were in the ancient world; that the English constitution has been lauded as a "beautiful compound" of all three types; and that "everywhere, and even in the United States, we find government divided between the one, the few, and the many." [3] Seeley seems to forget the cases of mixed government that Aristotle himself describes in some detail, and with approval. Even if similar cases are encountered more frequently today, that fact does not invalidate the Aristotelian categories. True, England has not only a House of Commons, but also a House of Lords and a King; true, "the American Senate has greater powers than our House of Lords, and the American President decidedly greater powers than our monarch." [4] But an analysis will show that both governments are democratic, because in both ultimate control lies with the people. In any situation Aristotle's criteria are valuable. By applying them we are led to search for the realities in each political system; to recognize periods of transition, when one form is gradually giving way to another; to appreciate the relative efficiency of factors that may be no more than survivals after a shift in the political center of gravity or may illustrate a national propensity, like that of the Romans and the English, to preserve old forms and effect some kind of a balance through compromise.

[1] *Ibid.*, III, 14.

[2] Book IV. Cicero (*De Republica*, II, 23) says that "the best form of government is a moderate mixture of royalty, nobility, and democracy." According to Polybius (VI, 10-11) Romans could not easily determine the type of their own government. "For, if they turned their view on the power of the consuls, the government appeared to be purely monarchical and royal. If, again, the authority of the senate was considered, it then seemed to be near the form of aristocracy. And, lastly, if regard was had to the share that the people possessed in the administration of affairs, it then appeared to be plainly a democracy."

[3] *Op. cit.*, p. 47.

[4] *Ibid.*, p. 48.

Appearance often disguises realities; and for that reason difficulty may be encountered in classifying particular governments. It is not always enough to survey the constitution—that is, the legal framework of institutions. We must be prepared to find discrepancies between the law and the customary modes of behavior that modify it. Our understanding of the British constitution would be grotesquely at variance with the facts if we assumed that the King's immense legal authority, his prerogative powers, still rested in his own hands. The King exercises those powers on the advice of a Prime Minister who bows to the will of the electorate. Political practice has been more potent than the law. This is, of course, no secret. All of us are familiar with the character of the "conventions" that force surviving relics of another age into the new democratic mold. Similar phenomena may be observed in other countries and at other times; but the contradiction between law and practice is often still more pronounced. Augustus, while carefully adhering to republican forms, dominated Comitia and Senate and ruled as an uncrowned king. He received from the assembly the tribunician power and the proconsular *imperium* for life. Cosimo dei Medici held no office whatever. By controlling the magistrates he ruled Florence as a private citizen; and the disguise was not thrown off until his grandson Lorenzo began issuing official decrees on his own initiative.[1] Spanish-American States, while retaining most impressive democratic institutions, have been ruled by dictators on many an occasion. The Russian constitution of 1936 sets up (on paper) a democratic régime; yet official pronouncements, coming after its adoption, show that Stalin and his associates have no intention of surrendering supreme power. Mussolini, as prime minister of Italy, has respected the Charter of 1848. He has transformed it without doing violence to its provisions; and he has been able to do so because the subservience of Parliament has resembled that of Comitia and Senate in the days of Augustus. Notwithstanding constitutional forms, Augustus and Cosimo, Stalin and Mussolini must be regarded as monarchs.

[1] As to the significance of Cosimo, Hugh Taylor remarks (*Origin of Government*, 1919, pp. 214-215): "The history of Florence is an almost continuous illustration of the method by which the decay of the State, rendered imminent by the indulgence of wild democratic theories, may be arrested by the assertion of the recuperative forces of nature at work in the social organism. The constitution of Florence was a masterpiece of intellectual ingenuity, but its history affords one more proof of the disorder which results from the attempt to impose high political ideas upon a community of low moral development, and one more illustration of the method by which nature corrects extravagant republicanism by the reimposition of strong individual government."

MONARCHY

As already indicated "monarchy" has, nowadays, one definite and limited meaning when contrasted with "republic." It means that the head of the State—no matter how slight his powers may be—is hereditary. Aristotle has a very different conception of the term. The essential point with him is that one man holds supreme authority,[1] whether he acquired it by inheritance, election, or violence. Bryce takes the same position. "By monarchy," he says,[2] "I mean the Thing, not the Name, *i.e.* not any State the head of which is called King or Emperor, but one in which the personal will of the monarch is a constantly effective, and in the last resort preponderant, factor in government." [3] Now, it is sometimes maintained that monarchy in the Aristotelian sense cannot exist. According to Professor MacIver,[4] the ruler who seems to be supreme "inevitably rests his power on the active support of an associated class. He rules in its interest no less than with its co-operation.... All monarchies are forms of oligarchy...." For a different reason—general civic apathy—it has been said that democracy is a permanent impossibility, power always passing to the energetic few.[5] Yet much would be lost in the analysis of political types if we started with the asumption that all States are alike in being oligarchies. Indeed, Professor MacIver's statement may be too sweeping. Cases come to mind in which the king has enjoyed such universal popularity that he needed the support of no special group, or in which he has been able to escape dependence by balancing one interest against another, or in which religious superstition has given him a secure tenure. In such circumstances it is enough to say that the monarchs must respect the cherished interests of the articulate classes or that, "as force is always on the side of the governed, the governors have nothing to support them but opinion." [6] According to Seeley: [7] "The despot,

[1] *Politics*, III, 7.

[2] *Modern Democracies* (2 vols., 1921), vol. II, p. 535.

[3] Thus, he says, the so-called monarchy of Norway is not a monarchy at all, but a democratic republic. Turkey before 1905 and Russia before 1917 were monarchies.

[4] *The Modern State* (1926), p. 345.

[5] Bryce observes (*op. cit.*, vol. II, p. 549): "The proportion of citizens who take a lively and constant interest in politics is so small, and likely to remain so small, that the direction of affairs inevitably passes to the few.... Nature is always tending to throw Power into the hands of the Few, and the Few always tend by a like natural process to solidify into a Class, as the vapors rising from the earth gather into clouds. Fortunately the Class also, by a like process, is always tending to dissolve." See also Robert Michels, *Political Parties* (1915).

[6] David Hume, *Essays* (1875 ed.), p. 110.

[7] *Op. cit.*, pp. 182.

like the constitutional minister, has to reckon with public opinion. He knows well what interests he must conciliate, what classes he must not offend, what public wants he must supply."

Seeley makes some penetrating observations about the dependence of the monarch. What would have happened, he asks, if the French people had arisen against Louis XIV? He could not have crushed them with his soldiers, because those soldiers were among the Frenchmen whom he had to subdue. "Surely if you admit that Louis XIV depended upon his army, it is evident that his power too 'came from below,' just as that of the modern ruler who says that he derives his power from the people. The systems no doubt are different, but in both cases the support is below, not above. For as the modern ruler must yield if the people do not support him, so must Louis XIV have yielded if the army had deserted him. The truth is that the antithesis between government from above and government from below is illusory. A despot governing by superior force as a father governs infant children is an absurd conception.... Indeed it seems strange that we should imagine the monarchical of all forms of government to rest on force, since evidently it is the only one of the Aristotelian forms which cannot do so.... In short, while the few and the many alike may depend on themselves alone and use naked force, the monarch cannot do so, but must necessarily persuade somebody that his rule is desirable, and therefore must depend on somebody, be responsible to somebody. Therefore there is no such thing as irresponsible monarchy, though irresponsible oligarchy, and still more irresponsible democracy, are quite possible and ordinary.... All monarchy whatsoever rests upon the consent of some tolerably numerous group."[1] In any country there must be, in addition to the government and governed, a third element—the government-supporting body.[2] Such, at least, is Seeley's contention.

Monarchy has been the most persistent of the three forms of government. It is an error to assume, as latter-day apostles of democracy have done, that, with the advance of civilization, the educated and prosperous masses will not acquiesce in the loss of self-government. The rise of so-called dictators in Europe—"tyrants" is the Aristotelian name for them—effectively disposes of that assumption. The popularity of Hitler or Mussolini recalls that of Henry Tudor, who brought the anarchic period of the Wars of the Roses to an end and ruled auto-

[1] *Ibid.*, pp. 175-185.
[2] *Ibid.*, p. 196.

cratically without a standing army. So popular was the new strong monarchy that Burgess calls it unorganized democracy. It may be explained in the same way as the modern dictatorships. Monarchy comes as a beneficent antidote to chaos or weak government. In an early chapter of this book[1] the origin of authoritative government in the form of monarchy was attributed to the need of safeguarding property. Over and over again the rule of one has been reimposed as a means of protecting the interests of the people at large from the rapacity of the few. Despotism, Seeley contends,[2] is "a contrivance for escaping a sort of government more oppressive still. Instead of being opposed to democracy it may, on this hypothesis, be a rude form of it.[3] That is, a great population scattered over a large territory and struggling against the oppression of great magnates, being unable to organize concerted action over so large a space, may collect all its power into the hands of an individual, and arm him with a sort of iron mace strong enough to crush any or all of the enemies of the people. This has certainly been the character of some despotisms, and in other despotisms we may trace that they had this character at the beginning, and have only lost it by corruption." The dictatorship of Mussolini has this character. The proletariat, or a section of it, can exercise an oppression quite as hateful as that of Seeley's "magnates."

In his *Origin of Government* Hugh Taylor examines this aspect of monarchy in detail and illuminates it by referring to many historical cases. "It is a commonplace of history," he says,[4] "that periods of political disorder, when the bonds of social discipline are relaxed, and society is resolved into something like its primitive elements, are wont to terminate in the rise to political predominance of some strong overmastering personality who utilizes the prevailing anarchy to secure his own elevation to power." What is the significance of this phenomenon of usurpation in times of social disorder? The government-making

[1] Chapter VII.

[2] *Op. cit.*, pp. 169-171. "Thus Julius Caesar, as we know, began his career as head of the *democratic* party at Rome; and the Roman emperors were the champions of the provincials against the oppression of senatorial proconsuls, who had depended upon the aristocracy. Thus the English supported their strong Tudor kings to be their protection against the lawlessness of the armed nobility."

[3] Henry VII and the people, says John W. Burgess (*op. cit.*, vol. I, pp. 93-94), were both hostile to the aristocracy. "England under the Tudors was a democratic political society under monarchic government.... Star-chamber and High Commission, as fashioned by the Tudors, were national popular institutions. They protected the people against the violence of the barons and the rapacity of foreign ecclesiastics."

[4] *Origin of Government* (1919), pp. 91 *et seq.*

instinct has reasserted itself in its crudest and most natural form. Usurpation and tyranny are the means "by which nature incessantly works to renew the political subordination of a community which has fallen into temporary disorder.... All such occurrences are here regarded as evidence that where political assemblies and parliaments have failed in the task of artificially reconstructing government, nature has in reserve another method of achieving the same result—namely, the self-imposition of the strong man acting under the influence of the love of power." Strong government is the medicine that nature prescribes in dealing with symptoms of disorder. Taylor points out, however, that the dominant individual may seize power before anarchy has actually supervened, coming forward to prevent its occurrence when the existing government has shown incapacity to rule. Mussolini saved Italy from the impotence of the Facta government. Indeed, the thesis of Hugh Taylor's book, amply illustrated by events in the past, receives new confirmation from the appearance of dictators or tyrants in the contemporary world.[1] Class-warfare spells the doom of democracy.

ARISTOCRACY AND OLIGARCHY

Both "aristocracy" and "oligarchy" mean government by a few; that is, by a minority or relatively small number. Aristotle distinguished between the two terms, taking the first (which means, literally, power in the hands of the best) to imply government for the common good, and the second government by the rich for the rich. Present-day usage varies. It is safe to say that most writers ascribe selfish motives to oligarchy, without making wealth a necessary attribute;[2] and that quite a few writers connect aristocracy with an hereditary class that prides itself on superior lineage. According to Treitschke:[3] "All aris-

[1] The term "dictator," though commonly used, is not altogether appropriate to indicate the character of the present phenomenon in Europe. In the constitutional practice of the Roman republic, for several centuries, the dictator was chosen to meet some emergency that the consuls, with fixed annual terms and divided authority, could not handle effectively; and his term of office was limited to six months. In this way the Romans made an ingenious attempt to forestall *coup d'état,* thinking a constitutional king for six months better than an irresponsible tyrant for life. The dictatorship fell into abeyance at the end of the third century B.C. As revived by Sulla and Caesar, at the close of the republican era, it did bear some resemblance to the European dictatorship of to-day.

[2] Theodore Woolsey (*Political Science,* 2 vols., 1893, vol. II, p. 3) says that there is "no marked line separating the two types," but that oligarchy exists "when another class arises of newly enriched families who demand privileges which are denied them by the old families, or where a few, a faction, and that a suspicious faction, have possession of power and wield it selfishly."

[3] *Politics* (2 vols., 1916), vol. II, pp. 228-229.

tocracy is founded upon the idea that one class is called into a higher position than the others. The very name signifies that this form of state reposes upon the belief that the purest blood flows in the veins of the rulers, which in itself throws a certain odium upon those who are ruled. There is something terribly inhuman and arrogant in a purely aristocratic temper of mind, which has a far more baneful effect than the haughtiness of a monarch." In a later passage Treitschke seems to grasp what the present author regards as the true distinction between aristocracy and oligarchy, a distinction at least worthy of being placed alongside of Aristotle's. "The conditions for aristocracy are no longer at hand," Treitschke says,[1] "for it requires on the part of the people a submissive acquiescence in the superiority of the ruling class, *and they must, moreover, find comfort in this belief.*" In a word, popular deference is the secret of aristocracy. This is the point that Hilaire Belloc has emphasized in *The House of Commons and Monarchy.* Belloc maintains that "the whole meaning of Aristocracy is the provision of a sort of worship addressed to the few that govern.... For the definition of 'The Aristocracy' in an Aristocratic State is, not a body recruited by birth or even from wealth, not a Caste (though it may be a caste), least of all a plutocracy, but essentially *an Oligarchy enjoying a Peculiar Respect from its fellow citizens.*"[2] Aristocracy is a special form of oligarchy.

It is, nevertheless, much more than a mere oligarchy. "It is an *Aristocracy,* because it enjoys the quasi-religious respect of its fellow-citizens. It is not appointed by its fellow-citizens; it has a life and growth of its own. It co-opts more or less unconsciously into its own body, perpetually digesting new men into its own substance. Nevertheless it exists by the active consent and desire of those below it."[3] The governing few is a peculiar few, forming a separate organism and keeping up its own life by continuous reproduction. "The Governing Group may, or may not, be hereditary, though in the nature of things it tends to be largely hereditary. It may or may not be in the aggregate wealthier than the average of citizens, though in the nature of things it tends to be wealthier. Its prime characteristic is neither its wealth nor its hereditary element. Its prime characteristic is that of a permanent (though often vague) body in the State which governs through the moral authority conferred on it by a general respect."[4] Belloc

[1] *Ibid.*, vol. II, p. 238. My italics.
[2] *The House of Commons and Monarchy* (1920), p. 13.
[3] *Ibid.*, p. 46.
[4] *Ibid.*, p. 47.

then proceeds to list half a dozen tests that can be applied to discover its presence.[1] One of them is a reverential attitude toward public servants; another, the integration of the various branches of the government as a common possession of the aristocracy; a third, the avoidance of exact political definition, which characterizes English and Roman government alike; [2] a fourth the importance attached to personality or character.

It is in "mixed" governments, where we find it persisting in a democratic period, that aristocracy has shown to best advantage. Theodore Woolsey, while not thinking well of aristocracy in its general manifestations and accusing it of faction and haughtiness, takes a very favorable view of it when surviving as one order by the side of other orders in the State. "Some of the most vigorous nations," he says,[3] "have had an infusion of this element in their constitutions, and the relation of nobility to royal power or to democracy, as well as the exact place it has occupied in developing national character and strength,[4] are second in importance to few subjects in political science." Rome and England afford the best illustrations. Late in the fourth century B.C., when the plebeians had completely wrested from the patricians their monopoly of office, it seemed that aristocracy had come to an end in Rome. Such was not the case at all. The old aristocracy, taking over the best or wealthiest families of the victorious party, produced a new

[1] *Ibid.*, pp. 48-59.

[2] "No such small body could be cut off from the rest by a plain definition without losing its principle of life. An Oligarchy can only exercise authority through the worship of those whom it governs, and through its own genius of commanding and retaining a mixture of awe and affection; but this it cannot do as an isolated thing; it must be interwoven with the commonwealth and separated by no exact boundary." *Ibid.*, p. 53.-

[3] *Political Science* (2 vols., 1893), vol. II, p. 2.

[4] On this point see Anthony M. Ludovici, *A Defence of Aristocracy* (1915), pp. 249-251. Ludovici holds that only the aristocrats, "the lucky strokes of nature" can "exercise taste in discriminating between right and wrong... because flourishing life never becomes articulate about its likes and dislikes, save through them." They cannot make all men like unto themselves, but they can impose their taste on others and "help them to share in the inestimable benefits." On the other hand, "democracy means death." The democrat "proceeds to mass together all those examples of impoverished and mediocre vitality, who cannot open their mouths without expressing the taste of impoverished and mediocre life.... What happens? What cannot help happening? What indeed has happened under our very eyes? Death begins to threaten all the power, all the institutions and all the prestige which were once built up by the tasteful founders of the nation. Death begins to assail the nation's virtues, its character, its beauty, its world-ambition, its resistance, its stability, its courage and its very people. Death under the cover of insidious and almost imperceptible decay begins like a hidden vandal to undermine the great structure of a noble nation, and to level everything of value, of grandeur and grace, to the dust."

aristocracy, the Optimates; and, although the position of the Optimates was never legally defined, they governed Rome, under a democratic constitution, down almost to the fall of the republic. It was the deference of the lower classes, their conviction that the magistracies should be reserved for the upper classes, that made this thing possible. The law permitted plebeians to hold any office. Nevertheless, Léon Homo tells us,[1] only nobles were elected; such exceptions as occurred gave recognition to outstanding character and achievement. In some degree the uniform success of the well-born at the polls may be attributed to the fact that "new men," beginning a public career at middle age, were handicapped by the necessity of climbing the official ladder (*cursus honorum*) rung by rung, from the quaestorship up; and to the further fact that election expenses were heavy and offices unpaid. The controlling factor is found, however, in the attitude of the masses. They did not want men of their own kind to rule them. In a spirit of habitual deference they cast their votes for scions of the Fabian, Julian, and even Valerian houses. Since the higher magistrates at the end of their official terms entered the Senate for life, that body became a center of aristocratic power and of political experience. Bryce calls it the "most successful" of all assemblies that have ruled in any State.[2]

The British electorate has shown the same spirit of deference. In the eighteenth and nineteenth centuries the undisputed primacy of the House of Commons among legislative assemblies lay in its aristocratic composition. A survey, from time to time, of the front benches of Government and Opposition will show that successive extensions of the suffrage made no sudden or marked change. Even with the rise of the socialistic Labor party in the present century, when Hilaire Belloc and Anthony M. Ludovici mourn the death of aristocracy, men of good family still have some advantage in making a public career. The English have long entertained a peculiar reverence for gentlemen. Their attitude recalls the closing lines of Shaw's *Caesar and Cleopatra*. Caesar bids farewell to Cleopatra, who has been pushed from his mind latterly by exigent public problems, and promises to send her "a beautiful present from Rome."

[1] *Roman Political Institutions* (1926), pp. 123-124.

[2] *Modern Democracies*, vol. II, p. 407. Woolsey is equally emphatic. He says (*op. cit.*, vol. II, pp. 18 and 27) that the Senate contained "more political experience than any other assembly of public men under any form of government whatsoever.... We shall hardly hesitate to regard this as the ablest and best constituted of the councils which are recorded in the history of political institutions."

Cleopatra (proudly). Beauty from Rome to Egypt indeed! What can Rome give me that Egypt cannot give me?

Apollodorus. That is true, Caesar. If the present is to be really beautiful, I shall have to buy it for you in Alexandria.

Caesar. You are forgetting the treasures for which Rome is most famous, my friend. You cannot buy them in Alexandria.

Apollodorus. What are they, Caesar?

Caesar. Her sons. Come, Cleopatra: forgive me and bid me farewell; and I will send you a man, Roman from head to heel, and Roman of the noblest . . .

England, too, has admired her gentlemen, as the greatest of her treasures. If this is snobbery, it does not differ from the appreciation of an artistic masterpiece—a painting by Titian, an opera by Wagner, a history by Thucydides—except for its greater practical value. The gentleman represents a standard of perfection, derived from heredity and environment, that all should imitate as well as revere. He has a due sense of the proprieties in conduct, following a traditional code of honor and a traditional code of manners. What counts most for success is character. If he is wealthy, so much the better; for, as Gilbert Chesterton has said, he is born with a silver spoon in his mouth so that later, in the service of the State, he will not be found with it in his pocket. From his early youth his family have designed him for a political career; his political education begins long before he takes his seat in the House among men of his own class, who will get to know him intimately and gauge his worth for advancement. Any temptation to abuse his privileged position will be restrained by family pride and the watchful eyes of his fellow-members. He has to consider, not only his personal reputation, but also the prestige of family and class. That class, holding office as a trust, as a conditional gift from the masses, must insist upon circumspect behavior, because the sins of one impair the standing of all. Aristocracy has suffered, it is true, from the subordination of the House of Lords and from the preference of the Labor party for men of the working class. Still, a good many young aristocrats have espoused socialism (at least Fabian socialism) and will make their way to the House of Commons when their loyalty to the cause has been demonstrated. But the capital point to observe is that the center of gravity has been shifting from the politicians to

the permanent experts and that the higher ranges of the civil service have been recruited from the aristocracy.

Harsh things have been said about oligarchies, particularly those of ancient Greece.[1] Of aristocracies Woolsey says that they have been "the weakest and most uncertain of all governments" and that "most of them have been short-lived and transitory."[2] If this be true, the exceptions are, nevertheless, very striking. What shall be said of Sparta, which had five hundred years of life and which all Greeks regarded as the fountain-head of political wisdom?[3] What shall be said of Rome; of Carthage, Venice, and the Dutch Republic? Treitschke may come nearer to the truth than Woolsey. "The long life of aristocracies, as compared with the democratic form of state," he says,[4] "bears testimony to their statesmanship and prudence and wisdom. The democratic republics of Italy fell everywhere into subjection to a Tyranny, and in every case monarchy laid violent hands upon them, while the sternly aristocratic City States lived on until the French Revolution." Venice had a brilliant history, her independence lasting from the barbarian invasions of the fifth century to the advent of Napoleon in 1797. Every student of political institutions should be familiar with that history and seek the explanation of such longevity and such marvelous achievement. For centuries Venice was the chief European center of intelligence and practical sagacity. Like Carthage, it was governed by a mercantile aristocracy, which was able to last so long and accomplish so much because of the severe discipline which the ruling class imposed upon itself. Failure to maintain the required standard of conduct entailed almost savage punishment; "but," says Ludovici,[5] "if we remember exactly what was at stake, if we think of the authority, the trust, the prestige, the rectitude, the lofty ambition, the presbyopic wisdom, and above all the taste, which were here indispensable and practically inviolable, we shall take a more reasonable view of those expiatory degradations which sometimes shattered the body and spirit of the aristocratic delinquent."

[1] For Aristotle tyranny alone was worse. Bryce says (*op. cit.*, vol. I, p. 184) that they afforded less security for property and liberty, and "far less chance of justice," than democracies, and that they were rapacious and corrupt.

[2] *Op. cit.*, pp. 99 and 1. He adds (p. 1): "We are entitled by deductions from history to lay down the principle that aristocracy is ordinarily capable of no long continuance, when it is the sole governing, or by far the strongest power in the state."

[3] Treitschke, *op. cit.*, vol. II, pp. 241-246.

[4] *Ibid.*, pp. 259-260.

[5] *A Defence of Aristocracy* (1915), p. 367.

DEMOCRACY [1]

Etymologically the word "democracy" means government by the people. It was so understood by the Greeks; and, notwithstanding the numerous vagaries that one encounters,[2] the weight of modern authority still gives it the same meaning when used as a political term. In the field of politics writers of assured eminence and reputation agree with Sir Henry Maine that "democracy means simply a particular form of government," government by the Many.[3] But who are the Many? Maine, writing half a century ago, held that "the border between the Few and the Many, and again between the varieties of the Many, is necessarily indeterminate." Nowadays we are inclined to speak with more precision. We smile over Professor Hearnshaw's naïve statement that democracy "continued to flourish" in the English shire courts of the twelfth century.[4] It would seem grotesque to describe the United States as a democracy in 1789, when, in a number of states, the voters

[1] This section is based in part upon the author's *Democracy* (1929).

[2] Examples of incorrect definitions are given in E. M. Sait, *Democracy* (1929), pp. 3-5. According to Paul Kester (*Conservative Democracy*, 1919, p. 1), it is another form of Christianity, "a perfect and complete philosophy of life, even more than it is a theory of government." According to Ralph Adams Cram (*The Nemesis of Mediocrity*, 1919, p. 3), "true democracy means three things: Abolition of Privilege; Equal Opportunity for All; Utilization of Ability." According to William Milligan Sloane (*The Promise and Aims of Western Democracy*, 1919, p. 14), it is moral, legal, and practical equality.

[3] Some writers persist in a different view, forgetting that, though the word may be developing several secondary meanings, the original meaning and the one appropriate to politics is Maine's. Thus, Walter Lippmann (*Public Opinion*, 1922, p. 256) says that democracy is "ever so much deeper, and more intimate and more important than any theory of government." F. J. C. Hearnshaw (*Democracy at the Crossways*, 1918, p. 12) says: "Democracy is not merely a form of government.... It is also a form of society." J. MacCunn (*Six Radical Thinkers*, 1919, p. 197) says: "Democratic government is not the whole of democracy. It is but one, and among the later of its forms." It finds its way into the political constitution, he says, because it has long existed elsewhere. H. E. Barnes (*Sociology and Political Theory*, 1924, p. 4) says that it also "implies a type of society."

The student of politics must be warned against these aberrations. It is permissible to speak of a democratic society and indicate by the phrase a society appropriate to a democracy; or of democratic manners in the same way. But from the time of Plato and Aristotle democracy has meant a form of government in which the mass of the people exercise control. Take, for example, Bryce's view. He says (*Modern Democracies*, vol. I, p. 23): "Although the words 'democracy' and 'democratic' *denote nothing more than a form of government*, they have, particularly in the United States, Canada, and Australia, acquired attractive associations of a social and indeed almost of a moral character.... Democracy is supposed to be the product and the guardian both of Equality and of Liberty, being so consecrated by its relationship to both these precious possessions as to be almost above criticism. Historically no doubt the three have been intimately connected, yet they are separable in theory and have sometimes been separated in practice...."

[4] *Democracy at the Crossways* (1918), p. 124.

constituted only three per cent of the population; or to describe England as a democracy in 1832, when the Reform Act enfranchised only one adult male in every five. Democracy now implies universal suffrage, a suffrage extended either to substantially all adults without distinction of sex, or at least to substantially all adult males. Sir John Seeley defines it as a government in which every one has a share.[1] "In this book," says Bryce,[2] "I use the word in its old and strict sense, as denoting a government in which the will of the majority of qualified citizens rules, taking the qualified citizens to constitute at least three-fourths, so that the physical force of the citizens coincides (broadly speaking) with their voting power."[3] Beatrice and Sidney Webb may be quoted in a similar sense:[4] "When we speak of political democracy to-day, we mean the association of all the adult inhabitants, within a given area, claiming and exercising the rights and powers of political self-government."

Democracy, conceived as a government resting on manhood suffrage, is a creation of the nineteenth century. The republics of antiquity made some approach to it. Early in the third century B.C. the plebeian tribal assembly at Rome, in which landless men and freedmen could vote, became the supreme law-making body. In the Athenian ecclesia of the fifth century B.C., all adult male citizens had a seat. Nevertheless, Rousseau had some grounds for styling the régime of the Periclean Age as "a tyrannical oligarchy." Of the whole population, 50 per cent were slaves, another fifteen per cent were metics—that is, resident aliens; and these metics, who made the business prosperity of Athens and bore the brunt of taxation, had no more political rights than the slaves. Indeed, since citizenship could be acquired only by inheritance from a father and mother who were themselves citizens, political rights were the monopoly of a closed caste—the adult male citizens. Wherever we look among the ancient republics, we find a society that guarded its privileges jealously against the alien and that was largely sustained by slave labor. If, at the same time, we find equality prevailing within the

[1] *Op. cit.*, p. 324.

[2] *Modern Democracies*, vol. I, p. 23.

[3] Bryce says (p. 22): "No one has proposed a formula which will cover every case, because there are governments which are 'on the line,' too popular to be called oligarchies, and scarcely popular enough to be called democracies. But though we cannot define either Oligarchy or Democracy, we can usually know either the one or the other when we see it. Where the will of the whole people prevails in all important matters, even if it has some retarding influences to overcome, or is legally required to act for some purposes in some specially provided manner, that may be called a Democracy."

[4] *A Constitution for the Socialist Commonwealth of Great Britain* (1920), p. 60.

restricted citizen class, that kind of democracy was, nevertheless, very different from our own.

Let it be said again for the sake of emphasis: democracy was a creation of the nineteenth century. What, then, of the American Revolution and the French Revolution? Are these not pictured in the pages of Carlyle—and other, less dithyrambic, historians—as great domestic upheavals? Here is Carlyle: "Boston Harbor is black with unexpected Tea: behold a Pennsylvania Congress gather; and ere long, on Bunker Hill, Democracy announcing, in rifle volleys deathwinged, under the Star Banner, to the tune of Yankee-doodle-doo, that she is born, and, whirlwind-like, will envelop the whole world! ... Democracy is born; storm-girt, is struggling for life and victory. A sympathetic France rejoices in the Rights of Man."[1] But was democracy born? The French Revolution, if it gave currency to the *idea* of manhood suffrage, fell short of it in practice. If it took the Rights of Man as its creed and made genuflections at appropriate passages in the ritual, its new faith was not applied literally, in the region of mundane affairs. The middle-class deputies diluted the principle of equality when they framed the constitutions of 1791 and 1795. As devout worshipers of an idea, one might say, they gave ostentatious welcome to the clodhopper in their own pews, when the democratic mass was being celebrated; as calculating politicians, they shrank from rude contact with him at the polls. Otherwise, why did they base voting rights upon a tax-paying qualification and provide for indirect election, with a higher qualification at the second stage? Napoleon, it is true, invoked the plebiscite: he decorated the institutions of Consulate and Empire with a halo of universal suffrage; but what he gave was the illusion, not the reality, of popular control. With the restoration of the Bourbons, even that illusion vanished. The vote was now restricted to persons of consequence who paid a direct tax of at least 300 francs, quite a large sum in those days.

The American Revolution was, still less than the French, a democratic movement. Discontent had been aroused, not by the domestic institutions, which the colonists themselves had built up, but by restrictions which an external authority had imposed. After independence had been achieved, the position of the propertied class remained almost as secure as it had been before.[2] The right to vote depended upon a property qualification in eleven states and upon a tax-paying qualifica-

[1] *The French Revolution,* book I, chapter II and book II, chapter V.
[2] E. M. Sait, *American Parties and Elections* (1927), p. 11.

tion in the other two. Thomas Jefferson supported in 1776 and 1783 a property qualification in Virginia; and in later years, while endorsing the principle of manhood suffrage, he did not regard it as an essential element of republican faith.[1] Nor did his followers generally accept it during his lifetime. The Declaration of Independence had no more practical application than the Declaration of the Rights of Man. The age of Jefferson was the age of aristocratic politics in the United States, of government by the rich and well-born. The voters, themselves a very limited body according to our present democratic notions, accepted as a matter of course the leadership assumed by men of wealth and social prominence. The Livingstons and Clintons and Schuylers governed New York,[2] as the great planters governed Virginia; and John Adams declared that a few rich merchants could carry any election in Massachusetts.

Men of substance regarded democracy as a detestable form of government, its only excellence being (as John Adams said) that it is the quickest to pass away. That opinion persisted well into the nineteenth century. In the New York constitutional convention of 1821 Chancellor Kent vehemently denounced the movement to abolish the property qualification for voters. "Such a proposition, at the distance of ten years past, would have struck the public mind with astonishment and terror," he explained.[3] "The apprehended danger from the experiment of universal suffrage, applied to the whole legislative department, is no dream of the imagination. It is too mighty an excitement for the moral condition of men to endure. The tendency of universal suffrage is to jeopardize the rights of property and the principles of liberty. There is a constant tendency in human society—and the history of every age proves it—there is a constant tendency in the poor to covet and to share the plunder of the rich; in the debtor to relax or to avoid the obligations of contract; in the indolent and profligate to cast the whole burthen of society upon the industrious and virtuous; and there is a tendency in ambitious and wicked men to inflame those combustible materials.... We stand, therefore, on the brink of fate, on the very edge of a precipice. If we let go our present hold on the Senate, we commit our proudest hopes and most precious interests to the waves."

Kent's tragic tones and dark forebodings left the apostles of democracy unshaken. His speech was derided as the "elegant epitaph" of an

[1] C. A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), pp. 457 and 461.
[2] D. R. Fox, *The Decline of Aristocracy in the Politics of New York* (1919).
[3] *Ibid.*, pp. 252-255.

old aristocratic order that was sinking to the grave. In that same year New York and Massachusetts substituted a tax-paying for a property qualification. If we look forward to the first election of Andrew Jackson, we may say that democracy has at last arrived. Manhood suffrage then prevailed in fourteen of the twenty-four states; the property qualification, which had been universal in the eighteenth century, survived in only four. In the original states the process had been gradual, personal property appearing as an alternative to landed property in satisfaction of the suffrage requirements, these later giving way to tax payments of one kind or another, and, finally, tests being abolished altogether. The influence of the new frontier states had accelerated the process. There social conditions among the homesteading pioneers assumed a remarkable uniformity that reflected itself in politics; and the leveling ideas of the West, propagated by this economic equality, served to encourage the democratic movement as it made headway in the East.[1]

That the United States was the birth-place of modern democracy need occasion no surprise. The colonists had drawn from the germplasm of the mother-country—the home of ordered liberty and of parliamentary institutions—certain innate qualities that gathered new strength and expanded rapidly under the stimulus of a congenial environment. Democracy, as an American offspring, was not, therefore, a biological sport, an illustration of the mutation theory of de Vries; it came in the natural course of evolutionary adaptation. In the Old World the democratic impulse had to combat hostile prejudices, entrenched interests, and traditional class distinctions. Against such obstacles, often fighting its way with revolutionary violence, now advancing and now retreating, it made slow progress. Triumph came suddenly in France, with the collapse of the Second Empire, more than a generation after Andrew Jackson had entered the White House. It came gradually in Great Britain, bit by bit, as successive classes advanced in economic power, in enlightenment, and in political consciousness. First, in 1832, the monopoly of landed wealth gave way before the new wealth of manufacture and commerce; then, after a period of middle-class ascendancy, the door was opened successively to the urban proletariat in 1867 and agricultural workers in 1884. Thus, in a series of stages, spread over half a century, and by complicated statutory

[1] New Jersey in 1844 and Virginia in 1850 dropped the property qualification in favor of manhood suffrage. Rhode Island in 1842 (as a consequence of Dorr's Rebellion) and North Carolina in 1856 resorted to a tax-paying qualification. See Sait, *American Parties and Elections* (1927), pp. 14-18.

provisions, the British Parliament reached an approximation to manhood suffrage without openly acknowledging the principle. There is a reason for giving the dates, for connecting the rise of democracy with the age of Jackson in the United States, of Gambetta in France, and of Gladstone in England. The dates are recent dates. The phenomena are new phenomena. How can we regard with casual complacency—as if it were part of the natural order of things and divinely appointed from the beginning as man's permanent possession—a system which appeared only yesterday, which has still to prove itself in practical achievement, and which, for all we can tell, will prove as transitory as the rule of the Many at Athens?

Democracy is only a hundred years old in the United States—a short period when we think in terms of aristocracy in Sparta and Venice or monarchy in England and France. Its life is measured in some countries by decades, in others by future expectation. Twenty years ago it was marching forward, apparently to the conquest of the whole world; often a dubious conquest, depending upon the attractive force of a prevailing fashion rather than upon the existence of appropriate social conditions, and suggesting the incongruity of a silk hat on a naked savage. Democracy cannot endure, or even pass beyond the stage of architects' drawings, unless social conditions are favorable. For that reason many provinces should be severed from the map of its empire. Whether the revised map must be folded up, in the near or distant future, is a question of some moment. Before turning to that question, however, there is a difference between ancient and modern democracy that deserves attention.

DIRECT AND REPRESENTATIVE DEMOCRACY

We shall see, in Chapter XX, that the ancient world was familiar with the principle of representation, but, out of conscious preference, made little use of it. In the small city State all adult male citizens were expected to meet together in the assembly—the Ecclesia of Athens, the Comitia of Rome.[1] We call this system pure democracy or direct democracy.[2] Its efficiency varied greatly. The Athenian Ecclesia seems

[1] In fact only those living in the city or its immediate neighborhood were likely to attend—in Attica seldom more than five thousand out of some 30,000 or 35,000 qualified persons. Bryce, *op. cit.*, p. 175. But 5,000 seems to be several thousands too large for an effective deliberative assembly. Often enough the mob-spirit took hold of the Athenian ecclesia, which gives point to Hamilton's phrase about hemlock to-day and statues to-morrow.

[2] Madison, in *The Federalist,* especially Numbers X and XIV, calls it democracy, without any qualifying adjective; and he contrasts it with republican gov-

to have attempted too much. Not only was it free to amend measures, but it failed to observe the constitutional rule that the sole initiative in legislation lay with the Council.[1] It must be held in mind that the Ecclesia was a much larger body than our national conventions, which are universally held to be altogether incapable of deliberation; and the Ecclesia enjoys a low reputation with unbiased readers of history, as it did with Madison and Hamilton. In Rome, on the other hand, the Comitia were severely circumscribed. They received all proposed measures from the presiding magistrate and acted upon them without any discussion and without amendment. "Such a machinery," says Bryce,[2] "seems almost as if calculated either to check legislation by throwing obstacles in its way, or else to make legislation hasty and imperfect. The passing of a long measure or a complex measure might be thought scarcely possible under it; while at the same time it secures no opportunities for criticism and revision, and for reconsideration at a future stage, of decisions too hastily taken when the measure was first submitted. Thus there would appear to be a double danger involved in such a system, the danger of not moving at all, and the danger of going too fast and too far." In fact, no such evils were experienced. There was little legislation, since public law was left almost untouched during the republic and since private law grew in the hands of praetors and jurists; and Bryce regards this as a matter of satisfaction, not regret. Moreover, the magistrate, being responsible for the bill that he presented, prepared it with scrupulous care; he made it short, terse, and clear, so that ordinary citizens would understand it; he might even submit it to a preliminary, sparsely-attended meeting of the Comitia for discussion. More important still, on many occasions the bill originated with the Senate, which had the right to advise the magistrates.[3]

ernment, the true distinction between the two forms being that "in a democracy the people meet and exercise the government in person" and that "in a republic they assemble and administer it by their representatives and agents." The effect of representation is "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

[1] Bryce, *op. cit.*, Vol. I, p. 175.

[2] *Studies in History and Jurisprudence* (2 vols., 1901), Vol. II, p. 712.

[3] The exact power of the Senate to direct the magistrates in matters of legislation, like so many other points in Roman constitutional practice, was uncertain, a matter of dispute among lawyers. Certainly the magistrates often sheltered themselves under senatorial authority as a matter of prudence. Bryce, *ibid.*, pp. 716-717. As to the uncertainty note the observations of Belloc, earlier in the chapter, about characteristics of aristocracy.

"The statutes passed by the Roman people had, therefore, three great merits. There were few of them. They were brief. They were clear." [1]

James Madison emphasized one great weakness of pure democracy.[2] "A [pure] democracy will be confined to a small spot. A republic may be extended over a large region.... As the natural limit of a [pure] democracy is that distance from the central point which will permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the center which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs." Under the ancient system of direct democracy, the territorial expansion of the State carried with it the loss of self-government by the outlying areas. Rome illustrates this phenomenon. In course of time, as her conquests spread, the Comitia took on the appearance of a mere municipal council trying to rule a world. Such an anomaly made for failure on the one side and resentment on the other; and it was one of the chief causes of the collapse of the republic.

Pure democracy has not been confined to the ancient world. It commends itself to small communities that must preserve such common aims as defense against enemies, the settlement of disputes, and periodic allotment of land. It is not confined to any one human stock, having existed until recently in the Russian Mir and being found still among the Bantus of South Africa and in many parts of India. The Anglo-Saxon folk-moot is familiar to every one. Surviving relics are found to-day in the New England town-meeting,[3] which enacts local by-laws and elects local officers, and in the Swiss *landsgemeinde*. Nowhere is it associated with national government. There were twenty-six *landsgemeinden* in the middle of the eighteenth century; to-day there are only five, these cantons or half-cantons having in the aggregate about three per cent of the Swiss population; and one of the *landsgemeinden* has been confined to elective functions. On a Sunday in April or May the adult male citizens assemble out of doors.[4] By a show of hands they elect cantonal officers and adopt legislation. In some cantons, but not in others, discussion is permitted. This institution has been com-

[1] *Ibid.*, p. 714.
[2] *The Federalist*, No. XIV.
[3] J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), pp. 430-439.
[4] Although attendance is compulsory, only a part of the qualified persons appear, perhaps a majority.

mended by some writers with great enthusiasm; but a close acquaintance with it, a sufficient familiarity to pierce the shams, produces a very different effect. "It would be naïve," says Professor William E. Rappard, a Swiss scholar,[1] to believe that even a small community of only a few thousand well-trained citizens could, under the complex conditions of the twentieth century, effectively govern itself by means of such an ephemeral legislative assembly. One might as well expect a football crowd, assembled for a few hours in a stadium, to make itself responsible for the establishment of an academic curriculum or for the drafting of a measure of social insurance!"

Even for the purposes of local government assemblies of this kind are passing away. But direct government—in a form that is better designed for large areas and dense population—has reasserted itself. Instead of gathering in a body, citizens perform their legislative tasks in scattered polling places. The referendum and the popular initiative have long been familiar in Switzerland[2] and the United States (in which it is confined, however, to the member-states); and after the World War they made an appearance in Germany, Latvia, Estonia, and Ireland.[3] They were deleted from the Irish constitution in 1928; in Germany, after lying dormant for thirteen years, they disappeared unmourned when Hitler struck down the Weimar constitution. Popular, or direct, legislation is little more than a fad outside of Switzerland, where unique conditions prevail. Assuming, as it does, that the people have more virtue and wisdom than their representatives,—the very opposite of Madison's view,—it is unlikely to make headway in the future. Its history in the United States is instructive. After moving forward slowly for a decade, the gospel of direct democracy made many converts in the years 1908-1912 as a part of the so-called "progressive movement" and won eleven states, most of them (as in the earlier period) in the West. Then the impulse spent itself. For the past twenty years no advance of any kind has been made.

The initiative and referendum still find support in Switzerland and in parts of the American West. But the dominant verdict is undoubtedly hostile. "The case against direct legislation," says Leo Kohn,[4]

[1] *The Government of Switzerland* (1936), p. 36.

[2] See Bryce, *Modern Democracies*, Vol. I, pp. 371-407.

[3] Partially in Austria, Czechoslovakia, and Lithuania. See Agnes Headlam-Morley, *The New Democratic Constitutions of Europe* (1929), pp. 132-147.

[4] *The Constitution of the Irish Free State* (1932), pp. 244-245. The literature on direct legislation is extensive. For a sketch of the subject and arguments on both sides see Robert Luce, *Legislative Procedure* (1922), pp. 563-598; and *Legislative Principles* (1930), pp. 599-634.

"has in recent years been vindicated in ever-growing measure both by political experience and by theoretical analysis. Its crudeness in the face of the highly complex problems of modern legislation, its exclusion of the vital factor of authoritative deliberation, its anarchical interference with representative government, its inevitable production of incoherent legislation, its intolerance of religious and racial minorities—these and kindred defects of the system have often been stressed. Recent experience in Continental countries has emphasized its most insidious feature: the irresponsibility of the anonymous legislator."

CHAPTER XIX

THE DECLINE OF DEMOCRACY[1]

THE triumphs of democracy in the nineteenth century bred a strange mystical faith that did not allow itself to be disturbed by facts. The mystical democrat—he still survives among us—has passed through a religious experience. He has seen God. To him democracy implies, not just a convenient or appropriate means of political control, but—in terms that writers have actually employed—a state of mind, a true and beautiful thing, a perfect and complete philosophy of life. He accepts with reverence and awe the statement of faith that has come down from the apostolic age, the dogmatic creed that was proclaimed in a time of ridicule and persecution, when rigid formulas alone could withstand the insidious attacks of pagan skepticism and when any concession, however slight, might open a fatal breach in the defences.[2] The fundamentalist holds fast to the original creed by lifting it above the plane of reason and argument. It is revealed truth. No matter what strange anomalies confront him in its practical application, he must keep this precious inheritance whole and undefiled. The cure for the shortcomings of democracy, he always maintains, is more democracy. If he is confronted with facts, with the contradiction between those facts and his theory, he replies that "democracy must not be judged by its yesterday, or by its to-day, but by its to-morrow"—its always receding to-morrow; [3] and that, as Chesterton says of Christianity, it has not been tried and found wanting, but found hard and not tried.

The fundamentalist takes a sanguine view of human nature and of average human capacity. He believes that, notwithstanding the evil

[1] Some passages in the earlier part of this chapter are taken from the author's *Democracy* (1929).

[2] "The critics were about as welcome as a small boy with a drum. Every one of their observations on the fallibility of man was being exploited *ad nauseam*. Had democrats admitted there was truth in any of the aristocratic arguments they would have opened a breach in the defences. And so, just as Aristotle had to insist that the slave was a slave by nature, the democrats had to insist that the free man was a legislator and administrator by nature." Walter Lippmann, *Public Opinion* (1922), p. 256.

[3] Alleyne Ireland, *Democracy and the Human Equation* (1921), p. 125.

propensities of individuals, men taken in the mass spontaneously generate the truth, or at least, by some mysterious power of divination, recognize the truth and resolutely follow it. The voice of the people is the voice of God. The fundamentalist further believes that, since the business of government requires no special training, the average man is able to discharge any public function. In the United States, Jacksonian democracy set no limits to the competence of the voter. In the idealized portrait he possessed a strength of character, a soundness of judgment, and a devotion to civic duty that cannot always be detected in the flesh-and-blood original. The conviction prevailed that, the more frequently and directly the voter intervened in government, the better the results would be. The Athenians, in their logical and doctrinaire fashion, filled public office by lot; for, as Aristotle observes, all men claim political ability and think themselves qualified to hold any office.[1]

Now, since the voice of the people is the voice of God, a peculiar spiritual quality attaches to the ballot, through which the people speak. The ballot has magical properties. A century ago, the English fundamentalists embodied their aspirations—universal suffrage, annual elections, vote by ballot, etc.—in the People's Charter and took Feargus O'Connor as their prophet. Deploring the misery of the masses, O'Connor said: [2] "Laws made by all would be respected by all.... Universal Suffrage would, at once, change the whole character of society from a state of watchfulness, doubt, and suspicion, to that of brotherly love, reciprocal interest, and universal confidence.... Away, then, with the whole system at once: the wound is too deep to be healed by partial remedies; the nation's heart's blood is flowing too rapidly to be stopped by ordinary stypticks.... Give us, then, the only remedy for all our social ills and political maladies; make every man in his artificial state

[1] *Politics*, VI, 2. "Hence arises the claim to be under no command whatever, on any account, except by rotation.... This is conducive to that equality which liberty demands. Such being the premises of democratic government, rules like the following should be observed: that all magistrates should be chosen out of the people, all to command each, and each, in his turn, to command all; that, except for offices requiring some particular knowledge and skill, all magistrates should be chosen by lot; that no tax-payment, or a very small one, should be required as a qualification for office; that no one should be in the same employment twice, or very few and very seldom, except in the army; that all appointments should be limited to a very short time, or at least as many as possible; that the whole community should be allowed to judge in all causes whatsoever...; that the supreme power should be in the assembly; and that no magistrate should be allowed any discretionary power except in a few instances of no consequence to public business."

[2] Julius West, *A History of the Chartist Movement* (1920), pp. 88 and 167.

as he might be in his natural state, his own doctor, by placing the restorative in his hand, which is UNIVERSAL SUFFRAGE!!!... Six months after the Charter is passed every man, woman, and child in the country will be well fed, well housed, and well clothed." Feargus O'Connor glimpsed the millennium, the ultimate goal of the race: poverty and ignorance, like injustice and oppression, would melt away at the magic touch of the ballot.

It may be true nowadays that men have a rather low opinion of the ballot. "No vote famine has broken out in these disfranchised countries," says H. G. Wells, referring to Russia and Italy.[1] "You do not find haggard peasants wandering about in search of a polling booth." Nevertheless, in the nineteenth century men laid down their lives for the democratic cause; and among women, in the present century, mystical faith has bred courage to the point of martyrdom. The militant suffragettes, as pictured by Dame Ethel Smith,[2] "pushed selflessness, endurance, passionate pity and love, in short, idealism in its most transcendental form, to a pitch that will be the wonder of the human race as long as this globe soars around the sun." The suffragettes had their *Book of Martyrs*. Who does not recall the tragedy at Epsom Downs, in the running of the Derby, when Emily Wilding Davison broke through the barriers and flung herself in the path of the King's horse as he led the field on the home stretch? Who does not recall the English hunger-strikers in Holloway Prison and the American hunger-strikers in Occoquan Workhouse? To prevent martyrdom the Asquith government resorted to forcible feeding and—since that often had harmful results—the Cat and Mouse Act, under which the prisoner was released, in order that she might recover health, and then jailed again.

When the abandonment of forcible feeding was proposed in the House of Commons, Reginald McKenna, the Home Secretary, said: [3] "We have to face the fact that they would die.... There are those who hold another assumption. They think that after one or two deaths in prison militancy would cease. In my judgment there was never a greater delusion. I readily admit that this is the issue upon which I stand and upon which I feel I would fight to the end those who would

[1] *Democracy under Revision* (1927), p. 41.

[2] *A Final Burning of the Boat* (1928). The militant agitation for woman's suffrage has been described, in excellent literary form, by Sylvia Pankhurst in *The Suffragette* (1911) and *The Suffragette Movement* (1931). See also Emmeline Pankhurst, *My Own Story* (1914).

[3] Sait and Barrows, *British Politics in Transition* (1925), pp. 103-104.

adopt the policy to let the prisoners die. So far from putting an end to militancy, I believe it would be the greatest incentive to militancy which could ever happen. For every woman who died, there would be scores of women who would come forward for the honour—as they would deem it—of earning the crown of martyrdom.... They are hysterical fanatics, but, coupled with their hysterical fanaticism, they have a courage which, a part of their fanaticism, undoubtedly stands at nothing; and the honourable member who thinks that they would not come forward, not merely to risk death, but to undergo it, for what they deem the greatest cause on earth, is making, in my judgment, a profound mistake. Many of them want to die.... They would seek death."

The fundamentalist is sustained by the conviction that his god is the only god and that truth has been revealed once for all to the chosen people. He has heard of other creeds, "old faiths infirm and dead"; but, when he glances back and sees the political aberrations and monstrous delusions of the past, he thinks of democracy as the natural, inevitable, and final culmination of human groping for the truth. Something has already been said about the succession of political types.[1] According to the Greek view—the view of Plato and Aristotle and Polybius—forms of government perpetually change and succeed each other in some definite cycle; but, according to the fundamentalist, democracy is the perfect and permanent flower of a completed evolution. It is an everlasting flower which, without the help of the watering-can, will keep its bloom through the ages. No matter if it is neglected utterly: never will a petal fall.

This belief in the permanence of democracy does not harmonize well with an age that has the facts of history at its command and which prates about a scientific attitude. Yet quite a few educated persons entertain it. A Socialist, like Franz Oppenheimer,[2] may be forgiven; he must not look outside his Marxian bible, being intellectually free, as the medieval schoolmen were, only within rigidly-set limits. Perhaps Woodrow Wilson may be forgiven; [3] he wrote at the end of the nineteenth century, before the symptoms of democratic decay had become manifest. Less lenience can be shown to college

[1] Chapter XVIII.

[2] *The State* (1914). Oppenheimer says (p. 275): "The tendency of state development unmistakably leads to one point: seen in its essentials the state will cease to be the 'developed political means' [of exploitation] and will become 'a freemen's citizenship.'... The 'state' of the future will be 'society' guided by self-government."

[3] *The State* (rev. ed., 1898), p. 581.

professors of the present day. Harold J. Laski says: [1] "Democratic government is doubtless a final form of political organisation in the sense that men who have once tasted power will not, without conflict, surrender it." This opinion is all the more curious in view of the fact that it was expressed several years after the Italian people had cheerfully surrendered their power to Mussolini. Robert M. MacIver says: [2] "If we are right in our interpretation of the state as an organ of community, we must regard all states in which the general will is not active as imperfect forms. This view seems to be confirmed by a study of the historical process, for it appears to be true that, in spite of reversions, the main trend of the state, *after it has finally emerged as a state,* is toward democracy.... No institutions are secure, but those which rest on the sustaining power of the community are the strongest. A people can overthrow every form of government but its own—then it finds no alternative. A republic may be destroyed from without, but it is as nearly invincible from within as anything human." On this statement it is enough to say for the moment that the people are not like an individual; they divide in opinion; and, if they divide on fundamental issues, chaos supervenes and opens the way for monarchy. Charles S. Cooley says: [3] "Discussion regarding the comparative merits of monarchy, aristocracy and democracy has come to be looked upon as scholastic. The world is clearly democratizing; it is only a question of how fast the movement can take place, and what, under various conditions, it involves." The facts of history and social science, he concludes, sanction a belief in the efficacy and permanence of democracy.

SYMPTOMS OF DECLINE

Is democracy the final flower of political evolution? Perhaps, to scientific minds, it appears rather as a system which, in a world of ceaseless change, has shown itself best adapted to a certain set of temporary conditions. Yesterday the rule of One was all but universal; to-day the rule of the Many has supplanted it. There is no reason to suppose that to-morrow will be as to-day. Institutions are set up and modified and abandoned, sometimes by the caprice of man or what seems like it, sometimes by the stern pressure of circumstances. Will democracy still fit our circumstances twenty-five, fifty, or one hundred

[1] *A Grammar of Politics* (1925), p. 17.
[2] *The Modern State* (1926), p. 340.
[3] *Social Organization* (rev. ed., 1920), p. 120.

years from now? There are obscure, underlying forces that act quite independently of the human will and shape the social structure. These forces may be exerting an influence that will ultimately undermine the foundations of democracy. That Western civilization is drawing to the end of a cultural epoch has been the theme of several German writers who, in spite of varying methods, reach very much the same pessimistic conclusion.[1] We may suspect some of them of distorting history and of pushing aside rebellious facts. But certain studies of a more specific and limited nature point in the same direction.

In *Democracy and the Human Equation* Alleyne Ireland discovers within democratic society the seeds of its own demise. He suggests an hypothesis which Professor N. J. Lennes has taken as the thesis of his *Whither Democracy?* and at the same time restated in a more definite form. What is Alleyne Ireland's argument? In our era of political democracy, as a factor in the situation that produced it, we observe a marked social fluidity, an absence of status and rigid class distinctions. The gates of opportunity are opened wide; and an able man finds it easy to rise in the social scale, perhaps from the humblest to the highest station. If we speak nowadays of social classes, we do so vaguely, understanding that there is no fixed boundary line between them and no serious obstacle to interclass migration. "The more intelligent and successful elements of the 'lower' classes," Ireland says,[2] "have been constantly rising out of their class and into the one socially above it. This movement must have the consequence of draining the 'lower' classes of talent and genius, and, through the process of social migration, increasing the genius and talent of each succeeding upper layer in the social scale."

This phenomenon of migration has been noticed often enough—as

[1] The book that has attracted most attention is Oswald Spengler's *Decline of the West* (2 vols., 1926-28). His most interesting contribution takes the form of splitting history, for different areas, into cultural cycles, approximately a thousand years long. In 1937 Pitirim A. Sorokin published the first three volumes of his *Social and Cultural Dynamics.* He deals with two human attitudes: the "sensate," which finds reality in what can be perceived and which seeks adjustment to the conditions so perceived; and the "ideational," which regards the material world as an illusion and which finds reality somewhere beyond experience. The "sensate" age in which we live is rapidly succumbing to decay and will soon give place to a new "ideational" age. Senator J. H. Lewis once acknowledged that Senator Boies Penrose was "a big man—in the physical sense"; and Sorokin's is a big book in that sense too. Some suspicion is awakened by its pretentiousness and inclination to use a jargon of pseudo-scientific terms. The publisher's announcement speaks of "logico-meaningful" thought being subjected to the severe "causal-inductive test." It is possible for sociologists to write without being pretentious and unintelligible. Robert M. MacIver has done it.

[2] *Democracy and the Human Equation* (1921), p. 142.

in the endless plaint of English trade-unionists that the capitalist "picks over" his employees and abstracts the able men. But its deep significance is just coming to be appreciated. Talents are hereditary; and the class that has once been divested of talents has, within itself, no means of recreating them. Nor can it replenish its exhausted supply by drawing upon the class above it through intermarriage; for the inevitable product of social propinquity is assortive mating, the mating of like with like, of intelligence with intelligence, of stupidity with stupidity. Ireland insists that there must be, in view of these conditions, "a constant upward and downward genetic pressure tending to produce an increasing difference between the two ends of the social spectrum." [1] This process of class-differentiation, on the basis of varying ability, will become more and more evident. At last "from their sheer instinct of self-preservation, the Democratic nations will be driven to give special ability and usefulness a survival value in their political systems." [2]

In support of his argument Alleyne Ireland has used studies of the social distribution of British talent and genius by Havelock Ellis and Frederick Adams Woods, both of whom drew their material from the *Dictionary of National Biography*. What do these studies show? From the earliest times till the end of the nineteenth century the sons of craftsmen, artisans, and unskilled laborers yielded 11.7 per cent of the eminent names. As we pass through the period of what may be termed social democratization, however, the percentage declines sharply. It is 7.2 for those born in the first quarter of the nineteenth century; 4.2 for those born in the second quarter.[3] These figures seem to indicate a gradual exhaustion of outstanding ability in the lower classes, unless

[1] *Ibid.*, p. 142.
[2] *Ibid.*, p. 138.
[3] Edward M. East (*Heredity and Human Affairs*, 1929, pp. 208-212) describes the studies of Ellis and Woods and concludes that "no environmental differences can account for such results." He says (pp. 208-209): "There has been a marked progressive decline in the proportion of eminent men emerging from the laboring classes in England during the last 200 years. This observation ... shows that the paradoxical triumph of democracy is a greater stratification of society. In earlier days, when scholastic privileges were niggardly distributed, the better germ plasm segregating out of the lower economic levels had little opportunity to demonstrate its worth. It was repressed by circumstances and kept the status to which it was born. When popular education became more wide-spread, the situation changed. The exceptional children who appeared had a chance for fame and fortune which they promptly seized. They rose to eminence, married well, and their sweating fellows saw them no more. The lower orders of society being thus drained of the little fine blood they had, the result was a continued diminution in the proportion of the famous persons produced, in spite of a constant economic and literate advance. What a stubborn set of facts to the ultra-socialist!" See East, p. 213 for the findings of de Candolle and others in France.

the investigators failed to detect the play of some other factor. This exhaustion became noticeable in the period before democracy had been established—by the extension of the suffrage in 1867 and 1884—and apparently in consequence of the change of manners, through the breaking-down of class-distinctions, that laid the foundations of political democracy. It is to be hoped that the studies will now be extended to include persons born in the third quarter of the century.

Professor Lennes points out that two essentially new elements have come upon the stage of social evolution.[1] In the first place, the ideals that are appropriate to democracy have made quick headway in practice; and these ideals tend to disregard social differences and to equalize opportunity, thus facilitating transfer from one occupational class to another. In the second place, the complexity of our industrial organization has vastly increased, and with it the number of distinct occupations. "As the ideals of democracy are realized in practice," he says,[2] "in that proportion does society tend to become divided into occupational classes with hereditary membership.... In a non-democratic society the son of a laborer is very likely to become a common laborer because of the occupation of his father. In a thoroughly democratic society, this son will be given every opportunity to reach any occupational station, however exalted, the point which he does actually reach depending very largely upon himself.... How can it be that thoroughgoing removal of friction in interclass migration will in the end greatly reduce such migration? After all, there is no mystery about it; a simple analogy makes it quite plain: Suppose a farmer were to remove from his herd all but the poorest specimens.... There can be no doubt but that agencies are now at work which are tending strongly to remove from each class those who do not naturally belong to it. That is, each occupational class is being made more homogeneous with respect to certain traits which will make their possessors remain in the occupational class in which they were born. It seems impossible therefore to escape the conclusion that the process of creating hereditary occupational castes is going on at an ever increasingly rapid rate."

According to Professor Lennes, mental level is indicated by the highest point in the occupational scale that a person can reach when working under favorable conditions in the occupation best suited to his talents.[3] Lennes has to assume that the higher points in the scale—say

[1] *Whither Democracy?* (1927), pp. 22-23.
[2] *Ibid.*, pp. 274, viii, and 331.
[3] *Ibid.*, p. 79.

in Barr's scale—are generally regarded as more desirable and that effort will be made to reach them.[1] Each occupational class, he believes, is becoming steadily more homogeneous in respect to the very traits that make their possessors remain in that class. This circumstance, fortified by the practice of assortive mating,[2] ensures the formation of hereditary occupational castes.[3] To confirm his hypothesis Lennes relies upon the data of intelligence tests. Those tests show, for example, that intelligence grows distinctly higher as we go upward in the occupational scale and that the intelligence of children corresponds with that of their parents.[4] Is such evidence reliable? Mental tests do measure inborn capacities, Lennes maintains. They show that the IQ of an individual remains fairly constant from early childhood; that persons reared in the same environment from childhood frequently have very different IQ's, this difference persisting though the environments remain the same; that persons reared in very different environments from childhood may have equal IQ's, this sameness persisting though the environments remain different; that there is a high correlation between a pupil's IQ and success in school; and that there is a high correlation between an adult's IQ and success in his occupation.[5]

Hilaire Belloc, analyzing a different set of social forces and proceeding along a different route, arrives at a position equally incompatible with democracy. His argument appears in *The Servile State.* That brilliant and ingenious essay, which was published in 1912, seeks to prove that the capitalist régime—unstable in equilibrium, incapable of guaranteeing sufficiency and security to the mass of the wage-earners —is moving toward something quite different from the socialist solution and quite at variance with the democratic ideal. The future society will be a servile society. "We are," says Belloc, "rapidly coming nearer to the establishment of compulsory labour among an unfree majority

[1] *Ibid.*, pp. 110-111.

[2] The numbers of marriages between members of different social groups, says Lennes (p. 248), decreases as the distance between the groups increases; the numbers of such marriages taking place between members of widely separated groups is so small as to be negligible. The term used for this phenomenon is "assortive mating," already mentioned in connection with Ireland's theory. S. J. Holmes (*The Trend of the Race,* 1921, p. 231) says: "Passing to people of a higher grade it may be said that mediocrity tends to mate with mediocrity and that superior types tend to select their mates among the superior. Common standards, agreement in tastes and similar educational attainments, doubtless have a marked effect in bringing about unions between those of similar inherent endowments. By thus limiting marriage to certain castes assortive mating tends to bring about the differentiation of the race into a number of different stocks."

[3] Lennes, *op. cit.*, p. 331.

[4] *Ibid.*, pp. 295 and 311.

[5] *Ibid.*, p. 95.

of non-owners for the benefit of a free minority of owners." The very legislation that is designed to improve the lot of the masses—employers' liability, insurance against sickness and unemployment, old-age pensions, the minimum wage—carries with it the implication of servitude. The State guarantees to the proletarian, as the master did to his slave, sufficiency and security; and the next step, the fatal corollary of the first—already foreshadowed in the attitude of the State toward its employees—will lead it to impose the obligation to work. Belloc believes that, except for the active and adventurous few, men like slavery when they experience it; they get the things most valued in life: sufficiency, security, and relief from responsibility. The people of the U.S.S.R. have had experience of something akin to it latterly; and, whether they really like it or not, they seem quiescent.

LOSS OF FAITH

No human institution can stand still; the process of transformation goes steadily forward. It is possible, as Professor Lennes and others have suggested, that we are moving toward a social structure that will not tolerate democracy. Long before the new social structure has taken definite shape, however, democracy may have disappeared. There are ominous signs and portents. Reference has already been made to the rhythmic behavior of society; how it turns periodically from activity to quietism, from stimulation to repose, from orgy to routine.[1] The eager pursuit of fashion leads to fatigue, to a sudden shift in the direction of the opposite extreme. The shift seems, when seen superficially, inexplicable. Consider the collapse of the Stuart cause in 1688. Viscount Cornbury deserted to William of Orange, taking some of the King's troops with him; his father, the Earl of Clarendon, ejaculated in rage and sorrow, "O God! that a son of mine should be a traitor!" and two weeks later made up his mind to be a traitor himself. Similarly, just before the epidemic of Jewish conversions in Germany, when Eduard Gans turned Christian, Heinrich Heine hurled after him a robust curse ("But yesterday he was a hero; to-day he is a villain!"), and, a little later, achieved the same villainy. Under the spell of the philosophers, Frenchmen criticized many social abuses without having any desire to pull down the edifice of monarchy. But faith had gone out; skepticism had come in; and there, said Carlyle, lay properly the cardinal symptom of the whole widespread malady in France. Skeptical minds are empty minds, painfully aware of their emptiness and

[1] See Chapter XIV.

eager to be filled. If they have rejected one "dusty answer," they remain, none the less, "hot for certainties in this our life." In France, when a new answer came in the shape of Liberty, Equality, Fraternity, mark the sudden collapse of the impressive foundations of monarchy—the scene transformed as by an earthquake in the night.

It would be easy to misread the portents of to-day, as it was in seventeenth-century England or eighteenth-century France. It would be easy to build a reassuring sense of security on the fact that men continue to practice the democratic religion or conform in external acts of worship. But perhaps the worshipers are not filled with reverence as they gaze at the altar lights; perhaps they do not glow with sacrificial ardor and long to lay down their lives for the faith. What are the skeptical thoughts that reduce each affirmation of the creed to a remote, meaningless jumble? The late Lord Bryce was unrivaled in his acquaintance with political affairs and unsurpassed in sobriety and penetration of judgment. His sympathies were strongly democratic. Yet at the close of his life his optimism faltered. The time had come for men to face the facts and be done with fantasies. "Few are the free countries," he wrote,[1] "in which freedom seems safe for a century or two ahead.... When the spiritual oxygen which has kept alive the attachment to liberty and self-government in the minds of the people becomes exhausted, will not the flame burn low and perhaps flicker out?" No one thought of trying to revive popular government when it disappeared in Greece and Rome. "The thing did happen: and whatever has happened may happen again. People that had known and prized political freedom resigned it, did not much regret it, and forgot it." [2] These lines were written before the March on Rome by Mussolini's Black Shirts.

Unquestionably the growing skepticism about democracy must be attributed in part to the excesses committed in its name. The franchise has been given to all adults, women as well as men; special privileges or immunities have been granted to organized labor and other interests; the rich have been taxed for the benefit of the poor. Let us remember the warning of Montesquieu: Governments decline and fall as often by carrying their principles to excess as by neglecting them altogether. Plato and Aristotle make this a capital point. According to Plato,[3] "the excessive increase of anything often causes a reaction in the oppo-

[1] *Modern Democracies,* Vol. I, p. 603.
[2] *Ibid.,* p. 600.
[3] *The Republic,* Book VIII.

site direction, and this is the case ... above all in forms of government." Aristotle is no less emphatic. In one passage he says: [1] "Many governments, now corrupted, reflect the supremely important consideration that the mean should be preserved.... Those who think democracy or oligarchy the only virtue extend it to excess. They overlook the fact that a nose that varies a little from perfect straightness, either towards a hook nose or a flat one, may yet be agreeable to look at, but that, if the peculiarity be extended beyond measure, first the properties of the part are lost and at last it can hardly be admitted to be a nose at all on account of the excessive rising or sinking. Thus it is with other parts of the human body; and thus, too, with respect to States. Both an oligarchy and a democracy may vary from their most perfect form and yet be well-constituted; but, if any one endeavors to extend either of them too far, at first he will make the government the worse for it, and at last there will be no government at all." [2]

Evidence of popular disillusionment, of declining faith in democracy, can be found in many different places. Within the last twenty years, for example, the critical literature has assumed formidable proportions.[3] Its significance can no longer be misunderstood. We are not listening now, as we once did when Maine wrote his *Popular Government* or even when Lecky wrote his *Democracy and Liberty,* to the complaints of a dispossessed aristocracy. We hear the authentic voice of a new generation that bends its eager eyes upon the future. "Liberty," says Mussolini, "is no longer a chaste, severe maiden for whom, in the first half of the last century, men fought and died. For the intrepid, restless youths who are now in the dawn of a new history other words excite a greater fascination; namely, order, hierarchy, discipline. Fascism is not afraid to declare itself liberal or anti-liberal. It has already passed and, if necessary, will pass again, without the slightest hesitation, over the more or less decomposed body of the goddess of liberty." The voice of the new generation is so strong and persistent that it captures attention and carries us back to the eve

[1] *Politics,* Book V, Chapter 9.

[2] Aristotle continues: "The lawgiver and the politician, therefore, should know well what preserves and what destroys a democracy or an oligarchy, because neither one nor the other can possibly continue without rich and poor. Whenever an entire equality of circumstances prevails, the State must necessarily assume another form. Hence those who destroy the laws authorizing inequality in property destroy the government. It is also an error in democracies for demagogues to endeavor to make the common people superior to the laws, thus setting them at variance with the rich and dividing the State into two."

[3] On this point see E. M. Sait, *Democracy* (1929), and Sir Charles Petrie, *The Story of Government* (1929), pp. 199-204.

of the French Revolution, to the time when a host of "philosophers" and pamphleteers heralded the decay of the old social system. Philosophy has little positive effect on human behavior; men act, more or less blindly, under the impulsion of instinct and circumstance, and then proceed to explain their conduct on rational grounds. But, if the philosopher does not make things happen, his lucubrations may be symptomatic of what is actually happening; and the fact that so many writers are busily engaged in attacking the present democratic régime is fair evidence of a widespread heresy.

The most obvious of all the disquieting phenomena is the fallen prestige of representative assemblies. Cynicism is not, of course, peculiar to our own time. Carlyle, after taking Emerson to "the national talk-shop," the House of Commons, asked him if he did not now believe in a personal devil; Lavelaye observed that Italy was fortunate in the situation of her capital, since the Roman malaria effectively abridged the sessions of parliament. But back in the early, optimistic days, when manhood suffrage faced the future with the immeasurable buoyancy of youth, the legislature held a secure place in the popular regard. It was venerated as the palladium of liberty and the indispensable instrument of progress. In moments of anxiety the people turned with confidence to their representatives. Whittier invested the Thirty-ninth Congress with the sacred mission of a Bourbon king:

> O people-chosen! are ye not
> Likewise the chosen of the Lord
> To do his will and speak his word?

Is this the kind of apostrophe that greets the Seventy-fifth Congress? Ridicule and contempt are the familiar language of the Press and of men prominent in the business world. The country feels safest, according to the New York *Times*,[1] when Congress is not in session. The worst thing we have, according to E. H. Gary,[2] is our American Congress. "There has never been a time," says Representative Robert Luce, whose scholarly books and long service in the House give his words some authority,[3] "when the legislative branch of the government, both national and state, has been held in such low esteem." Even the British House of Commons—doubtless regarded more highly, both at home and abroad, than any other representative body—suffers from

[1] March 12, 1928.
[2] *Congressional Record*, March 19, 1926, p. 5703.
[3] *Ibid.*

a perpetual bombardment of derisory missiles. It is "past praying for," we are told; [1] it "has fallen into universally recognized decay"; it "has ceased to be an instrument of government. Its ancient functions have been killed under the prolonged and continuous operation of hypocrisy." The mourners gather about the sick-bed and, squeezing out a pious tear or two, await the end. Hilaire Belloc is there, ready with expert medical advice.[2] The patient, he avers, has passed beyond the help of stimulants and operations. Get ready the winding-sheet, and see that the heir to this bankrupt estate, whoever he may be, is duly notified.[3]

That representative assemblies have sunk low in prestige will probably be admitted without the submission of more evidence. However, our state constitutions offer cogent proof. In pre-democratic days these constitutions went no farther than to lay down a few principles and describe the framework of government. They were brief documents, running to no more than ten or twelve pages in Thorpe's collection. What influence was at work, then, to produce monstrosities like the Oklahoma constitution of 1907, which—though not now the longest—spreads itself over seventy-odd pages? If one glances through those dreary pages, the answer becomes apparent: the legislature had to be put under restraint. And so, to-day, "the people-chosen," "the chosen of the Lord," find themselves in the calaboose, behind barred windows and steel doors. They lock-step around the prison yard under restrictions that would provoke a mutiny at Sing Sing or San Quentin. Through page after page of the regulations we read the formidable list of things that the prisoner is prohibited from doing for fear he might abuse his liberty and indulge his criminal propensities. Our state legislatures, with half a dozen exceptions, are permitted to meet only once every two years, and, even so, are limited in more than half the states to a session of sixty days or less. According to the *New Republic*,[4] business associations wish "to reduce the sessions of the state legislatures, which are supposed to safeguard American social welfare, to once every four years." May we not expect in the future some still more drastic curtailment of power? The popular attitude suggests it. When the legislature completes its little span of active life, a sigh of

[1] Hilaire Belloc and Cecil Chesterton, *The Party System* (1911), p. 185.

[2] *The House of Commons and Monarchy* (1920).

[3] Towards the end of his life Georges Clemenceau expressed the opinion that "our verbose parliaments are but an incident in eternity" and that they will give way to something else—to something better, he hoped.

[4] Vol. XLIX (1926), p. 55.

relief shakes the atmosphere. The newspapers busily set to work estimating the damage that the "people-chosen" have done.

The typical product of popular rule is the politician. Since it is his function to make the laws and guide the destinies of the community, he must be chosen, one would suppose, because of his outstanding qualifications. Yet the politician, far from commanding respect, is the perpetual butt of sarcasms. H. G. Wells describes him as "an acutely humiliating caricature of the struggling soul of our race." [1] He is, says Émile Faguet,[2] "a man who, in respect of his personal opinions, is a nullity, in respect of education, a mediocrity; he shares the general sentiments and passions of the crowd; his sole occupation is politics, and if that career were closed to him, he would die of starvation. He is precisely the thing of which democracy has need. He will never be led away by his education to develop ideas of his own; and having no ideas of his own, he will not allow them to enter into conflict with his prejudices. His prejudices will be, at first, a feeble sort of conviction, afterwards, by reason of his own interest, identical with those of the crowd; and lastly, his poverty and the impossibility of his getting a living outside of politics make it certain that he will never break out of the narrow circle, where his political employers have confined him."

It is absurd to blame the politician because he is not a superman. In order to become a politician, he had first of all to be a mediocrity. "What is the people's one desire, when once it has been stung by the democratic tarantula?" asks M. Faguet.[3] "It is that all men should be equal, and in consequence that all inequalities, natural as well as artificial, should disappear. It will not have artificial inequalities.... Nor does it like natural inequalities, that is to say a man more intelligent, more active, more courageous, more skilful than his neighbors. It cannot destroy these inequalities, for they are natural, but it can neutralize them, strike them with impotence by excluding them from the employments under its control. Democracy is thus led quite naturally, irresistibly one may say, to exclude the competent precisely because they are competent, or if the phrase pleases better and as a popular advocate would put it, not because they are competent, but because they are unequal, or, as he would probably go on to say, if he wished to excuse such action, not because they are unequal, but

[1] New York *Times Magazine*, March 20, 1927.
[2] *The Cult of Incompetence* (1911), p. 34.
[3] *Ibid.*, pp. 30-31.

because, being unequal, they are suspected of being opponents of equality. So it all comes to the same thing."

The masses resent superiority as reflecting upon their own condition, and fear it as subversive of the democratic régime. This attitude involves a paradox that Walter Lippmann has emphasized in his *Preface to Politics*.[1] The religion of humanity has no faith in human beings. Democracy loves a crowd, but, fearing the individuals who compose it, tries to blot out human prestige and minimize the influence of personality. "Democracy has achieved its perfect work," says Ralph Adams Cram,[2] "and has now reduced all mankind to a dead level of incapacity, where great leaders are no longer wanted or brought into existence, while society itself is unable, of its own power as a whole, to lift itself from the nadir of its own uniformity.... For exactly a hundred years democracy has suffered from progressive deterioration until it is now not a blessing, but a menace." Mr. Cram's esthetic feelings are outraged as he watches the mountains being levelled and the valleys filled in. Professor Irving Babbitt has horrid presentiments of the future American society as "a huge mass of standardized mediocrity..., one of the most trifling brands of the human species that the world has ever seen."[3] Is that the direction in which democracy is taking us? There go the millions, ballot in hand, on their way to the polls: the same ballot for each individual, irrespective of his mental and moral endowments; the same ballot for high and low, intelligent and stupid, energetic and inert; and, since each voter among the millions makes the same infinitesimal contribution, must we not suppose that the élite will be submerged, crushed by weight of numbers?

POLITICS AND ECONOMICS

The democratic régime postulates political equality. Political life, as described in constitutions and statutes, is based upon an artificial equality, each man or each adult being entrusted with a ballot of the same value. Under any form of government, however, economic life develops inequality. In the machine age, just as in a pastoral or agricultural community, such qualities as industry and thrift, foresight and sound judgment, give a great advantage in the pursuit of wealth. Although rapacity, cunning, or accident may sometimes be a factor, on the whole the accumulation of wealth attests the possession of superior

[1] (1913), p. 17.
[2] *The Nemesis of Mediocrity* (1919), pp. 21-22.
[3] *Democracy and Leadership* (1924), p. 243.

native endowments. There is a disposition among rather impecunious intellectuals, especially among college professors, to dispute this point; but perhaps the latter may recall one of Shaw's penetrating aphorisms: "Those who can, do; those who can't, teach." At any rate, there always have been and always will be rich and poor, no matter what leveling plan the government may, for the moment, try to enforce; for superior hereditary endowments are certain to assert themselves. What do we find in the U.S.S.R. to-day? How have the leveling plans succeeded there? Within the Communist party, the able men, in key positions, form an aristocratic fringe around the dictatorship, living sumptuously in comparison with the wage-earners and wielding an autocratic power that only Stalin can control. Like aristocrats of other days, they are both rich and powerful; and they enjoy something of the popular deference that belongs to aristocracy. The State, monopolizing manufacture and commerce, has kept the wages of artisans close to the subsistence level, necessarily so because of the general economic situtation. But it has set no limit at all to the salaries that efficient business executives may receive. By insisting that salaries shall be big enough to attract the most competent men to onerous and responsible posts, Stalin has shown characteristic realism. Most interesting of all is the gradual rise of a new bourgeois class, this being due largely to the floating of enormous government loans and to the restoration of the right to inherit wealth.

This coexistence of equality in politics and inequality in business is the most curious anomaly of our social arrangements. Between the two there is chronic rivalry and friction; but open hostilities may be averted by negotiation, in which the politicians win popular applause by attacking some exposed economic salient and business obtains a truce by making modest concessions. It may be good strategy for business to purchase peace at some sacrifice rather than endure perpetual war. Business thrives on peace. But in any fight to a finish business must eventually win; for, while political equality is an artificial contrivance, economic inequality is part of the natural order. Business moves along its own orbit and responds to the working of a higher law. Its life cannot be changed fundamentally and permanently by expressing an aspiration on paper and calling it a statute, or by exercising revolutionary force. Biological inequality, being transmitted through the germplasm, will always reassert itself in defiance of artificial restraints. Democracy would be committing suicide if it tried persistently to universalize its own artificial principle of equality. Making war upon the

prosperous is one of the democratic excesses that Aristotle specially mentioned as fatal to the régime. In modern democracies it has become something more than an abstract possibility,[1] and the time may be drawing near when the rich will offer forcible resistance to the poor.

Economics precedes politics, shaping, directing, and controlling it. But, although business must always have, in some degree, an independent life, government can never, even when under the spell of *laissez-faire*, leave business entirely alone or ignore the social effects produced by economic innovations. To-day everybody is impressed with the complexity of our economic, and consequently of our social, life. In place of the simple conditions of the frontier, which gave President Jackson the idea that, without preliminary training or special aptitudes, any one was competent to hold public office, we are confronted now with the most baffling and intricate problems. How striking the change has been may be gathered by comparing the national party platforms of the present era with the platforms of the forties or even the seventies. The problems have grown highly technical, transcending the capacities of ordinary citizens and requiring the attention of experts. Can democracy, with its belief in the average man and its distrust of the specialist, endure this new strain? Bismarck said quite truly that institutions must be judged by what is accomplished through them. Democracy will be judged—and is being judged—by its success or failure in supervising a highly specialized economic mechanism. According to Bryce: [2] "Neither the conviction that power is better entrusted to the people than to a ruling One or Few, nor the desire of the average man to share in the government of his own community, has in fact been a strong force inducing political change. Popular government has been usually sought and won and valued, not as a good thing in itself, but as a means of getting rid of tangible grievances or securing tangible benefits, and when these objects had been attained, the interest in it has gradually tended to decline. If it be improbable, yet it is not unthinkable that, as in many countries impatience with tangible evils substituted democracy for monarchy or oligarchy, a like impatience might some day reverse the process."

The task of government has become vastly more difficult during the past generation. Have the people acquired a corresponding increase in

[1] In the middle of the nineteenth century Lord Salisbury discerned the approach of a divorce between political power and responsibility. When that divorce occurred, "the rich would pay all the taxes and the poor make all the laws." Lady Gwendolen Cecil, *Life of Robert Marquis of Salisbury*, vol. I (1922), p. 149.

[2] *Modern Democracies*, vol. I, pp. 41-42.

competence? In the art of warfare, each improvement of defensive armor has been offest by an improvement in offensive weapons. The "impregnable" Belgian fortresses crumbled under German artillery fire; the finest superdreadnought succumbs to a submarine's torpedo. And so, we are sometimes told, if public affairs have grown terribly complicated, terribly hard to penetrate, the capacity of the masses to control them has, like the efficiency of the naval gun, increased at a higher ratio. The masses are educated, enlightened. How could it be otherwise when we spend more than two billion dollars yearly on our public schools in the United States and at the same time diffuse the highest forms of culture through the moving pictures, the radio, and the Sunday supplement?

What the average citizen has obtained is the rudiments of knowledge. He can write a letter; he can read a book. But, unfortunately, his smattering of education has made him arrogant and bold in situations that call for modesty and caution in expressing a judgment. The more remote things are from his experience and the less he knows about them, the more definite his opinions seem to be. It is doubtful that bigger doses of education would do him any good. Education can train, but not create, intelligence. When Dr. Joseph Collins tells about the prevalence of adult-infantilism and when the testers fix the average mental age of the electorate at fourteen, there may be some excuse for regarding the electorate as incurably stupid.

Wyndham Lewis, master of devastating satire and picturesque phrase, has given free play to his convictions on this subject. He says: [1] "Take the poorest and most abject *crétin* in the community (eighty per cent of which resemble him very nearly). Say to yourself, There is nothing too simple and inhumanly stupid ... for this low-grade fool. It would take you five hundred centuries to teach him to frame the simplest abstract notion. He is permanently and forever an infant; the Infants' Class always absorbs eighty per cent of the personnel of our famous terrestrial training school, or technical institute, which we call 'mankind.' ... Abandon, therefore, all those queer attempts to 'educate' this dense throng of *inapertiva* mankind; or rather, canalize your educative efforts in such a way that only the simplest instruction is provided, nothing that will tax those truly infantile intelligences.... So, *A, B, C, D: Two and two make four—Donkey tap the door. Three and three make six—Lamps, not tramps, have wicks* (compare the American army tests of Yerkes and others): Whatever you consider it pos-

[1] *The Art of Being Ruled* (1926), pp. 90-91.

sible or desirable to impart to them, let it be done on that system.... Although we have called this prodigious mass of people 'infantile,' they are of course outwardly grown up. They do not call themselves infantile as a community. They claim to be treated as responsible, accomplished, intelligent beings. They want to have official bulletins every morning of all accidents, fires, murders, rapes that have occurred throughout the night and part of the preceding day. They wish a detailed account of how their agents and ministers of state have 'fulfilled their trust,' as they call it, in the conduct of that great and sacred affair, the commonwealth. And they wish to be informed punctually of the results of all racing, ball-games, paper-chases, bull-fights, and other similar events."

The potentialities of education have been exaggerated grotesquely. Education can only "lead forth" inborn talents, not create them; and many biologists believe that the germ-plasm of Western peoples is deteriorating. Not only is warfare dysgenic,[1]—it "but straws the wheat and saves the chaff with a most evil fan,"—but the best stock, rising to the top in the social scale, resorts to birth-control or becomes sterile.[2] It is the Infant Class of Wyndham Lewis that is setting the future tone of the human species. This tendency has been confirmed by the growth of a somewhat indiscriminate humanitarian spirit in the West. Help is extended prodigally to those who cannot or will not help themselves. The doctrine of equality, which justifies the raising of the low and the leveling of the high,[3] becomes a doctrine of inequality in practice, when the energetic and thrifty Few are called upon to provide housing, food, medical care, education, amusements, and much besides for the slothful and improvident Many, the very dregs of society. The worst specimens are coddled, and encouraged to breed, as if they were

[1] See Chapter XIV.

[2] See Chapter I.

[3] "But the curse of class distinctions from our shoulders shall be hurled
An' the sense of Human Kinship revolutionize the world;
There'll be higher education for the toilin', starvin' clown,
An' the rich and educated shall be educated down."

This represents the twentieth-century confidence of the masses. The convenient principle of "human kinship" will bring about a happy situation "where the people work together, an' there ain't no fore-'n'-aft." In 1845 Thomas Cooper put no faith in altruism:

"Slaves, toil no more! Why delve, and moil, and pine,
To glut the tyrant-forgers of your chain?
Slaves, toil no more! Up from the midnight mine,
Summon your swarthy thousands to the plain.

.....

How, 'neath its terrors, are the tyrants bowed!
Slaves, toil no more—to starve! Go forth and tame the proud."

the best. They are even maintained at public expense without the necessity of working. From the standpoint of heritable qualities, the political competence of the people as a whole declines, while the complexity of the problems of government increases.

EFFECTS OF CITY LIFE

Environment, like heredity, plays a part in the deterioration of the masses. The era of the machine is an era of urbanization; and, in the words of Professor S. J. Holmes,[1] "there is little doubt that cities have been and still are deleterious to the physical welfare of their inhabitants. ... Cities have proven to be consumers of men; they are vortices into which are drawn ever-larger proportions of our race." The unwholesomeness of the city is indicated by an enhanced death-rate and a lower birth-rate, by the frequency of suicides, by the higher percentage of crime, alcoholism, drug-addiction, prostitution, venereal diseases, illegitimacy, stillbirths, sterility of women, and their inability to nurse children.[2] Were it not for rural immigration, many cities would decrease in population; and, where that is not the case, the increase comes from the proletarian class.[3] The cities cause a gradual deterioration of stock. "The rapid fall in the birth rate has affected most the classes upon whose intelligence, initiative and energy the rank of a people mainly depends.... It is not impossible that more or less change has thereby been produced in the germ-plasm of the race." [4]

According to Alleyne Ireland, the mentality of the urban voter is very inferior to that of the rural voter. "It is the mind of the propertyless wage-earner, of the clerk, of the shop assistant, of the day laborer, of a man herded with other men and profoundly affected by the herd-instinct, of a man of weak individuality, of a man who spends his working hours doing things for other people and his leisure in having things done for him by other people, of a man whose life is passed in surroundings entirely created by machinery and in circumstances where his free-will is perpetually constrained by the contagion of an artificial environment, of a man who knows (or at any rate of whom it is known) that if he drops dead while at his work he can, in normal times, be replaced in an hour by another man who will do just as well. His whole

[1] *The Trend of the Race* (1921), pp. 342 and 344.
[2] *Ibid.*, pp. 342-343.
[3] *Ibid.*, p. 345.
[4] *Ibid.*, pp. 348 and 350. Holmes says (p. 349) that "the baleful influence of industrial development is not so much its effect upon the physical welfare of womankind in general, as its tendency to divert the better endowed from the duties of motherhood."

existence is passed in the feverish occupations of earning his wages and of spending them." [1] In the country the farmer conducts a diversified business that he sees as a whole. He looks after all the connected activities of his farm: buying supplies, building barns, repairing machines, caring for and breeding stock, plowing, sowing, reaping, threshing, marketing, cutting wood, making butter. At all times he is conscious of the processes of nature. He sees them in rain and drought, heat and cold, in the birth of a chicken or a calf, in diseases like wheat-rust and hog-cholera. The city-dweller, on the other hand, is hardly ever brought into contact with the origin of things. "To him a house is something produced by a real-estate agent, food something taken from a counter or emptied out of a can, heat something which he hopes to get by opening the valve of a radiator, light something which appears in a glass bulb in one part of a room when he presses a button in another part of it." He sees things only in their finished state and so cannot realize "the inescapable mesh of causation in which he is entangled." [2]

According to Carr-Saunders,[3] city life fosters discontent. Through millions of years our bodies were slowly adapted to meet what may be termed country conditions. "Far-fetched as it may seem to many people, there is good reason to believe that, when our senses do not receive the stimuli which alone can satisfy them, we are discontented. Our bodies are adapted to perform a certain amount of work in the open air, and failing suitable opportunities we cannot experience the sense of physical well-being that does so much to drive away discontent." Ernest Barker holds that "a nation loses its vitality when it loses

[1] *Democracy and the Human Equation* (1921), p. 190.

[2] What a dull and meaningless life he leads! Living in New York, he knows little of the city between 190th Street, where he takes the subway in the morning, and 14th Street, where he leaves it. He spends a dreary day (with his eyes on the clock), poring over accounts that cannot translate themselves into the reality of rubber plantations, or sheep farms, or steel mills. Since his employment provides neither exercise nor drama, he must get these artificially, the one in a gymnasium, the other in a movie theater.

"Life in a great modern city," says Ernest Barker (*National Character*, 1927, p. 101), "is a great artifice. A river may flow through its length; but if it does, it becomes 'a trough between banked warehouses.' It has its roads, but what moves along them is a mechanism of grinding trams. There may be municipal trees along the streets—and each will be set in its grating. There may be municipal parks—but they will be regular and uniform, and their flowers will be protected by iron bars and warning notices. You will see thousands of men swarming to and fro on their regular occasions; but of other living things you will see, at most, only a few horses, and, it may be, some pigeons and sparrows. This is the daily environment of that part of our population which lives in towns with a population of 100,000 and upward."

[3] A. M. Carr-Saunders, *Population* (1925), pp. 101-102.

contact with the soil." [1] The environment of the city induces nervousness; for, when men live in crowded houses, without sufficient air, and when their food is a mere mechanical preparation, their bodies cannot easily acquire the firm tone that goes with a quiet temper. "They may work in bursts for short periods: they cannot regularly exert a continuous effort. On this physical basis, itself unbalanced and insecure, the conditions of industry erect an edifice which tends to exaggerate its defects. To get to work is a rush; the work itself may be timed and speeded; it is surrounded by noise and bustle.[2] A body prone to nervousness works under conditions which accentuate nervousness. When the physical conditions of life are of this nature, we may expect to find them accompanied by their mental and moral corollaries—a lively and impressionable receptivity, which readily sheds what it has quickly imbibed; an instantaneous zest for some new purpose or mode of life, coupled with a rapid cooling and evaporation of the interest and the energy necessary for its permanent maintenance. The dweller in the great town is always receiving fresh impressions; and he may readily fall into a longing for a constant renewal of his sensations." [3]

The will of the people is supposed to be the propelling force in a democracy. Public opinion rules. Whether it rules well or badly depends upon the character of the people, and upon circumstance. While the consideration of public opinion has been deferred to the last chapter, here one salient point must be emphasized. In view of the fact that government, nowadays, has to meet perplexing problems and that the problems tend steadily to become more intricate and more technical, the immediate future of democracy may well be found in the answers to two questions. Does the capacity of the people increase in proportion to the difficulty of their task? Does their interest in politics mount in like measure? The facts indicate a negative answer. Education cannot

[1] *National Character* (1927), p. 100.

[2] The effect of the hubbub of urban life attracts the attention of Walter Lippmann. He says (*Public Opinion*, 1922, p. 72): "Can anything be heard in the hubbub that does not shriek, or be seen in the general glare that does not flash like an electric sign? The life of the city dweller lacks solitude, silence, ease. The nights are noisy and ablaze. The people of a big city are assaulted by incessant sound, now violent and jagged, now falling into unfinished rhythms, but endless and remorseless. Under modern industrialism thought goes on in a bath of noise.... Every man whose business it is to think knows that he must for a part of the day create about himself a pool of silence. But in that helter-skelter which we flatter by the name of civilization, the citizen performs the perilous business of government under the worst possible conditions."

[3] Barker, *op. cit.*, p. 102. He says further (p. 103): "The great industrial town, alike by its congestion and by the uniformity of its mechanism, leaves little chance for the play of forces which tend to correct the gregarious and imitative instincts."

create intelligence; what it does too often create is a disposition to mistake elementary book-knowledge for practical wisdom and universal competence. From the standpoint of heredity, the conclusions of some eminent biologists point to deterioration. From the standpoint of environment, it is commonly remarked that city life, which is characteristic of the industrial age, fosters superficial and volatile conduct.

Political interest is declining. Apathy is attested not only by the bewildered complaints of democratic fundamentalists, but by the statistics of elections. The statistics may well depress the most convinced and resolute democrat. As to the active proportion of the British electorate, Sir Charles Petrie notes that "at the last five General Elections before the great war, the average was eighty-four per cent, while at the four held since it has fallen to seventy-three." [1] By way of generalization it is enough to say of the American situation that half the potential voters ignore the election and that three-quarters ignore the primary. The diagnostician, as he observes the pallid countenance of democracy, the wasting-away of a once robust physique, recognizes the symptoms of a fatal malady: there is no hope for the patient; this is persistent anemia. What has become of the devotion and enthusiasm that marked the democratic crusade in the nineteenth century or the suffragette movement of the early twentieth? The crusading spirit is gone now. As long as the ballot was held tight in the hands of the privileged Few, the covetous Many desired it as a symbol of freedom and power, as a mark of distinction in an unequal society. But why should they set much store by a possession which now, freely bestowed upon men of the lowest estate and even upon women,[2] has lost its fictitious value of scarcity? And so impends the final confession of failure, already made in at least four Latin-American and six European States,

[1] *The Story of Government* (1929), p. 170.

[2] The State rests ultimately on force; and the enfranchisement of women builds a shaky superstructure on the foundation. Possessing the physical force, men may be inclined to flout laws, not of their own making, which impose feminine standards of morality. When moral questions are involved (segregation of prostitutes, race-track gambling, the sale of liquor), women take a stricter position than men. But the equality of the sexes has, perhaps, a deeper significance, reflecting a decline in male self-confidence and will to dominate. According to Plato (*Republic*, Book VIII), it marks the period of democratic disintegration. Professor S. J. Holmes (*The Trend of the Race*, 1921, p. 232) says: "It may seriously be doubted whether the growing independence of women, despite its many advantages, has proven an unmixed blessing. Thus far it has worked to deteriorate the race in the interests of social advancement, a process which is bound to be disastrous in the long run." This is a very mild statement.—As to the consequence of enfranchising women in the United States, Alleyne Ireland says (*Democracy and the Human Equation*, 1921, p. 229): "The cry of 'More voters!' is dead in the land; and we shall soon begin to hear the cry of 'Better voters!'"

as well as in New Zealand and Australia, whispered in the United States by permissive clauses in the constitutions of Massachusetts and North Dakota: the compulsory vote. Men once gladly laid down their lives so that their fellows might enjoy the inestimable blessings of the ballot; now they think it such a shabby thing that it is not worth a walk or ride to a nearby polling place, and so they must be forced to vote. What will be accomplished by such a degradation of the ballot? The State can mobilize the voters at the polls, but not make them think; it can manufacture more votes, but not more intelligent opinions; it can publish an alluring balance-sheet, but not deceive the actuaries.

The ordinary voter is ill-informed, apathetic, and indolent. Political issues do not touch him closely. He is preoccupied, first of all, with the task of making a living and, then, with his home and family. If he is a religious man, the church attracts him more than the polling booth. And can we be surprised that, after the exhausting labors of the day, he wants to keep his few hours of leisure for recreation and amusement? Now that political issues have grown so complicated as to be unintelligible to the average voter, civic duty does not attract his jaded mind. He will not listen to the pious doctrine that, in addition to being wise about his own personal affairs, he must now be wise about everybody else's as well.[1] "When the private man has lived through the romantic age," says Walter Lippmann,[2] "and is no longer moved by the stale echoes of its hot cries, when he is sober and unimpressed, his own part in public affairs appears to him a pretentious thing, a second-rate, an inconsequential. You cannot move him with a good straight talk about service and civic duty, nor by waving a flag in his face, nor by sending a boy scout after him to make him vote. He is a man back home from a crusade to make the world something or other it did not become...."

Many of the issues that are presented to the voters are utterly remote from his experience, utterly beyond his comprehension, and at the same time dreary. In his *Preface to Politics* Walter Lippmann confessed to a respect for popular indifference. "There was something notoriously trivial and irrelevant about our reformist enthusiasm," he thought, "and an appalling justice in that half-conscious criticism which refuses to place politics among the genuine, creative activities of men.... Politics was a drama without meaning or a vague abstraction without substance." Indeed, politics is more than ever meaningless

[1] Sir Norman Angell, *The Public Mind* (1927), pp. 4 *et seq.*
[2] *The Phantom Public* (1925), p. 15.

and abstract, because it deals with an increasingly complex and specialized society. "To-day the interest in politics is on the wane," says Sir Charles Petrie,[1] "and save on exceptional occasions they are rarely discussed by younger people outside the ranks of the professional politicians. Various reasons, mostly the reverse of flattering to those concerned, have been advanced to acount for this, but the real cause is undoubtedly the fact that *the problems which face the rulers of mankind are such that no ordinary layman can understand them.... The interest in politics has declined because they have become unintelligible.*"

Interest in politics is also being sapped by interest in sports. Petrie believes "the steadily increasing absorption in games and pastimes of various kinds of so large a percentage of the population strikes a severe blow at the very root of political democracy."[2] In the countryside, sport is the monopoly of the leisured class, the peasant having no energy left for artificial forms of exercise and no leisure left for watching others indulge in them. In the city, the middle class, which is keen on fresh air and sound physique, plays the games; the proletarians incline rather to provide an audience. But the middle class has always been the foundation upon which enduring democratic régimes have rested. Its disintegration in ancient Rome and in contemporary Germany from economic causes contributed in large measure, in each case, to the fall of the republic. Western democracies are faced to-day by a portentous situation: not only is the middle class being sapped by social reform and heavy taxes, but its interest is being diverted from politics to sport; and, by such a diversion of interest, that class can be extinguished in a political sense as surely as by the inflation that ruined it in Germany. Sport seems to be regarded as one of the most effective antidotes to political unrest. How else shall we explain its tremendous vogue under Stalin, Mussolini, and Hitler?

EXPERTS AS A MENACE

There is no use blinking the fact: democracy everywhere is on trial. On all sides the gospel of efficiency is being preached. The apostles of that rather repellent creed, hankering after dictatorship, watch every move of politicians and electorate, after the manner of the John-the-Baptist democrats a century ago, who advertised every slip that decaying royalty made. There seems to be no way of silencing or diverting

[1] *The Story of Government* (1929), p. 300. My italics.
[2] *Ibid.*, p. 220.

the efficiency-mongers. Therefore, the one way of escape for stultified and exasperated democrats is to introduce efficiency. They can do so only by installing experts. Here lies the dilemma: democracy without experts—and it has a justifiable fear of them—faces the danger of collapse; with experts—they being a lean and hungry crowd—it faces the danger of being devoured by its own offspring. It is on the latter horn of the dilemma that democracy is being impaled. In some countries (like the United States) the technicians, though late in arrival, are gradually assuming control. In other countries (like France), where reliance on them has persisted from monarchical times, their power and prestige have increased as the poor, over-taxed brains of the ministers get fuddled over the problems that confront them.

British experience with experts dates back to the adoption of the merit system for the civil service after the middle of the last century. The practical sagacity of the people and their peculiar love of compromise have attained what seems to be a satisfactory balance between evanescent amateur ministers and permanent experts. Yet the experts have a traditional affinity with monarchical government, which has always relied heavily upon them; [1] and, even though democracy under aristocratic leadership still seems secure in Great Britain, the experts might not offer strong objection to its overthrow, if ministerial office became the monopoly of coal-miners and longshoremen. Perhaps they would like to take the place of the ministers, instead of telling them what to do and letting them get all the public credit. But, as things stand, they do enjoy the substance of power. Sidney Webb (Lord Passfield), formerly having served in the upper ranges of the civil service, can speak on this head with authority. "But are we governed," he asks,[2] "by the twenty or more gentlemen who form the British Cabinet? Is it they who collectively determine how the work of the Government shall be carried on? . . . The Government of Great Britain is in fact carried on, not by the Cabinet, nor even by the Individual Ministers, but by the Civil Service, the Parliamentary Chief of each Department seldom actively intervening, except when the point at issue is likely to become acutely political. . . . *The great mass of government*

[1] Consider, for example, the rôle of the experts in the Roman Empire. T. R. Glover (*Democracy in the Ancient World*, 1927, p. 176) even says that they were too efficient. "The Roman Empire fell in the long run, because nobody could govern it except civil servants and soldiers, and they began by governing it too well."

[2] *A Constitution for the Socialist Commonwealth of Great Britain* (1920), pp. 56-69; reprinted in Sait and Barrows, *British Politics in Transition* (1925), pp. 26 *et seq.* My italics.

to-day is the work of an able and honest but secretive bureaucracy, tempered by the ever-present apprehension of the revolt of powerful sectional interests, and mitigated by the spasmodic intervention of imperfectly comprehending ministers."

More than twenty-five years ago Ramsay Muir came to the pessimistic conclusion that Englishmen, gradually ceasing to feel a sense of personal responsibility for public affairs, were losing, in consequence, the habit of self-government.[1] He attributed this tragic condition to the steady, persistent, and powerful influence of the great permanent officials, whose actions are never submitted to the judgment of the electorate and whose names are never—or very seldom—mentioned by the newspapers. "The Houses of Lords and Commons, and the Cabinet as well, might be abolished to-morrow, and, so far as the mass of citizens is concerned, there would be not the least difference except for the absence of certain columns of not very instructive speeches in the newspapers; for a time at least the government of the country would go on as usual." [2] The tendency that Muir had noticed began to attract widespread attention some twenty years later.[3] This is what has been taking place. First of all, and for a variety of reasons that must carry a good deal of weight,[4] Parliament has delegated a vast range of legislative power to the departments. Delegation has gone so far that, in one statute at least, the minister (in practice, his technical advisers) was empowered to do anything "which appears to him necessary or expedient" for the purpose named, even to the point of modifying the provisions of the Act.[5] Most of the departmental rules and orders do not require any affirmative action by Parliament. What we encounter, therefore, is parliamentary abdication in the interest of efficiency. In the second place, there has been an equally marked tendency to confer upon the administrative experts judicial or quasi-judicial power, without allowing appeal to the ordinary courts.[6] The expert makes the law, applies it, and penalizes offenders. Yet he

[1] *Peers and Bureaucrats* (1910), p. 6. Muir returns to this theme in *How Britain Is Governed* (1930; rev. ed., 1936), chapter II.

[2] *Ibid.*, p. 15.

[3] Among the numerous contributions to this subject the most authoritative and serviceable are: Lord Hewart, *The New Despotism* (1929); C. K. Allen, *Bureaucracy Triumphant* (1931); F. J. Port, *Administrative Law* (1929); and W. A. Robson, *Justice and Administrative Law* (1928).

[4] Port, *op. cit.*, pp. 137-145.

[5] The Rating and Valuation Act, 1925. See Port, p. 140; and Hewart, *op. cit.*, pp. 3-4.

[6] See Allen, *op. cit.*, pp. 56 *et seq.*; Hewart, *op. cit.*, pp. 43-57, on "Administrative Lawlessness"; and, for a detailed treatment, Port, *op. cit.*, chapter V, pp. 188-229.

lives somewhere in the shadows, beyond the range of the light that beats upon Parliament, the police, and the courts.

What has happened to the "rule of law" that Britons have so long cherished? Can it be that the ordinary courts no longer decide for all men, officials included, what the law is and whether it has been violated? According to Lord Hewart, Lord Chief Justice of England,[1] "a mass of evidence establishes the fact that there is in existence a persistent and well-contrived system, intended to produce and in practice producing, a despotic power which at one and the same time places Government Departments above the sovereignty of Parliament and beyond the jurisdiction of the Courts. If it appears that this system springs from and depends upon a deep-seated official conviction, which in turn it nourishes and strengthens by each successive manifestation of its vigor, that this, when all is said and done, is the best and most scientific way of ruling the country, the consequences, unless they are checked, must be in the highest degree formidable.[2] . . . The whole scheme of government is being undermined, and that, too, in a way which no self-respecting people, if they were aware of the facts, would for a moment tolerate. Much nonsense, to be sure, is written about what is called democracy. It might be thought, on the testimony of some of its apologists, that democracy was a patent medicine—on the testimony of others that it was a fancy religion. But when once the fact is appreciated that democracy is really the name of a form of government, the essence of which is that every citizen of the State shares the responsibility for the good government of the State, . . . the true dimensions of the present issue, and the true nature of the assault which is being resisted, become reasonably clear. Much toil, and not a little blood, has been spent in bringing slowly into being a polity wherein the people make their laws, and independent judges administer them. If that edifice is to be overthrown, let the overthrow be accomplished openly. Never let it be said that liberty and justice, having

[1] *Op. cit.*, pp. 7-10.

[2] C. K. Allen (*op. cit.*, p. 59) says: "It is exactly from the executive officer's efficiency and zeal that we must save ourselves—and him. His business is to get things done. He knows best what is to be done and the most convenient means of doing it: he is the expert with special means of knowledge at his command: and when principles of law are put in his way, he is apt to be impatient of them as mere pedantic obstructions."—Ramsay Muir (*How Britain Is Governed*, 1930, p. 72) says: "When a body of able men devote their lives to a particular branch of the public service, it is almost inevitable that they should learn to feel contempt for the amateurs who insist upon meddling, should be impatient of criticism, and should be inclined to the view that the best thing for the nation is that its affairs should be managed by those who know, with as little interference as possible."

with difficulty been won, were suffered to be abstracted and impaired in a fit of absence of mind."

All thoughtful Englishmen must now be aware that a "new despotism" is taking shape. Americans should recognize a similar phenomenon in their own country. Long before the danger was made obvious by the New Deal, the note of alarm had been sounded. Senator Borah wrote in 1924:[1] "We will still have a Republic in name, but a bureaucracy in fact—the most wasteful, the most extravagant, the most demoralizing and deadly form of government which God has ever permitted to torture the human family." Three years later he returned to the attack:[2] "As a result of well-organized propaganda on the one hand and sheer political expediency on the other, we are building up a condition under which every conceivable thing relating to human activity is being given over to regulation by bureaus administered from Washington." The fiber of true citizenship and the spirit of self-reliance, said the Senator, are being destroyed. A little later came Roosevelt and his "brain trust," putting the most extraordinary measures through a Congress that, in its humility and obedience, recalled Mussolini's "nice little parliament." For a time everything went well with the innovators. Many new bureaus were endowed with arbitrary power. With a late start, the United States was easily outdistancing Great Britain in the race to the new despotism. Unfortunately, the brain-trusters, being new to the job and somewhat crude in their methods, got drunk with early successes, and, with a strange lack of sanity, made a frontal attack upon the Supreme Court. Their insatiable thirst for power was revealed. Henceforward they should pattern their behavior after that of their British prototypes, who move forward cautiously and anonymously, preferring to appear as passive recipients of power rather than to stretch out greedy hands and grab it.[3] The aristocrat, unlike the man who has emerged from nowhere, grabs nothing; he accepts what is given to him as his due. This may explain the

[1] *Nation's Business,* August, 1924.

[2] *Ibid.,* February, 1927.

[3] In a satirical vein Lord Hewart depicts the mentality of the ardent bureaucrat, the amateur of the new despotism (*op. cit.,* pp. 13-14). The permanent official begins his course of logical reasoning with the assumption that government is the business of the executive and that the expert is the only person fit to govern. In his path stand two obstacles: the sovereignty of Parliament and the rule of law, both of which an ignorant public revere and will not hand over to destruction. The ingenious expert uses the first against the second. He gets an overworked and harassed Parliament to delegate its power and clothe him with despotic authority; and then, since that authority has been derived from the people themselves through Parliament, uses it to undermine the jurisdiction of the courts. As to subsequent proceedings the student should consult *The New Despotism.*

restrained behavior of the British experts: the highest division in the British civil service is the stronghold of the upper classes.

THE COLLAPSE OF CONSENSUS

Democracy implies in one sense the rule of all, and in another sense the rule of the majority. We speak of all as ruling when all respect the right of the majority to rule. Since unanimous decisions are rare, whether in the popular choice of representatives or in the passing of laws, it has been the practice of democracies from time immemorial to accept the voice of the majority as the voice of all. Without such a compromise, little business could be transacted. But such a compromise is possible only when the disagreements between majority and minority touch upon matters of secondary importance and when there is a coincidence of interest in matters of primary concern, unless the latter have been removed from the arena of normal party conflict by some artificial contrivance such as a constitutional bill of rights. The accord between majority and minority goes by the name of consensus. It was the existence of consensus that enabled John Cam Hobhouse, a century ago, to coin his famous phrase, "His Majesty's Opposition." The two parties, advocating more or less of the same thing, were equally loyal to the existing social system; when Opposition became Government, it would leave fundamental institutions alone.

Democracy cannot exist without consensus, or a near approach to it. In a dominantly republican country the existence of a small and irreconcilable group that demands the restoration of monarchy cannot be said seriously to impair consensus. It was the remarkable coincidence of opinion about social arrangements in the latter part of the nineteenth century that made the progress of democracy so easy. The twentieth century witnesses a sudden growth of social cleavages and violent class hatreds, such as kept Spain in turmoil for years and at last plunged her into a savage civil war. Russia, Italy, and Germany have found a way out through the suppression of irreconcilable minorities and the creation of an artificial uniformity. In those countries only one opinion and only one party can exist—except in the catacombs. Perhaps the real significance of modern dictatorships has been overlooked. The way was opened to democracy, we should never forget, by centuries of discipline under kings who taught their subjects, as parents are supposed to teach their children, to treat each other with forbearance and obey the law. The lesson took a long

time to learn. Perhaps, having been forgotten, it must be learned over again in the same severe school, the reëstablishment of consensus having to wait until the healing effects of reimposed authority have made themselves felt.

At any rate, the collapse of consensus will always and everywhere entail the collapse of democracy. On that point there can be no doubt whatever. It is curious to find Communists, whose immediate efforts are bent upon precipitating class-warfare, shuddering over "the menace of Fascism" and at the same time preparing the way for it. They are quite mistaken in thinking that they can set up a classless society on the Marxian model by the dissemination of hatreds and the use of machine guns and dynamite. No matter what they choose to call it, they will get monarchy—an end to their dreams and an end to ours too. The answer to chaos is the tyrant, dictator, monarch.

In Great Britain, notwithstanding the rise of a Socialist party and the deleterious effect of urban life upon the masses, the native inclination to compromise still runs strong, as does also respect for law. Yet Professor Laski says: [1] "The success of the British Parliamentary system has been built upon the fact that the major parties in the state could agree to accept each other's legislation, since neither altered the essential outlines of that social-economic system in which the interests of both were involved. With the emergence of the Labor party as the alternative government, a different position has come into view. The Labor party aims at the transformation of a capitalist into a socialist society. It seeks, therefore, directly to attack, by means of Parliament, the ownership of the means of production by those classes which constitute the foundation of Tory and Liberal strength. Its principles are a direct contradiction of those of its rivals. It denies the validity of the whole social order which the nineteenth century maintained. Is it likely that it can obtain its objectives in the peaceful and constitutional fashion which was characteristic of the Victorian epoch? .... A change in the essential methods of production, such as the Labor party envisages, involves changes in the legal and political institutions which are literally fundamental. However generous be the compensation to established expectations, the interference with vested interests which the policy predicates is momentous in amount. Are the owners of property likely to accept the peaceful destruction of their position in the state?" Such are the views of a prominent British socialist.

[1] *The American Political Science Review*, vol. XXVI (1932), pp. 634-635.

In the United States the situation is, in some respects, more reassuring. It is true that the urban population now exceeds the rural and that class-consciousness has spread among the ranks of the proletariat, especially with the growth of industrial unionism since 1936. These factors will make themselves felt in the partisan realignment that seems to be impending. The proletariat is far from being a class-conscious unit, however; the skilled trades—constituting a sort of aristocracy of labor—incline to something like a middle-class mentality; and, with the middle-classes, they stand in the way of a clear-cut social division in party politics. Far more effective as an obstacle to such a division are the agricultural interests, which cannot be harmonized with those of the wage-earners. As long as agriculture retains anything like its present character and importance, there is no good prospect for the formation of a major party that openly advocates a Marxian solution.[1]

There is, of course, another side to the picture. Lawlessness is so rife, even among high officials, that one of the usual restraints upon excesses in labor conflicts and other manifestations of class-antagonism can hardly be said to exist. Mayors and governors have allowed striking trade-unionists to supersede the lawful government, and have sometimes openly abetted the law-breakers. It is no excuse to say that they formerly did such things for powerful industrialists and merchants. Indeed, that apology illustrates a second danger—the danger of abandoning the mean and fluctuating between the extremes. Certain extravagances of opinion, abundantly displayed during the business depression, have tended to undermine confidence in the sanity of the American electorate. If not fools, they did just the things that fools would do. Reassurance came, it is true, with the resolute popular opposition to the proposed degradation of the Supreme Court and to the excesses committed by strikers in Michigan and other states. There still seems to be a vast reservoir of moderate opinion that makes itself heard in time of crisis. But that alone does not guarantee the survival of consensus.

[1] For the views of Professor A. N. Holcombe on the future alignment of parties, see his *The New Party Politics* (1933), chapter V; and also his chapter I ("Present-day Characteristics of American Political Parties"), especially p. 45, in *The American Political Scene* (1936), edited by E. B. Logan.

CHAPTER XX

REPRESENTATION

THE dominant rôle played by representative assemblies has been a characteristic feature of the modern State. Until the rise of the new monarchies or dictatorships of the present day, government everywhere was, or tended to be, representative government. The general adoption of a system that had hitherto existed only by way of exception occurred in the nineteenth century.[1] It marked a redistribution of political power in European countries, a shift of the center of gravity to the middle class. The latter, looking about for an appropriate means of exercising and defending their new ascendancy, found a model in the British parliament, which had embodied the representative principle since the thirteenth century.[2]

But where had this practice of representation originated? Did England and, therefore, modern Europe in general inherit it, along with so many other cherished possessions, from the Greeks and Romans? The answer used to be clean-cut and unqualified. Antiquity, it was said, could conceive of nothing but autocratic rule as an alternative to the primary assembly of the city-state. The English must have borrowed the idea from the liberty-loving Germans, whose institutions Tacitus had described. "The beautiful system," says Montesquieu,[3] "was invented in the woods." Its seeds, says Freeman, more than a century later, were planted by the despised barbarian "in his German forests and on his Scandinavian rocks." This is the "Teutonic theory," so widely entertained by nineteenth-century historians.[4] The Anglo-Saxon conquerors of Britain not only brought with them the institution of local popular assemblies; they applied the principle of representation

[1] H. J. Ford, *Representative Government* (1924), chapter I.

[2] A less perfect model might have been found in Hungary, where representation had lasted since the beginning of the fifteenth century. Count Julius Andrassy, *The Development of Hungarian Constitutional Liberty* (1908). The Dutch and Swiss confederations also had representative assemblies.

[3] *L'Esprit des lois* (1748), book xi, chapter 6. "In perusing the admirable treatise of Tacitus 'On the Manners of the Germans,' we find it is from that nation that the English have borrowed the idea of their political government." Apparently this passage refers both to representation and to separation of powers.

[4] Ford, *op. cit.*, chapters iv-ix.

to hundred-moots and shire-moots by sending to them from each tun or village the reeve and four elected delegates. These local institutions survived the Norman Conquest and triumphed in the thirteenth century, when elected knights of the shire and burgesses from the towns were admitted to the King's council or parliament.

This explanation, having no historical basis, has been discredited. It would be a waste of time, says Hilaire Belloc,[1] "to go into the silly 'Teutonic' theories of the last generation, common in the German and English universities at that time." The attempt to discover some aboriginal, barbaric, and prehistoric origin for representation "was like trying to prove a theory that the first, second, and third class on modern railway trains arose from the division of nobles, free men, and serfs six hundred years before our time." Fustel de Coulanges, in 1885, undertook to show that the German "mark" or free village community is "a figment of the Teutonic imagination."[2] Frederick Seebohm did very much the same thing for pre-Norman England. In the light of his researches it appears that the Anglo-Saxon open-field agriculture was Roman in origin and that the bulk of the rural population were serfs.[3] "From the very beginning of historical times," says Munro Chadwick,[4] "we meet with a system in the Anglo-Saxon kingdoms which may be described as more or less autocratic. Conditions which go back to the fourth century give no hint of a different type of government." Perhaps, on some of these points, judgment must still be reserved.[5] But with respect to the main issue, the alleged representation of villages in the hundred-moot and shire-moot before the Norman Conquest, Professor Beard has shown that no evidence can be found to support it.[6] The earliest reference to the reeve and four men as delegates is for the year 1188. It is not the persistence of Anglo-Saxon liberties that we see

[1] *The House of Commons and Monarchy* (1920), pp. 19-20.
[2] *Recherches sur quelques problèmes d'histoire* (1885), pp. 332-340.
[3] *The English Village Community* (1883) and other works.
[4] *The Origin of the English Nation* (1907), p. 320.
[5] D. J. Medley, *A Student's Manual of English Constitutional History* (6th ed., 1925), p. 9.
[6] "The Teutonic Origin of Representative Government," *American Political Science Review*, vol. XXVI (1932), pp. 28-44. Yet F. W. Maitland, in *The Constitutional History of England* (1908), pp. 70-71, says: "The modern notion of representation of a community by some of its members must have been old. Already in the *Leges Henrici Primi* we find that in the local courts the townships are represented by the priest, the reeve and four of the best men. This usage may have been very old. Certainly at a little later date we find that the county court when summoned in all its fulness to meet the king's justices in their eyres comprises not only all the free tenants of the shire, but also a representation of the boroughs and townships, from every township four lawful men and the reeve, from every borough twelve lawful burgesses."

here, but the setting up of new local machinery for the purposes of the royal administration. Even if specific grounds for rejecting the Teutonic theory had not been found, general considerations might have sufficed. Freeman tells about the seed being planted, but he fails to explain why it germinated so slowly. The first Teutonic sprouts appeared in fifteenth-century Scandinavia, whereas in the region of the Pyrenees—far from that seed-bed of the German forests—representation was generally practised at least as early as the twelfth century.

We have to ask again the same question: Where did representation originate? Since the evidence is not conclusive, the answer is likely to be colored by prejudice or by the inclination to believe one of two possible reasons for the general prevalence of certain institutions. Some believe that such institutions—like federalism, the responsible cabinet, or the executive veto—have been developed first in one community and then, by a process of borrowing or imitation, introduced into other communities. Diffusion, as we call it, undoubtedly explains most of the analogies that confront students of comparative politics to-day: deliberate borrowing can usually be proved. In more remote times proof may be lacking. Then, if the various communities that possess the same institution—perhaps indirect election or division of the people into ten tribes—are somewhat isolated from each other, the analogy may be explained on the ground of parallel development, which is also termed convergence or independent invention. Peoples that have reached a similar level of civilization are likely, it is held, to employ similar devices. Thus, Hilaire Belloc maintains that representative assemblies sprang naturally from the condition of western Europe in the Middle Ages. "Parliaments," he says,[1] somewhat ecstatically, "were the spontaneous product of that great moment of youth and spring in our blood, the sunrise or boyhood of which was the twelfth century, and the noon or strong manhood the thirteenth century." Where the first of these assemblies may have arisen is not of practical value to history. "One might as well discuss where had been found in some country the first green shoots of the year: there was an outburst of new life."

Convergence, however, is relatively weak as an explanation of such a phenomenon as we are now dealing with. In our own time, when records are abundant, evidence points almost always to diffusion; and we may therefore be pardoned for suspecting convergence as an explanation when the records are silent. The similarity of circumstances between two communities, instead of leading to the independent inven-

[1] *The House of Commons and Monarchy* (1920), p. 20.

tion of similar institutions, suggests to one community that it should borrow from the other, since what it borrows will probably suit its requirements. The needs of the moment could best be served by summoning knights of the shire in 1254, when Henry III wanted money and when the regents found the barons indisposed to grant it; and by summoning knights and burgesses in 1265, when Simon de Montfort found that only a handful of the barons would stand by him. But it will be shown later that Henry III, his two regents, and Simon de Montfort had become familiar with the practice of representation outside of England. The hypothesis of diffusion will be supported here. Circumstantial evidence will be offered to establish something more than a possibility that the English borrowed the idea of parliamentary representation from southern France and northern Spain.[1] Should we, carrying our inquiry farther, ask how those regions came by it? They did not get it from the German forests. Is there any reason to suppose that, after all, representation is Roman (and also Greek), that the Romans applied it in the provinces, and that we should recognize it as part of the classical heritage of the Middle Ages?

REPRESENTATION IN ANTIQUITY

The principle of representation was not only known to antiquity, but applied by it in practice. This statement does not rest on the peculiar and perhaps erratic opinion of the author. Ernest Barker, who speaks with authority in such matters, maintains that the Greek city-state "was not devoid of representative institutions, nor unacquainted with the political machinery which is connected with those institutions."[2] According to Léon Duguit:[3] "It is said often enough that political representation is a fact peculiar to the modern world. That statement is inexact.... The idea of representation was by no means unknown to Greek and Roman antiquity. No doubt the popular assembly voted law directly. But wherever the direct action of the people was barred by actual circumstances, the concept of representation appeared. The acts of magistrates were considered, independently of

[1] "Just as it was a proper conclusion for a late nineteenth-century writer [Henry Sidgwick] that constitutional monarchies which then existed in Europe were due to direct or indirect imitation of England, and not to internal invention, so it may be reasonably deduced, unless good reasons to the contrary are produced, that the diffusion of represented estates in the Middle Ages proceeded by imitation of the country in which the system first arose—namely, Spain." Hugh McDowall Clokie, *The Origin and Nature of Constitutional Government* (1936), p. 17.

[2] *Greek Political Theory* (2nd ed., 1925), p. 23.

[3] *Traité de droit constitutionnel*, vol. II (1923), pp. 495-496.

juridical theory, as the acts of the people.... The Romans, being jurists above all, connected this representation with the contract of mandate; and so they created the theory of mandate that was to occupy so great a place—in my opinion too great a place—in modern public law."

Barker and Duguit have in mind facts that are familiar to all students of ancient history.[1] No one can deny that a quaestor or consul, elected by the Roman comitia, possessed a representative character. What of the city-states of Hellas? It is true that in some of them (for example, Athens) an extreme form of democratic theory and practice, emphasizing equality, prescribed the choice by lot of all magistrates, except, says Aristotle,[2] when their duties required special knowledge and skill. So the archons were chosen from a group of elected candidates.[3] But however glibly the Athenians might prate about equality,—the qualification of all citizens for office-holding, limits to discretionary power, short terms, rotation, accountability,[4]—they did not apply their doctrine when the safety of the State was involved. The ten generals were elected by the people, and frequently reëlected. Pericles held the office of general for fifteen years. Dominating the assembly itself, as well as his nine colleagues, he might be regarded as prime minister, by virtue of the fact that he represented the general will.[5] Aristotle holds that magistrates should be elected by the people and, at the close of their terms, be held to account. The people, he says,[6] generally do have the power of censuring them.

This representative character attached also to certain assemblies. Most notable, of course, was the Senate of Rome, whose quality has never been approached for practical ability and experience. "In the

[1] See W. C. MacLeod, *The Origin and History of Politics* (1931), chapters XIX and XX.

[2] *Politics*, vi, 2.

[3] This method of choice did not deprive them of representative character. "Representation," says Maitland (*The Constitutional History of England*, 1908) "does not necessarily imply election by the represented; representatives may be chosen by a public officer or by lot."

[4] *Politics*, vi, 2.

[5] Barker, *op. cit.*, p. 36.

[6] *Politics*, vi, 4. In an article on "Representative Government in Evolution" (*American Political Science Review*, vol. XXVI, 1932, p. 229), which seeks to show that the Greeks and Romans knew next to nothing about representation, Beard and Lewis mistakenly suppose that this is the only passage in which Aristotle deals with the election of magistrates. They also misunderstand the passage. This is no "casual" reference to election at Mantinaea in a tone suggesting that the one case is exceptional. After referring to the election of magistrates by the people, Aristotle mentions Mantinaea as peculiar in the fact that election does not rest with the mass of the people.

early period," says Abbott,[1] "the senate had been composed of the representatives of the leading clans, but as public business became more complex, in making out the list of senators, the censors gave a preference to ex-magistrates, who were already experienced in public affairs, and in course of time this practice was crystallized into law.[2] The men who thus became senators by virtue of having held the praetorship, or consulship, for instance, were elected to a magistracy by the people.... In the second place the senate, being henceforth made up of men who had had experience in administration at home and abroad, easily gained supremacy both over the magistrates, who held office for a year only, and over the popular assemblies, which were unwieldy and ill-informed on important matters. For a century and a half, down to the time of the Gracchi,... Rome was ruled by a parliament." The senate or Gerousia of Sparta was elected by the assembly, prepared all business that the latter considered, and had a veto over its legislation.[3] In almost all the Greek States there was a council that resembled the Spartan Gerousia as being elective and as having the initiative in public business. Aristotle speaks of the council, in general language, as being supreme over all the other magistrates, very often charged with the disposal of the public revenue, and entitled to convoke and preside over the assembly.[4]

"The power of framing the issue, and deciding the question to be put," Barker maintains,[5] "is no small power; and if the composition of the body which enjoys this power is in any way representative, we cannot say that the principle of representation is absent or unknown. The composition of the Council at Athens *was* representative, and the demes acted as the local constituencies or electorates. The demes did not directly elect the 500 members of the Council; but each deme elected, and what is more, elected on a proportional system, according to the number of its inhabitants, a list of candidates who, provided they passed a test of their qualifications, were duly eligible for selection by lot for a seat on the Council. After all Athens not only knew representation, but proportional representation, and she not only had parliamentary elections, but she had them annually, for the Council was renewed annually and, we may add, no councillor was eligible for more than a second time. When we reflect that the demes also elected

[1] F. F. Abbott, *Roman Politics* (1923), p. 19.
[2] 312 B.C.
[3] MacLeod, *op. cit.*, pp. 316-317.
[4] *Politics*, vi, 8.
[5] *Op. cit.*, pp. 34-35.

candidates from whom the nine archons were chosen by lot, we can see that the annual elections of the deme were no inconsiderable thing." The various Greek confederacies also had representative assemblies. To say that the synod of the Bœotian League "was more of a diplomatic assembly than a legislature in the modern sense" [1] is scarcely apposite. The 660 members were elected; they represented certain constituencies.

The best illustrations, however, are found in Roman practice. After the second Macedonian war, early in the second century B.C., Flamininus organized new States in Thessaly, federations with a primary assembly and a representative senate. "Since the senate was given control over legislation, this government," says Tenney Frank,[2] "contains the essentials of what we now call representative government." After the third war, the Macedonian kingdom was divided into four republics. They were organized after the plan of Flamininus. "Thus these Macedonian republics seem to have been true territorial states of a very modern type, administered by a representative government. It is a great pity that these governments were overthrown within twenty years by a disastrous revolution. They might well have handed on the idea of representative government to the modern world." [3] Gaius Gracchus, just before his death in 121 B.C., apparently was preparing to set up a representative government for the whole of Italy.[4] Again, in 90 B.C., when the Social war broke out, the faithful allies of Rome formed a new State called Italia. It was a territorial State, a federation of eight tribes. Professor Frank believes "that the 500 senators were somehow representative of the several tribes and that they not only made the laws but also chose the magistrates. In other words, Italia seems to have made generous use of the principle of representative government as it had been marked out by Flamininus and Paullus in Thessaly and Macedonia during the preceding century." [5]

Evidence of this kind should be conclusive. Yet we constantly encounter the charge that, through ignorance of the representative principle, the ancient world had to choose between popular government in a small city-state, where every adult male citizen was himself a member of parliament, and autocratic government in a country-state. The Macedonian Empire, being a huge country-state, had to be an

[1] Beard and Lewis, *op. cit.*, p. 230.
[2] *A History of Rome* (1923), p. 142.
[3] *Ibid.*, p. 157.
[4] *Ibid.*, pp. 209-210.
[5] *Ibid.*, p. 230.

autocracy. The fall of the Roman Republic brought the city-state era to an end. When a local government at Rome proved itself incapable of ruling the whole basin of the Mediterranean Sea, monarchy came to the rescue. There was no thought of exercising control through a representative assembly. Sir John Seeley imagines somebody asking why Augustus did not introduce the representative system. You might as well ask, he replies,[1] why Augustus did not discover America. "If, as we have seen, the political philosophers scarcely realized that there was such a thing as a country-state, can we expect the Roman politicians to have known by what changes of machinery, by what reforms, a city-state could be transformed into a healthy country-state?"

At this point Seeley does not appear to have reflected very deeply. There may have been something besides ignorance that stood in the way of a representative system for that heterogeneous world-state. Consider the case of England. When, late in the thirteenth century, the first experiments were made with knights and burgesses as subordinate adjuncts to parliament, what was the situation? Before the Norman Conquest England had possessed religious unity and, to a large degree, political unity. Then, for two centuries, powerful Norman and Angevin kings had disciplined a fairly homogeneous population that lived in a small country, isolated from foreign aggression. Some degree of homogeneity, some consciousness of kind must precede any experiment with majority rule. The vast and polyglot dominions of Rome could not have been held together without a strong central power, served by the Roman legions and the Roman military roads. It required force to protect the far-flung frontiers and to suppress rebellion. It required time to Romanize the diverse population. How well the task was done! How long the effects have endured! No talk-shop or mongrel debating-club could have produced results like these. Fortunately, the Romans were not a people who could be deflected from a concrete undertaking by the fascinations of a nice theory. Nor would Englishmen to-day entertain thoughts of a representative parliament for the whole empire. They have no desire to be governed by Hindus and African negroes.

Even for Italy alone, in the fourth century B.C., Tenney Frank concludes that representative government would have been quite impossible. The proposal was actually made. Why was it rejected? "The Romans," says Professor Frank,[2] "could hardly be willing to give up

[1] *Introduction to Political Science* (1896), p. 164.
[2] *A History of Rome* (1923), p. 68.

their democratic assembly, where every man had a vote, for a representative senate composed of peoples many of whom were strange to Roman ways.... Furthermore the people had long fought against a senate for the privilege of direct participation in the government, and a representative senate made up from Latin delegates might possibly restore the aristocracy which they had struggled so hard to subdue. Thirdly, if Etruscans, Volscians, Oscans, and Greeks were to help rule the state in a representative body, Rome would quickly be outvoted by foreigners who cared nothing for her culture and religion, and from their bickerings in various tongues there could hardly have emerged anything but divided purposes. The representative principle might later have been introduced, and was again proposed, but Italy needed first to be permeated by one language and one culture before it could be considered practicable." What was then impossible for Italy could hardly be recommended for the Empire in the time of Tiberius or of Diocletian.

In spite of the overwhelming evidence to the contrary, we are told over and over again that the representative system is a modern innovation. The ancients scarcely knew it, says Seeley.[1] They had no notion of it, says Montesquieu.[2] They did not even have a word for it, says Rousseau.[3] "Representative government was unknown," says Bryce,[4] "superfluous where the whole body of citizens could meet in one spot to discuss affairs. It does not seem to have entered the thoughts of any among the philosophers or constitution framers." Bryce mentions the philosophers in all seriousness, as if philosophic ideas had some influence on practical politics. But in a note he refers to something more important than he realized at the time. "The nearest approach to representation made in the ancient world seems to have been in the assembly of delegates from the chief cities of the Roman province of Asia under the Roman Empire; but it met for religious and ceremonial, not for political purposes." We shall see that representative assemblies did not meet in the province of Asia alone or merely for ceremonial purposes. A little later Bryce makes mention of the Athenian Council of Five Hundred, without recognizing its representative character.[5] Still more recently Beard and Lewis contend that "the philosophy of representative government was unknown to the

[1] *Op. cit.*, p. 158.
[2] *Esprit des lois*, xi, 8.
[3] *Contrat social*, III, 15.
[4] *Modern Democracies* (2 vols., 1921), vol. I, p. 167.
[5] *Ibid.*, vol. I, p. 172.

ancients." It would not be correct, they acknowledge, to say that representation was "utterly foreign" to their politics, yet "practical illustrations of it were few and must be strained to make any case worthy of serious attention. At all events, modern legislative bodies have no historic connection with Greek and Roman representative agencies." [1]

Having found nothing in the ancient world, these authors blithely skip through the centuries to thirteenth-century England. They make no mention of what happened in the later Roman Empire, especially in the West; or of the rise of representative assemblies elsewhere than in England and at a much earlier date. They are far from suspecting an historical connection between Roman provincial assemblies and the recrudescence of the representative pattern in the eleventh or at least the twelfth century. Aside from Beard's rejection of the Teutonic theory, to which reference has been made, the authors adhere to the old conventional position. This is briefly stated by Garner: [2] "The beginnings of the modern representative system are found in the folkmoots of the early Teutons of Germany. These were assemblies of the natural leaders of the tribe, who determined the more important questions of common interest to the tribe. The Witenagemot of early English history was the assembly out of which in the course of time the first representative legislature known to history—the 'mother of parliaments'—was evolved. Not a representative body at first—at least not in the modern sense—it came in time, under another name, to contain a certain number of members who possessed the true representative character."

WHAT IS REPRESENTATION?

Some of those who deny that the Greeks and Romans knew the representative principle and acted upon it do so under a misapprehension. They are thinking, not of representation, which occurs whenever one person is authorized to act in place of others, but of representative government in the sense of control being exercised by a representative body. According to Barker,[3] "election is one thing, and representation is

[1] *Op. cit.*, pp. 229-230.

[2] *Political Science and Government* (1928), p. 596.

[3] *Op cit.*, p. 35. Barker adds: "It is here that the Athenian Council was deficient. It was, to some extent, elected, but it had little representative authority. The Assembly was sovereign, and the Assembly was its own representative. Yet Athens had in some sense a bicameral system; and the formula of enactment ran, 'It is enacted by the Council and Assembly.' The Council not only joined in enactments: it introduced them; and while the Assembly could amend its pro-

another. No body, even if directly elected, is really representative unless it has representative authority, or in other words is entitled to deliberate and decide as the exponent of the general will within its sphere." Henry Jones Ford says very much the same thing: the characteristic is "national control over authority"; but he is defining representative government.[1] Representation carries no implication of national control. Even in the nineteenth century some representative assemblies were accorded only a subordinate rôle; they served mainly as a means of acquainting an independent executive of the trend of public opinion. Surely George Burton Adams is not warranted in asserting that "representation in the modern sense" entails full powers of independent action apart from any decision taken beforehand by the constituents.[2]

Curiously enough, Beard and Lewis, who are so skeptical about the existence of representation in the ancient world, do not include political control as an element. The representative, they say, must (1) have power to act for others, (2) be elected by those for whom he is to act, and (3) be responsible to them for his acts.[3] Inconsistently they bring forward the question of political control when dealing with the council at Athens and the Bœotian synod. According to their definition, it is clear that representation was well known and much used by Greeks and Romans. Moreover, when Professor MacIver asserts that "it was never applied as a consciously organized principle for expressing the will of the many through the few,"[4] he overlooks, for example, the institutions that were organized after the second and third Macedonian wars. In what way, then, did ancient practice fall short of our own? Representation, instead of being the normal procedure of government, was supplementary to a dominant system of primary assemblies or of autocracy. True, the senate governed Rome for a century

posals, it had not itself the right of initiative. Further, the Council executed, and sometimes amplified enactments: it was the channel of foreign relations: it was the centre of the administration, and suspended the executive officials. We cannot but consider it as something, after all, of a representative assembly."

[1] *Op. cit.*, p. 8.

[2] *Constitutional History of England* (1921), p. 173.

[3] *Op. cit.*, p. 228.

[4] *The Modern State* (1926), p. 141. It has already been suggested that representative government would have been quite inadequate to meet the problems of control in the Roman Empire (or, for that matter, the Macedonian Empire). One reason why the people of antiquity did not carry the representative principle farther or reach true federalism in their numerous experiments in confederation is that they believed in the superiority of small States and direct democracy. It was not blindness, says Barker (*op. cit.*, p. 21), but "prepossession with a higher type, or what was regarded as a higher type, to the exclusion of all others."

and a half before the era of the Gracchi, although some may contend that the senate was not truly representative. But, with that exception, no independent State was governed by a representative assembly as the chief agency of control.

ROMAN PROVINCIAL ASSEMBLIES

There were in the Roman Empire certain institutions that have attracted little attention, perhaps because the available data are so meager. Thus the provincial assemblies are all but ignored by modern historians of Rome. Léon Homo, in a volume that should be exhaustive in such a matter, refers to them vaguely in ten lines. "There remained," he says,[1] "the two deliberative organs created by the Roman State itself, the provincial assemblies founded in the Early Empire and the Diocesan assemblies instituted, or rather authorized, at the end of the fourth century. But, although the former were able to do good work in controlling local representatives of the government and reporting the more flagrant abuses on occasion, they never played, or even aspired to playing, a serious part in politics; and the latter appeared too late, just when the Empire was about to fall a prey to the barbarians, to show what they could do." Such a brief passage might easily be read without any appreciation of its significance. Representative bodies did exist; they "did good work" in controlling local representatives of the government. Similarly, we find Bryce asserting that "representative government was unknown" and then, in a footnote, referring to a representative assembly in the province of Asia, which had, however, no political function.[2] Again, we find MacIver asserting that the representative solution "practically never occurred to the Romans themselves" and then referring to a scheme for a Gallic parliament (which came to nothing, he says) and to the imperial rescript of 418 A.D. that ordered it to meet annually.[3]

Now, Professor MacIver is obviously relying upon a book by Henry Jones Ford. What does Ford say? "When the Roman empire was established developments took place which approximated representative institutions and might have definitely produced them but for certain counteracting conditions.... Provincial councils were formed *consisting of delegates from cantonal and municipal districts,* and to some extent they were *employed in the government of the provinces.* [They controlled the officials, says Homo.] Imperial rescripts are known to

[1] *Roman Political Institutions* (1929), p. 372.
[2] *Modern Democracies,* vol. I, p. 167.
[3] *The Modern State* (1926), p. 142.

have been addressed to such bodies in regard to various *matters of public concern,* but in general their activity was strictly confined to the care of temples and sacred monuments, and the cult of emperor worship." [1] There did exist, Ford says, a disposition in favor of representative institutions, a disposition "strikingly attested" by the imperial rescript addressed to the prefect of the seven provinces of Gaul in 418 A.D. The rescript called for a parliament *"not much different from that which did eventually take shape in England.* It was composed in part of officials and notables summoned in person, and in part of deputies from provincial estates and municipal bodies.... These facts strongly suggest that the failure of the Roman empire to develop representative institutions was not due to congenital incapacity, but was an incident of its decline and fall." [2]

In the rescript of Emperor Honorius requires the assembly to meet every year, in August or September, at Arles.[3] It shall deliberate on every subject brought before it. The members shall be fined in case of failure to attend. According to Guizot, the assembly never met; because of the strength of local feeling, representatives were not chosen. "The Roman world had been formed of cities, and to cities again it returned." [4] But Georges Picot, writing sixty years later, maintains that "the institution lasted throughout the fifth century, and perpetuated itself up to the last days of Roman power." [5] At any rate, the emperor was familiar with the representative principle. So were the people of Gaul. Honorius says that he is restoring "an old practice." He refers particularly to a Gallic assembly which the "illustrious Prefect Petronius" had set up, but which had disappeared because of "the troubles of our times and the reign of usurpers."

In fact, Gaul had long been accustomed to representative institutions. Popular assemblies, says Picot,[6] were "cogs in the administrative machine. Periodically, after the celebration of the imperial religion, the delegates of a province or the delegates of all Gaul assembled. Their deliberations were not limited to the expenses of the religious festival or to the contributions that it involved. Composed of representatives of the powerful families and of elected magistrates from

[1] *Representative Government* (1924), pp. 89-90. My italics.
[2] *Ibid.,* pp. 91-92. My italics.
[3] The text appears in F. P. G. Guizot, *History of Civilization in Europe* (Am. ed. of 1885), pp. 33-34; and in Georges Picot, *Histoire des états-généraux* (2nd ed., 5 vols., 1888), vol. I, p. 4.
[4] Guizot, *op. cit.,* p. 35.
[5] *Histoire des états-généraux,* vol. I, pp. 4-5.
[6] *Ibid.,* vol. I, p. 3.

the towns, the assembly examined the condition of the provinces and determined whether circumstances warranted any criticism of the imperial government. Little by little, the assemblies lost their religious character, and there grew up a practice of drafting resolutions which two or three delegates were instructed to carry to the Emperor: sometimes the resolutions took the form of complaints; sometimes, the form of a request for financial help in building a road, a bridge, or other important public work. A law of 355 gives the assemblies full liberty to lay before the Emperor whatever recommendations the delegates, acting freely, may have made."

In an article, written more than half a century ago, George F. Stokes deals with the origin and evolution of provincial assemblies in Gaul and elsewhere.[1] The Greek geographer Strabo informed Augustus, by letter, of a peculiar situation existing in Asia Minor. "Alone of all nations," he said, the Lycians had been permitted to retain the laws and institutions of their ancestors. They had a representative assembly that levied taxes, elected magistrates, and administered justice. Stokes compares it, from the standpoint of powers, with the Canadian and Australian parliaments of his own time. In establishing provincial assemblies Augustus seems to have followed the Lycian model. Thus the towns alone, not the rural areas, were represented. On the other hand, the powers originally assumed were limited to the celebration of religious festivals (the worship of Augustus and his successors) and to raising the necessary revenue. It was only by degrees that political functions were added to the religious. First, the assemblies were empowered to bring political grievances directly to the attention of the emperor; soon they became the regular channel through which such complaints flowed. They were even authorized to prosecute officials for misconduct and to do so at public expense. In Gaul, according to a letter of Aedinus Julianus, we find a representative opposing such a prosecution on the ground that, when he was elected, his townsmen had endorsed the behavior of Paulinus, the official concerned. Stokes insists that Gallic assemblies continued from the time of Augustus to the middle or close of the fifth century at least, that "they certainly existed in Southern Gaul till the break-up of the Empire and the rise of the mediæval estates."[2] To them, he suggests, the origin of our modern parliaments may be traced.

What has been said of Gaul holds equally true for Spain. "Under the

[1] "Home Rule under the Roman Empire," *Macmillan's Magazine*, vol. XLVII (Nov., 1882), pp. 52-58.

[2] *Ibid.*, pp. 55 and 58.

Roman empire, before the barbarian invasions," says Guizot,[1] "Spain enjoyed considerable prosperity. The country was covered with roads, aqueducts, and public works of every description. The municipal government was almost independent; the principle of a landed census was applied to the formation of the *curiæ;* and various inscriptions prove that the mass of the people frequently took part with the Senate of the town, in the acts done in its name. There were *conventus juridici,* or sessions held by the presidents of the provinces and their assessors in fourteen towns of Spain; and *conventus provinciales,* or ordinary annual assemblies of the deputies of the towns, for the purpose of treating of the affairs of the province, and sending deputies to the emperor with their complaints and petitions. All these institutions fell into decay at the end of the fourth century."

Guizot offers no evidence that *all* these institutions fell into decay. We may suspect him of generalizing from the confusion that the barbarian inroads undoubtedly occasioned. Picot, we have seen, does not agree with him that the rescript of 418 was ineffective in Gaul. The paucity of available evidence or the silence of historical records does not necessarily mean that representative institutions altogether disappeared. Such silence may be susceptible of quite a different interpretation. Pasquet, for example, argues that, as the addition of representatives to the parliament of England was ignored by ten chroniclers, the idea of representation must have been familiar.[2] MacLeod explains why the absence of documentary evidence by no means implies that Spain was without municipal leagues after the invasion of the Visigoths.[3] Doubtless, the provincial assemblies ceased meeting in the fifth century or even earlier. It is the towns, and certain political traditions connected with them, that survived in certain parts of the Empire. After discussing the point in some detail, MacLeod concludes that the Visigothic rulers of Spain may have made terms with deputies from the towns.[4] Something of the kind, he insists, must have taken place. The Visigoths must have permitted the municipal representatives to assemble and to exercise the right of petition that formerly belonged to Roman provincial assemblies. At a later time, when the Moors had been driven back, Christian kings "may have continued the body of municipal deputies as one of the 'estates.'"

[1] *History of the Origin of Representative Government in Europe* (Bohn, 1861), p. 206.
[2] *Essai sur les origines de la chambre des communes* (1914), p. 18.
[3] *The Origin and History of Politics* (1931), p. 390.
[4] *Ibid.,* pp. 390-391.

At any rate, there can be no doubt that, in the north of Spain and the south of France, the towns survived through the early Middle Ages. Burke tells us that the municipal institutions of medieval Spain "sprang from Roman seed." [1] He refers to the military prowess of the fortified towns, the election of magistrates, the exclusion of royal judges, the proud temper of the burgesses as compared with "the timid shopkeepers of less favored lands;" and he adds: "The germ of all this remarkable independence of royal authority is, no doubt, to be found in the policy of Imperial Rome." For southern France the best authority is Wentworth Webster. "The Municipal régime in the provinces of ancient Rome," he says,[2] "the freedom of local administration which Rome so often left to the conquered populations and to the inhabitants of the provinces had been preserved among the townsmen of the large towns of southern France. This habit of popular administration had not been lost by the citizens through the successive invasions of the barbarian hordes." The Albigensian crusade could not destroy Roman tradition in Provence: the name of consul still survived; citizens still boasted of a Roman genealogy. Brissaud, in his *Les Anglais en Guyenne,* maintains that the magistrates of thirteenth-century Bordeaux were the successors of Roman magistrates. True, many of the documents that establish municipal privileges in the region of the Pyrenees name Charlemagne as their author. This is an ingenuous anachronism, pointing to an immemorial antiquity. Such privileges had been maintained without the help of any French or Spanish ruler. "It is clear that the municipal liberties of this period [the Middle Ages] date from the time of the ancient Roman Empire." [3]

REPRESENTATION IN SPAIN

Are there not grounds for believing, as MacLeod does, in continuity from Roman times to the establishment of representative assemblies in

[1] U. R. Burke, *History of Spain from the Earliest Times to the Death of Ferdinand the Catholic* (rev. ed., 2 vols., 1900), vol. I, pp. 340-341.

[2] *Les Loisirs d'un étranger au pays Basque* (1901), p. 58. This important book, although privately distributed, may be found in the Bodleian Library, along with other brochures by the same author, mainly concerned with the same region. Although he wrote in French, Webster was an English clergyman.

[3] *Ibid.,* pp. 60 and 64. Webster provides a good deal of detailed evidence (showing, for example, that the spacious lands attached to the towns were allodial and free from feudal burdens—p. 66); and he gives many interesting citations. In the *Cambridge Mediæval History,* vol. V (1926), Chapter 19 ("The Communal Movement, Especially in France") Eleanor Lodge denies that the medieval communes were directly descended from Roman municipalities. But she does admit that Roman influence was much stronger in southern France and that the valley communities of the Pyrenees had "from very early times" managed their own affairs, free from seigneurial interference.

the eleventh or twelfth century? Against such an assumption several historians of good standing can be quoted. Burke is one of them. He believes that, while Spanish municipal liberties had a Roman origin, "representative government was a plant of later growth, introduced from more northern regions by the ruder hands of the Visigoths." [1] Parenthetically, this observation should be made: medieval representation first took root, not in the more Teutonic north of France, but in the south of France and north of Spain, where the Roman tradition still ran strongly.[2] Sempere, likewise, attributes the origin of medieval representation to the Visigoths.[3] Pierre de la Marche, he says, professed to find a connection between the Roman provincial assemblies and the later Spanish Cortes; but "these two institutions were so different that it is hardly possible to find between them the slightest analogy." According to Guizot,[4] there was, under the Visigothic monarchy, no limitation on power, no vestige of free institutions. When the Moors came, however, many of the Goths fled to the mountains. There they divested themselves of their Roman veneer and returned to the life of their ancestors. "The companions of Pelagius, up to a certain point, became Germans once more from sheer necessity. It is after this involuntary return to their primitive condition, and, by consequence, to their ancient institutions, that they resumed the offensive against the Arabs, and reconquered Spain by degrees, bringing back with them those political and judicial customs, usages, and practices which they had partially regained." Forests, even in Spain, had a magic property that cleansed these Goths of corruption, re-Germanized them (as Guizot put its), gave to them those free institutions which "alone can supply strength in time of danger and misfortune."

Guizot's picture is fantastic. The Visigoths, invading a part of the Empire, where towns were "almost independent" and where representative assemblies met every year, were so corrupted by "Roman maxims" that they set up a monarchy "much more absolute . . . than it was anywhere else"; then later, having become Germans again by means of a sojourn in mountains and forests, they reconquered Spain and gave her representative institutions. Here we have the Teutonic

[1] *Op. cit.*, p. 342.

[2] Note the comments of Webster (*op. cit.*, p. 65) on the Albigensian crusade.

[3] Juan Sempere y Guarinos, *Histoire des Cortes d'Espagne* (1815), Chapter II. See also Don F. M. Marina, *Histoire des grandes assemblées nationales d'Espagne* (2nd Fch. ed., 2 vols., 1884), Introduction, vol. I, pp. viii *et seq.*; and vol. II, pp. 8 and 10.

[4] *History of the Origin of Representative Government in Europe* (Bohn, 1861), pp. 229-230, 236, 254.

theory—so dominant when Guizot wrote—in its most extravagant form. Burke and Sempere show a somewhat similar inclination. Their position is untenable for this reason: It was not in the Teutonic north of Europe that medieval representation originated, but in the Roman south, where it found a basis in tradition and in surviving municipal self-government. Simon de Montfort summoned knights and burgesses to parliament in 1265; the French states-general began in 1302. On both sides of the Pyrenees, however, in southern France and northern Spain, representative assemblies became a familiar adjunct of government at a much earlier time.

Unfortunately, Spanish constitutional history has not been thoroughly explored. Available records leave the beginnings obscure. There is a general disposition to agree with Marina that "the people began to have a voice in the deliberations of the Cortes, by means of representatives," only in the latter part of the twelfth century.[1] It is in Leon and in the year 1188, according to Sempere[2] and Altamira,[3] that popular deputies first sat in the cortes. Burke[4] and Marina,[5] however, give an earlier date of 1169 for Castile; and Altamira acknowledges that in Aragon, where the cortes assumed a settled form in advance of other Spanish kingdoms, there may have been a meeting in 1163.[6] Webster maintains that the first representative assembly was held at Barcelona in 1064 by Raymond Berenger the Old.[7] Some historians respect the claims of Jaca (1063).[8] It is even said that in 974 deputies attended the cortes in Leon, where Ramiro III was chosen king. In the opinion of Sempere, however, the people attended on both these occasions only to watch and applaud and had no active rôle in the proceedings.[9] The date 1163 for Aragon has generally been accepted,[10] a date

[1] *Histoire des grandes assemblées nationales d'Espagne* (2nd Fch. ed., 2 vols., 1824), vol. II, p. 10.

[2] *Histoire des Cortes d'Espagne* (1815), p. 55.

[3] *Cambridge Mediæval History*, vol. VI (1929), p. 419. See also C. H. McIlwain, *ibid.*, vol. VII (1932), Chapter XXIII, "Medieval Estates," p. 696.

[4] *A History of Spain* (2 vols., 1895), vol. I, p. 342.

[5] *Op. cit.*, vol. II, pp. 164 and 272.

[6] *Op. cit.*, p. 419.

[7] *Op. cit.*, p. 67. And p. 68: "In Navarre, although the Cortes was not summoned regularly till a later time, we know that at the extraordinary meetings of 1094 and 1134 representatives of the towns took part, along with the nobility."

[8] Hilaire Belloc, *The House of Commons and Monarchy* (1920), p. 20.

[9] *Op. cit.*, p. 57. The date of 974, says Sempere, was supported in a book by Father Risco and accepted by the editors of Marina's *History of Spain* as the first instance of representation in medieval Spain.

[10] Cf. Barker, *National Character* (1927), p. 26, where, however, the date appears as 1162; and MacLeod, *op. cit.*, p. 387. MacLeod sees "no good reason to believe" that 1163 marks the earliest appearance of representation in Spain or in southern France.

that precedes the meeting of Simon de Montfort's famous parliament by more than a century. Certain earlier dates—1094 (Navarre), 1064 (Barcelona), 1063 (Jaca)—cannot definitely be rejected. For the south of France certainty is still less possible. We must be satisfied, for example, with the vague conclusion of Eleanor Lodge that the provincial estates of Gascony "are said to date from very early days."[1] We must remain in doubt between the eleventh and twelfth centuries. It is important to hold in mind that in England the first suggestion of summoning knights of the shire was made in 1213, without bearing fruit, and that "the first authentic assembly of representatives for the grant of taxation is to be found only in 1254,"[2] when Gascony had been in English hands for just a century.

In all the Spanish kingdoms save Aragon the popular deputies constituted the third estate. Aragon was peculiar in the fact that the knights sat apart from the nobles and that the cortes, for that reason, included four estates—clergy, nobles, knights, and commoners. The town may more properly be described as a corporate district, since it included a large area of dependent land, somewhat after the manner of an ancient city-state. While in England the borough or town formed a constituency apart from the county, Spanish deputies represented a combined urban and rural area.[3] There was no fixed practice in designating the towns that were to be represented. Thus, in 1315 ninety towns sent 192 representatives to the Castilian cortes; in 1391 fifty towns sent 126.[4] Attendance was evidently regarded, in Spain as in England, as an onerous duty; abstention became common; and by 1480 only seventeen towns retained the right of representation. The apportionment of representation varied with time and place. Marina states that in some cases it depended upon the size of the town council.[5] According to the general rule in Castile (as also in England) two deputies were assigned to each town; yet we find Burgos and Salamanca with eight each, Leon with five, Toledo and Soria with four, and some with one only.[6] The deputies were elected, sometimes by the council, sometimes directly by the citizens.[7] Like the English parliament, the

[1] *Gascony under English Rule* (1926), p. 146.
[2] D. J. Medley, *A Student's Manual of English Constitutional History* (6th ed., 1925), pp. 176-177.
[3] Marina, *op. cit.*, II, 272; Burke, *op. cit.*, II, 340; MacLeod, *op. cit.*, 386; Henry Hallam, *View of the State of Europe during the Middle Ages* (2 vols., 1893), vol. I, pp. 490 and 507.
[4] Hallam, *op. cit.*, vol. I, p. 503; Burke, *op. cit.*, vol. I, pp. 337 and 343.
[5] Marina, *op. cit.*, vol. II, p. 32.
[6] Burke, *op. cit.*, vol. I, p. 337.
[7] Marina, *op. cit.*, vol. II, p. 23.

cortes were convoked by the king mainly to get a grant of supply and, again like parliament, they petitioned for the redress of grievances before satisfying the royal demands.

ORTHODOX VERSION: ENGLISH ORIGIN

The conventional history of representation ignores practice in the ancient world and attaches no significance to occurrences in Spain and southern France. Historians have been hypnotized by the impressive growth and persistence of the House of Commons, by its survival where other representative bodies had died of inanition or had been crushed by monarchy, and by its universal acceptance as a model in recent times. They have concentrated their attention so exclusively on the House of Commons that they get no glimpse of a general European pattern and of the probability of diffusion. Their picture is strangely distorted by myopia. It gives a wrong impression of the actual landscape. The Spanish cortes do not appear in the background or the French states-general in the immediate foreground. It is an isolated English scene. Representation rises out of a situation that is peculiarly English and that therefore cannot be used to explain its rise in other countries. The appearance of representative assemblies all over western Europe becomes an insoluble enigma; for both diffusion and parallel development are ruled out.

The orthodox view is set forth authoritatively by D. J. Medley of Oxford [1] and, at much greater length, by D. Pasquet.[2] "All historians of the English constitution," says Pasquet,[3] "have remarked that in the county court, which was later to elect parliamentary representatives, representation had long been practised." He is referring to the jury system. In connection with the growth of the common law (Chapter XI) the origin of the jury has already been told. The Normans, borrowing from the Franks, brought it, in embryonic form, to England. Sworn men were used, first, for the purpose of ascertaining the ownership of property, its value, and the royal rights connected with it, and later, for the purpose of strengthening the administration of justice. When the king's judges visited a county (shire), the shire court consisted not only of freeholders, but also of twelve burgesses from each borough and the bailiff and four men from each village.

[1] *A Student's Manual of English Constitutional History* (6th ed., 1925), esp. pp. 173 *et seq.*

[2] *Essai sur les origines de la chambre des communes* (1914).

[3] *Op. cit.*, p. 18.

Juries were elected.[1] "The use of representation has become common," Pasquet observes; [2] "the representative system is being used constantly to deal with local affairs; there is little delay in using it in national affairs. It will be enough to summon the representatives of the lesser nobility and of the bourgeoisie to parliament, in the very form in which they have been summoned to the shire assembly." They will attend the king's council or parliament with authority to speak for their several communities.

The transition occurred naturally and without attracting attention.[3] Not all controversies were disposed of finally by the itinerant justices; on the ground of "false judgment" appeal might be taken to the central king's court, where the king presided in person. In such circumstances four knights were deputed to take the record of the local judgment to the king's court and defend it there.[4] When the central court tried a case in the first instance, it required the presence of twelve knights of the shire to "recognize" the facts; there were numerous cases of this kind early in John's reign. Up to this point the knights appear only from one shire and for specific judicial business. In 1226, however, four knights were elected in eight different shires and assembled at Lincoln to prefer complaints against the sheriffs.[5] Formerly great importance was attached to the fact that in 1213 John summoned not only the barons, but also four knights from each shire (to be appointed by the sheriff, it seems) to consult with him on the affairs of the kingdom. All that we can now say is that John conceived the idea of such an assembly; there is no evidence that it ever met.[6] Elected knights first met with the king's council in 1254. "Perhaps," Medley concedes,[7] "the knights acted only as delegates bringing to the Assembly, as in judicial matters, merely a record of the decision arrived at in the shire court, and it was only for a specified purpose that they came. But it was for a new purpose and one that admitted of expansion, and the knights had been definitely elected. Hence this has been regarded as a landmark in the history of popular representation." This is the

[1] "The practice of election, therefore, was well known in the shire courts, whoever were the actual electors or whatever was the method pursued." Medley, *op. cit.*, p. 174.

[2] *Op. cit.*, p. 21.

[3] Pasquet, *op. cit.*, p. 18.

[4] The number, though usually four, varied from two to six. *Ibid.*, p. 28.

[5] *Ibid.*, p. 36. Medley says (p. 175): "Nor is this an isolated instance of such a summons."

[6] Pasquet, pp. 46-55; Medley, p. 176.

[7] Medley, p. 177.

opinion of Pasquet also.[1] On the other hand George Burton Adams holds that, since the knights were simply to report local decisions, "the modern idea of representation is not here, except so far as it may be involved in mere delegation."[2]

Any account of the origin of the House of Commons must explain how John got his idea of 1213 and how the regents came to summon two knights from each shire in 1254. The next two dates are relatively unimportant. It is not even established that a meeting took place in 1261, although three knights from each shire were summoned.[3] Simon de Montfort's first parliament, held in 1264, after the battle of Lewes, included three knights from each shire. His second parliament (1265), however, set a momentous precedent for the future: along with the knights (two from each shire) came the burgesses (two from each borough).[4] That he summoned both knights and burgesses suggests the propriety of calling him the creator of the House of Commons. Against such a claim it is urged that he had to rely upon the commons because so few of the baronage now supported him,[5] that the boroughs were selected arbitrarily according to their political attitude, that this parliament (although summoned ostensibly in the king's name) was a revolutionary convention of de Montfort's partisans, that long before proceedings came to an end the knights and burgesses were sent home, and that writs for another parliament, which never met, seem to have ignored knights and burgesses.

Nevertheless, Simon de Montfort started a practice that continued after his death in 1265. Pasquet indicates the probability that in the remaining few years of the reign burgesses as well as knights may have sat in several parliaments.[6] At the beginning of Edward's reign four knights from each shire and four burgesses from each borough met with the barons and clergy. Apparently the tradition begun by de Montfort had been maintained in the interval.[7] The discovery of the writs summoning knights and burgesses to the parliament of 1275 makes it plain

[1] *Op. cit.*, p. 39-42.
[2] *Constitutional History of England* (1921), p. 175.
[3] Medley, p. 177.
[4] Pasquet, pp. 61-73.
[5] Only 5 earls and 18 barons attended, as against 121 ecclesiastics. Pasquet says (p. 68): "Undoubtedly, it was because he took note of the feebleness of his baronial following, which lacked most of the great lords of England, that Simon de Montfort summoned representatives of the counties and towns. Circumstances, perhaps more than inclination, forced him into a policy, the almost demagogic character of which did not escape the notice of contemporaries."
[6] Pasquet, *op. cit.*, pp. 84-86.
[7] *Ibid.*, p. 87.

that Edward I was following precedents.[1] The so-called Model Parliament of 1295, which once was accorded such historical prominence, "can no longer be regarded as a point of departure." No: Simon de Montfort was the innovator; he brought representatives of the towns into parliament when, as far as we know, such a project had occurred to no one else. Why Simon de Montfort thought of it will appear later. Perhaps, there may have been a reason why he fixed the number of representatives from each constituency at two, not three or four.

BARKER ON ECCLESIASTICAL ORIGIN

The peculiar habit of isolating the development of representation in England and of ignoring analogous and earlier phenomena on the Continent has not gone unchallenged. From time to time writers have suggested the possibility and even the probability of diffusion. They have encountered supercilious silence. Lacking the scholarly eminence of a Stubbs or Pasquet and failing to marshal their evidence cogently, they have made no headway against the received doctrine. Twenty-five years ago, however, one of the foremost English scholars in the field of politics entered the lists. Ernest Barker made the first destructive attack on the prevailing notion that a development in England, which finds a parallel in various countries of western Europe, can be understood properly without any application of the comparative method.[2] Whether or not his own hypothesis can be sustained, he deserves the highest commendation for daring to question the orthodox faith and for emphasizing once more the probability of diffusion from Spain and southern France. In those regions medieval representation first appeared. It appeared in England much later; and unbiased investigators would first inquire into the obvious likelihood that the English borrowed it; they would be all the more justified in doing so because not a single fact supports an independent English origin as against diffusion. The question that diffusionists must attempt to answer is this: How was the practice carried to England? Professor Barker suggests that St. Dominic applied it to the organization of his great monastic order; that Archbishop Stephen Langton, borrowing from the Dominicans, applied it to the clerical convocations of Canterbury and York; that the State borrowed it from the church; and that the makers of the House of Commons, Simon de Montfort and Edward I, were influenced by Dominican advisers.

[1] *Ibid.*, p. 88.
[2] *The Dominican Order and Convocation* (1913), p. 76.

When the towns were first represented in the cortes of a Spanish kingdom we do not know. The earliest dates that reputable historians accept, as already indicated, are 1163 for Aragon, 1169 for Castile, and 1188 for Leon; and St. Dominic, being a native of Leon and a canon of Osma in 1188, must have known about these representative bodies. Barker observes, cautiously:[1] "How far they influenced him—how far the founder of an ecclesiastical Order would take heed of any but ecclesiastical precedents—we cannot say. If we could tell at what date prelates and chapters began to send plenipotentiary representatives to the Cortes, as we are told they did, we might be able to make some tentative statement.... We do not know whether Spanish precedent influenced St. Dominic: all that we know is that communities... were represented in Spain, and that, at any rate in time, these representatives were of the nature of proctors, and had powers of attorney." St. Dominic left Osma in 1203. For more than ten years he was connected with the south of France and the elder Simon de Montfort. In 1212 de Montfort convened at Pamiers a great parliament, which, in line with the practice of that region, included representatives of the towns. Barker is "tempted" to find here some ground for St. Dominic's subsequent allegiance to the principle of representation. The organization of the Dominicans, as fixed in 1221, apparently showed the influence of Spain and Languedoc.[2] The provincial chapter was composed not only of the priors, but also of two elected friars from each convent.

It was in 1221 that the first Dominican entered England. A few years later, after a fierce dispute between town and gown in Paris, many Dominicans and the master of the order emigrated to Oxford. They made friends among the powerful. "From all this," says Barker,[3] "it is plain that the Dominicans and their institutions were well known in the central places of England, at Oxford and at London; we can see that the heads of Church and State, Langton and Kilwardby, de Montfort and Edward I, were familiar with the Order." The vogue and prestige that the order enjoyed "would tend to the spread of its institutions. Here was an approved type; and it is a law of human nature that the approved type should at once be imitated. The majority of the religious Orders of the thirteenth century,... followed quite closely Dominican legislation, and the Church considered it the typical rule for new foundations."[4] In 1226, five years after the coming of the

[1] *Ibid.*, p. 26.
[2] *Ibid.*, pp. 13-14.
[3] *Ibid.*, p. 29.
[4] *Ibid.*, p. 25.

Dominicans, Stephen Langton adopted the principle of representation for clerical assemblies. Alongside of the bishops and other dignitaries sat proctors from chapters, monasteries, and other religious houses.[1] In 1273 the Dominican Kilwardby, archbishop of Canterbury, added proctors of the clergy of each diocese; and in 1283 the Franciscan Peckham summoned a model convocation of Canterbury, which included two proctors from each diocese and one proctor from each chapter of cathedral and collegiate churches. "It would be absurd to suggest that this evolution is entirely due to imitation of the Dominican model. It is only suggested that it is significant that the first step should have been taken by Langton, the friend of the Dominicans, and that the final steps should have been taken by two friars, the one belonging to the Dominican, the other to the Franciscan Order, in which the Dominican system had been adopted. . . ." [2] Professor Barker disarms criticism by this cautious statement.

He is bothered somewhat by the episode of 1213. Although they were not to be elected and probably never met, King John did summon four men from each shire to discuss public affairs at Oxford. He had the idea of representation two years before the first Dominican house was established at Toulouse. "But," Professor Barker argues,[3] "the events of 1226 are surely far more important in the history of representation than those of 1213. And the lesson they teach is that of the influence of the clergy on progress in political ideas. That is just the lesson we should expect to find in history." The clergy were familiar with representative assemblies; the new monastic orders had, in their experiments, widened that experience. Stubbs did not give sufficient weight to clerical precedents. He made the mistake of overemphasizing the old communal institutions of England, such as the attendance of four men and the reeve at the shire-moot, and the procedure of judicial administration in the twelfth century. If the jury contains a form of representation, "it is representation merely to give information . . . and not to take action. . . . The jurors are picked, often more or less at random, as samples of the *publica fama* whose voice the king and his justices would fain hear. . . . Representatives who are proxies for their constituents, to determine a course of action on their

[1] *Ibid.*, p. 42. Barker notes (pp. 32-40) that in 1215 Innocent III provided that the Fourth Lateran Council should be attended by the provost or dean or other suitable men from each chapter, and that in 1225 the legatine council of Bourges included proctors from the cathedral chapters.

[2] *Ibid.*, p. 43.

[3] *Ibid.*, pp. 52-53.

behalf, are a different matter; they demand as their vital atmosphere a mode of thought and a set of ideas in which conceptions like *procuratorium*, the binding of constituents by representatives, and further of minorities by majorities, are consciously realized. Only the clergy can give that atmosphere of thought and idea."

In this ingenious fashion Barker disguises the failure of his hypothesis to explain John's plan of 1213. For the year 1254, when knights of the shire for the first time actually attended a meeting of parliament, he is in a better position. He can point to the ecclesiastical precedent of 1226 and to the fact that the Dominicans had been in England for a generation. Without adducing any further evidence, he says: [1] "Thirty years of the rule of Henry III are bearing fruit; and even if Boniface of Savoy is archbishop, the voice of the clergy will out, and representation will come." (We shall see that strong, if indirect, evidence points to a different conclusion.) The next important date is 1265, when burgesses, as well as knights, sat in Parliament for the first time. How does Barker meet this situation? "Simon's action in summoning representatives of towns," he observes,[2] "has been explained by different writers as modelled on the institutions of Aragon, of Sicily, and of Gascony. It would seem absurd to add a fresh explanation, or to suggest the influence of the Church, and particularly of the friars, as a possible source. We may, however, raise one or two considerations. In the first place de Montfort was clearly connected with the friars. St. Dominic had been closely associated with his father. Simon himself was perhaps the pupil of the Dominicans; his wife found a refuge, and a resting-place, in the house of the canonesses of St. Dominic at Montargis."

Barker's hypothesis has now been presented in rough outline. Representation appeared in Spain and southern France much earlier than in England. It was through ecclesiastical agencies, chiefly Dominican, that diffusion occurred. The clergy were "the forerunners"; they led the movement "through their habits of organized action and their legal ideas of procuration." [3] The reinforcement of the bishops and other church dignitaries by proctors (1226) preceded, by many years, the reinforcement of the baronage by knights and burgesses (1254, 1265).[4] This thesis breaks down in face of the fact that John actually summoned knights of the shire eight years before the Dominican order

[1] *Ibid.*, p. 55.
[2] *Ibid.*, p. 58.
[3] *Ibid.*, p. 72.
[4] *Ibid.*, p. 73.

was organized, eight years before the first Dominican entered England, and thirteen years before Langton summoned proctors to convocation. Barker passes too easily over 1213, Pasquet insists.[1] Moreover, his attempt to connect Dominican practice with Langton's innovation seems "very tenuous"; and still more open to question is the alleged clerical influence on de Montfort and the parliament of 1265.[2] Medley is no more willing than Pasquet to recognize clerical assemblies as the pioneers. Parliamentary representation, he maintains,[3] "was not the result of any general theory advanced by them or anybody else and, therefore, owed nothing to the example of another organization." According to George Burton Adams,[4] "it is equally clear that the preliminary, formal steps by which non-feudal representatives were introduced into the great council were taken entirely free from influence of the church."

DIFFUSION FROM SPAIN AND SOUTHERN FRANCE

Barker's hypothesis must be rejected. His evidence does not indicate, as he contends, that the State borrowed the idea of representation from the church,[5] but that both State and church borrowed it from a common source. If he is wrong in naming St. Dominic and the church as the importers of the idea, he may still be right in supporting diffusion as against an independent origin in England. Indeed, the circumstantial evidence in favor of diffusion is all but conclusive.

The circumstances may be presented in this way. In the first place, the general development of medieval representation suggests diffusion. The practice originated in the countries lying on both sides of the Pyrenees; then, after a long interval, it appears in the English parliament and (a generation later) in the French states-general; and in time it becomes characteristic of all western Europe. How shall we account for this gradual extension of the practice? Did each ruler hit upon it independently, as an appropriate means of satisfying certain felt needs? If so, why did the needs and this particular means of satisfying

[1] *Op. cit.*, p. 25.
[2] *Ibid.*, p. 24.
[3] *Op. cit.*, pp. 175-176.
[4] *Constitutional History of England* (1921), p. 173.
[5] H. J. Ford (*Representative Government*, pp. 90-91), quoting Gibbon to the effect that "the representative assemblies of the Christian republic were regularly assembled in the spring and autumn of each year," comes to the erroneous conclusion that representative assemblies became, under the Roman Empire, "a feature of ecclesiastical administration." In fact, until the Fourth Lateran Council of 1215, the church councils did not include representatives. Barker, *The Dominican Order and Convocation*, pp. 32-33.

them become apparent, chronologically, roughly according to the distance of each country from the region of the Pyrenees? Why, for example, did Sweden and Hungary lag behind England and France? The contact of one people with another commonly leads to the diffusion of institutions.

In the second place, considering the case of England, we must remember that the dominions of the Angevin kings embraced a large part of France. John, the third of his line, lost everything north of the Loire and some territory south of it. After all, Normandy, Maine, Anjou, and Touraine were attracted to the rest of northern France by cultural affinities. The people of Aquitaine, on the other hand, differed in speech and manners from the people of the north and aspired to keep apart. They preferred John to Philip II, partly because he had lost his heritage in northern France and partly because, being preoccupied with English affairs, he was likely to be less active in Guienne and Gascony. Now, Gascony at least had representative assemblies in the time of John. It would be absurd to suppose that the English king and his advisers were not well acquainted with the local situation, and above all with the rôle played by representative bodies. The governors of Gascony must have corresponded regularly with the authorities at home. The king must have been surrounded by men who had taken an active part in the administration of his French dominions. Moreover, John himself conducted several campaigns in Aquitaine; so did Henry III—in 1230, 1242-43, and 1253-54. John was familiar with Gascon practice when, in 1213, he summoned representatives of the shires.

In the third place, the Angevin marriage alliances are peculiarly significant. The table that appears on the next page omits three children of Henry II and one child of John, who made northern marriages. Otherwise, these alliances brought England into closer contact with regions in which representative assemblies had become familiar. Attention has already been drawn to Aquitaine and the Spanish kingdoms. In Sicily, twice a year, deputies from the towns sat with the barons and bishops; and there, in the year 1238, Simon de Montfort visited his brother-in-law, Frederick II.[1] Like other parts of southern France, Provence and Toulouse had experimented with representation. It is safe

[1] Wentworth Webster, *op. cit.*, p. 69. In 1232 Frederick summoned two representatives of the third estate from each city and *castello;* and in 1234 he ordained that in each province of his realm nobles, prelates, and representatives of the third estate should meet twice a year. C. H. McIlwain, *Cambridge Mediæval History,* Vol. VII (1932), p. 704.

to say that representative assemblies would have been a common subject of discussion at the English court, even if there had been no habitual collaboration with them in Gascony.

There is nothing strange about John's familiarity with the idea of representation in 1213. His father had married Eleanor of Aquitaine; his brother had married Berengaria of Navarre; his sister Eleanor, Alfonso of Castile; his sister Joanna, first William II of Sicily, then Raymond VI of Toulouse; and he himself, Isabelle of Angoulême. Under such circumstances he must frequently have discussed the political rôle of the third estate in those southern lands. Visits to Aquitaine had given him the opportunity of studying its institutions. He had followed the progress of the Albigensian crusade, particularly in 1212,

SIGNIFICANT ROYAL MARRIAGES

Henry II (d. 1189) = Eleanor of Aquitaine (d. 1204)

- Richard I (o.s.p. 1199) = Berengaria of Navarre
- Eleanor = Alfonso VIII of Castile
- Joanna = (1) William II of Sicily (2) Raymond VI of Toulouse
- John (d. 1216) = (2) Isabelle of Angoulême
  - Henry III (d. 1272) = Eleanor of Provence
    - Edward I = Eleanor of Castile
  - Richard of Cornwall (d. 1272) = (2) Sancha of Provence
  - Isabella (d. 1241) = Frederick II (German Emperor and King of Sicily)
  - Eleanor = (2) Simon de Montfort

when its leader, the elder Simon de Montfort, had defeated the king's brother-in-law, Raymond of Toulouse, and then convened a great parliament at Pamiers.[1] Simon, though a northerner, followed southern practice. In this parliament, which was to provide for the future government of Languedoc, deputies from the towns sat with nobles and ecclesiastics. A few months later John summoned representatives of the shires to attend a meeting of his council!

The next important date is 1254. Then, probably for the first time in English history, elected knights of the shire met with the barons and prelates. What were the circumstances? Henry III, campaigning in Gascony, asked the regents to send men and money from England; and, in order to get a grant from the commons, they summoned two knights from each shire to Westminster. The regents were Queen Eleanor of Provence and Richard of Cornwall, who had married the Queen's sister and who had served for two years in Gascony (1242-43). The Queen's uncle, Boniface, was archbishop of Canterbury. Simon de Montfort, Earl of Leicester, was back in England, after serving for five years as governor of Gascony, where he had also fought during the campaigns of 1242-43. Whether or not he was consulted on this occasion, he must have recounted his experiences with Gascon assemblies, told about his visit to Sicily, and drawn upon dim recollections of his father's parliament at Pamiers. Gascony! Provence! Sicily! Did not these names impose an association of ideas—money, third estate, representation? "We need money; the third estate have it; perhaps, if we summon representatives, in the manner of Gascony and Provence, they will make a grant." Surely, in the atmosphere of 1254, when the barons had refused to speak for the rest of the laity, the regents and their advisers would naturally entertain these thoughts.

In 1265, during a period of civil war, burgesses for the first time sat in parliament. The importance of this innovation may be gathered from the fact that, for centuries, the representatives of the towns or boroughs in parliament outnumbered the representatives of the shires or counties almost three to one. Simon de Montfort, leader of the revolt against the king, was the innovator.[2] He had come to England

[1] *Ibid.*, p. 67; Reinhold Pauli, *Simon de Montfort* (1876), p. 232. This occasion was all the more notable in view of the fact that the committee of twelve, which laid business before the assembly, included four deputies of the third estate.

[2] Biographies of Simon de Montfort have been written by Somerset Bateman (1923), Charles Bémont (1884), R. Pauli (1876), G. W. Prothero (1877). More useful than any of these, for the present inquiry, is Wentworth Webster's *Les Loisirs d'un étranger au pays Basque* (1901), especially chapter iv.

in 1230, established his claim to the earldom of Leicester,[1] and married the king's sister. It is true that, after the death of his father in 1218, he had severed all connection with Languedoc; but he revived his acquaintance with representative assemblies during a visit to Sicily in 1238,[2] during Gascon campaigns of 1242-43, and during a five-year term as governor of Gascony (1248-1252). In that country representation was based on the towns, which always had, however, extensive rural areas dependent on them. At a time when his support among the baronage was waning and when, therefore, he sought an alliance with the third estate, experience pointed to the desirability of linking the towns with his faction or party.

Webster asserts that Simon, as leader of revolt and reform in England, "simply applied the same methods and principles which he had learned and followed as governor of Gascony." [3] The four "courts" of Gascony, he explains,[4] dealing as they did with political as well as judicial affairs, were parliaments. In them representatives of the towns sat beside leading nobles. "Thus had Simon de Montfort acquired the habit of acting with the simple townsmen on matters of permanent public interest." A close analysis of his conduct in the years 1258-1265 shows that "almost all of it" squared with his attitude towards the courts and municipalities of Gascony.[5] Webster takes as an illustration the analogy between Simon's treaty of 1251 with Gaston de Béarn and his celebrated *Forma Regiminis* (Form for the Government of the King and the Kingdom) of 1264; [6] and he makes the analogy all the more obvious by abstracting the documents in parallel columns. Webster does not rely solely on particular circumstances and isolated facts to show how Simon's conduct was influenced. He pictures the political scene in Gascony, the currents of opinion, and the practices generally followed.[7] He deals at length with representative institutions and

[1] With the death of Robert de Beaumont, fourth earl of Leicester, the earldom had reverted to the crown in 1204. The elder Simon de Montfort, asserting a claim through his mother, received the title and half the lands in 1207, as well as the office of High Steward of England. Having sided with Philip Augustus against John and having despoiled John's brother-in-law, Raymond of Toulouse, Simon suffered forfeiture—probably in 1215, although Bateman (*op. cit.*, p. 40) says late in 1207. When his older brother Amauri had renounced his claims, Simon de Montfort the younger was invested with the earldom by Henry III.

[2] Frederick II had established, in 1232, representation in the general court of Sicily.

[3] *Op. cit.*, p. 47.

[4] *Ibid.*, p. 54.

[5] *Ibid.*, p. 55.

[6] *Ibid.*, pp. 56-57. See also H. W. C. Davis, *England under the Normans and Angevins* (1905), pp. 465 *et seq.*

[7] *Ibid.*, pp. 58 *et seq.*

shows that Simon "always favored" the election of townsmen to high office and their participation in important public business. When, in England, he introduced parliamentary representation of the towns, he "had learned to know it first by practising it in his government of Gascony, according to the ancient charters, customs, and liberties of the country." [1]

Are we now in a position to decide between convergence and diffusion? Convergence, or parallel development, at least seems highly improbable. It implies the existence of similar circumstances as the source of similar institutions. No one has yet shown that conditions all over western Europe were so much alike as to generate spontaneously in each country the principle and practice of representation. Professor Ford maintains the thesis that strong monarchy was the common element and that England took the lead because her monarchy was the strongest.[2] This contention will not bear historical analysis; even in England representation appeared when monarchy was weak; the states-general of France languished and died as monarchy grew strong. But the traditional story, as told by Stubbs and Pasquet, pictures the rise of representation from conditions that were peculiarly English and existed nowhere else—a story that would be credible if England had been the point of origin from which the practice was generally diffused, all others borrowing from her. If England did not borrow, independent invention must have rested on the existence of factors, not peculiar to herself, but similar to those which earlier produced the same result in numerous southern communities. The same

[1] *Ibid.*, p. 71. Curiously enough, the biographers of Simon de Montfort pay little attention to Gascony. Pauli, in summing up (p. 232), says: "It can scarcely be questioned that the Earl of Leicester was acquainted with the Aragonese constitution, especially with the place it assigned to knights and towns in the Cortes. ... His father had certainly known the system as it had existed in southern France, furnishing one proof of the direct connection of the district with the country and people south of the Pyrenees, and the marked contrast between the political life prevailing there and that north of the Loire." Bemont (p. 230) mentions Gascon influence only to reject it: "This was not a borrowing by Simon de Montfort from abroad. It did not bring to England the customs of Aragon, nor of Sicily, nor even of Gascony. Still less was it an invention of his genius." The biographers generally accept the traditional view that representation of knights and burgesses alike developed from circumstances and precedents peculiar to England.

[2] *Representative Government*, pp. 88 and 95. "Now if it can be conceived that a situation should arise in which the king's authority was so massive that he had no cause to fear meeting with his estates, no serious difficulty in controlling their action, then their association with his rule would appear in the light of a convenience, by enabling him to reach effectively through their agency all sorts and conditions of his subjects. Just such a situation was created by the Norman conquest of England (A.D. 1066)." P. 95.

must be said regarding the medieval estates of every other northern country.

By comparison the case for diffusion looks strong. Take a map, and set down in each country the date when the third estate was first represented. You will then find a fair correspondence of time and of distance from the Pyrenees. The facts suggest, of course, a gradual extension from a common point of origin. If the case of England is examined apart, you will find a singularly close relationship with the earliest centers of representation. Not only did numerous marriage alliances connect English royalty with the south and incidentally bring a good many southerners to the English court, but the government of Gascony and Guienne must have given English officials an intimate acquaintance with representation. The difficulties that English governors encountered in Gascony required decisions by the king and his council in England: that is well known from the case of Simon de Montfort. Nothing is more certain than that John and his advisers were familiar in 1213 with the Gascon courts or parliaments. There is little more reason to suppose that John conceived independently of the idea of representation than that the Virginian colonists did.

Circumstantial evidence points to the south. It was from the south that England and other countries borrowed. Such at least is the probability. Probability, on the other hand, is perhaps too strong a term to employ when a Roman, and ultimately a Grecian origin, is attributed to medieval representation.

CHAPTER XXI

PUBLIC OPINION AND PARTY

THERE seems to be general agreement that the people of a State cannot be controlled over any long period by force alone. Naked military rule has been short-lived. Governments try to win the approbation of the governed and make use of two strong human attitudes—desire for public order and belief in authority. A despotism that has originated in conquest perpetuates itself by shifting its basis to popular assent. The Roman emperors relied far less upon their legions, whose main business it was to guard the frontiers, than upon the contentment of the people. According to the Spanish writer, José Ortega:[1] "This stable, normal relation among men which is known as 'rule' *never rests on force;* on the contrary, it is because a man or group of men exercise command that they have at their disposition that social apparatus or machinery known as 'force.' The cases in which at first sight force seems to be the basis of command are revealed on a closer inspection as the best examples to prove our thesis. . . . Never has any one ruled on this earth by basing his rule essentially on any other thing than public opinion."[2]

Bryce expresses the same thought with more restraint. He says that "opinion has really been the chief and ultimate power in nearly all nations at nearly all times. I do not mean merely the opinion of the class to which the rulers belong. Obviously the small oligarchy of Venice was influenced by the opinion of the Venetian nobility, as an absolute czar is influenced by the opinion of his court and his army.[3] I

[1] José Ortega y Gassett, *The Revolt of the Masses* (1932), p. 138.

[2] Ortega continues (p. 139): "The truth is that there is no ruling with Janissaries. As Talleyrand said to Napoleon: 'You can do everything with bayonets, Sire, except sit on them.' And to rule is not the gesture of snatching at power, but the tranquil exercise of it. . . . The State is, in fine, the state of opinion, a position of equilibrium. What happens is that at times public opinion is non-existent. A society divided into discordant groups, with their forces of opinion cancelling one another out, leaves no room for a ruling power to be constituted."

[3] David Hume (*Essays,* 1875 ed., p. 110) takes a narrower view of the necessary range of opinion supporting the government. "The Soldan of Egypt, or the Emperor of Rome, might drive his harmless subjects, like brute beasts, against their sentiments and inclinations; but he must at least have led his mamelukes or prætorian bands, like men, by their opinions."

mean the opinion, unspoken, unconscious, but not less real and potent, of the masses of the people. Governments have always rested and, special cases apart, must rest, if not on the affection, then on the silent acquiescence, of the numerical majority. It is only by rare exception that a monarch or an oligarchy has maintained authority against the will of the people."[1] But, although monarchical and democratic governments alike depend upon public opinion, the situation differs in the two cases. What a monarch requires is an acquiescence or passive consent that may proceed from reverence for authority, tradition of obedience, or dread of disorder. Under a democracy, public opinion becomes an active, propelling factor. The people regard the government as a mere agency to which they have delegated power without releasing it from the obligation to obey orders.

PUBLIC OPINION

The term "public opinion" has been much discussed in recent years. It has been subjected to a pseudo-scientific analysis that has often introduced confusion rather than enlightenment. There should be no question about what we mean by calling opinion "public"; we mean, in the light of long-established usage, that it is the opinion of the community, the opinion of the people. The community may be a village, a province, a State, a continent, or even the whole world. But some sociologists and psychologists, without the support of any previous authority, have tried to substitute a new meaning of their own. "As we see it," says Professor Kimball Young,[2] "the term public refers not to one great mass of persons living in a community, a state, or a nation, but rather to various groups of secondary contact.... We use it to indicate various interest groups, especially those marked by the secondary group characteristics. Therefore we shall speak of *publics* rather than a public.... It is sometimes thought that public opinion refers only to the final general consensus of an entire group. This, however, is rather the end-product."

Agreed: public opinion is the end-product. But why, in order to indicate some possible preliminary stages, does Professor Young borrow the word "public" and give it a novel signification, instead of coining a new word? Such an arbitrary distortion of the language may well seems indefensible. "Public" does not, and never did, mean "interest-

[1] *The American Commonwealth* (rev. ed., 2 vols., 1910), vol. II, p. 259. In this famous book Bryce devotes 125 pages to public opinion specifically.

[2] *Social Psychology* (1930), pp. 570 and 578.

group." The opinion of an interest-group, whose members are scattered over the community, is merely "group" opinion—church opinion, labor opinion, business opinion. Psychologists would not be open to censure if they invented a word of their own or if they used the word "public" metaphorically, just as we speak of a republic of letters or the king of sports without doing any violence to established usage. But they are not indulging in metaphor at all; they are defying usage by an innovation which is all the more objectionable because it plays havoc with a political term of ripe age and capital importance. Happily individual caprice of this sort rarely leaves any scars on the language after the momentary fad has been forgotten.

Within the community not every one can be regarded as contributing to the formation of opinion. Children must be excluded; also slaves, where slavery exists, because they are rated as chattels. Shall we say that the function is confined to the electorate? If we think in terms of the democratic régime, in which the voters formally express their opinions at the polls, there is some temptation to do so. But surely women did not lack influence before they were enfranchised; surely, too, public opinion exists in a monarchy, where there are no voters, men or women. Shall we stop short with the whole mass of adult citizens or subjects, whether there be universal suffrage or none at all? Then the resident alien would be left out. But he may be a great landowner, a railway executive, a merchant prince, an eminent editor or scientist. In seventeen states of the American union he was once allowed to vote. It seems correct to say that the whole adult population, irrespective of voting rights and irrespective of citizenship, but with certain obvious exceptions (such as slaves, or inmates of asylums), share in formulating public opinion. But the share of each individual will vary in proportion with the respect that others entertain for his opinion.

The opinion of the community is never unanimous. Although it may approach unanimity at the time of an emotional crisis, such as a foreign war, it is normally much divided; and, according to a settled practice, a fundamental and necessary convention of democracy, the major part is taken as the equivalent of the whole.[1] "The necessity of having recourse to this principle," says Sir George Cornewall Lewis,[2] "arises from the nature of political government, and the expediency of a coercive supreme power which it implies. Whenever the ultimate de-

[1] A. Lawrence Lowell, *Public Opinion in War and Peace* (1923), pp. 82-83.

[2] *Influence of Authority in Matters of Opinion* (2nd ed., 1875), p. 145. See also the further discussion at page 170.

cision is vested in a body, there is, by the supposition, no ulterior authority which can, in case of a difference of opinion, determine who are competent judges and who are not. There is, therefore, no other alternative than to count the numbers, and to abide by the opinion of the majority." According to President A. L. Lowell,[1] the success of this somewhat mechanical method depends, however, upon a further consideration. The minority must recognize the validity of the decision, and do so not because they fear the consequences of denying it, but because they accept the principle that the view of the majority ought to prevail. When the minority withhold their consent, or give it grudgingly and unwillingly, we are told, the prevailing opinion cannot be described as public. Nor can acquiescence be expected unless the law permits full and free discussion of political issues, without censorship of the press, without restraint upon legitimate propaganda, and without impairment of the right of assembly or of organized agitation. The minority must feel that they have had an unrestricted opportunity to present their case and that they may in the end, by converting opponents, themselves become the majority. President Lowell is here considering public opinion in a democracy, where, as we saw in Chapter XIX, consensus is essential. The conditions that he lays down would not be applicable to a monarchy.

The indispensable conditions of majority rule in a democracy are, on the part of the victors, forbearance, moderation, generosity; and, on the part of the vanquished, willing submission to the consequences of electoral defeat. Without the spontaneous and ungrudging acceptance of such conditions, consensus would disappear, and the democratic régime would fall to pieces. How could government be carried on, if at every turn some minority expressed disapproval by refusing obedience to the law? How could the minority be expected to acquiesce, if the majority began to tamper with their cherished rights and institutions? The only certain obstacle to the invasion of what the minority may regard as natural and primordial rights is provided by a sense of justice, a calmness of temper, a disposition to compromise, and a settled tradition of self-government among the people. Without this, recourse must be had to artificial safeguards—to checks and balances of various kinds and to the requirements for certain purposes of an overwhelming preponderance of affirmative opinion.[2] Rousseau recognized

[1] *Public Opinion and Popular Government* (rev. ed., 1926), Chapters I and III.

[2] For a lucid discussion of this point, with concrete illustrations of ancient and modern practice, see Bryce, *Modern Democracies* (2 vols., 1921), vol. II, pp. 390-397.

the need of safeguards. "The difference of a single vote destroys unanimity," he observes,[1] "but between unanimity and equality there are many unequal divisions, at each of which the number can be fixed according to the condition and requirements of the body politic. Two general principles may serve to regulate these proportions: the one that *the more important and weighty the resolutions, the more should the opinion which prevails approach unanimity;* the other, that the greater the despatch requisite in the matter under discussion, the more should we restrict the prescribed difference in the division of opinions." This brings us back again to the distinction between flexible and rigid constitutions.[2] The latter usually impose restraints upon the legislature, either by laying down rules which ought to be respected or also by authorizing the courts to enforce such rules. In the United States, constitutional limitations can be removed only by a two-thirds vote in each house of Congress, followed by favorable action by the legislatures in three-fourths of the states.

"Opinion" may be defined in two somewhat different ways. President Lowell defines it as "the acceptance of one among two or more inconsistent views which are capable of being accepted by a rational mind as true. If only one view can be logically accepted, it is not an opinion, but the result of a demonstration. . . . All opinion, therefore, involves a choice, conscious or not, between different views which may be rationally held." [3] The choice need not be based upon an actual process of reasoning.[4] Every one has convictions; he has formed or borrowed, or acquired in some fashion, a crude philosophy of life; and his attitude toward particular proposals may be determined altogether on the ground of their consistency or inconsistency with the principles that he professes. "When an old conviction is retained," says Lowell,[5] "or a new one is accepted, on account of its consonance with the code of beliefs already in mind, although without any sufficient process of reasoning or knowledge of the facts, it may be regarded as an opinion in a very different sense from an impression derived from authority or suggestion apart from such connection with existing ideas." Thus, a man who believes in personal liberty may, without

[1] *Social Contract,* IV, 2. My italics.
[2] See Chapter XV.
[3] *Public Opinion in War and Peace* (1923), pp. 12-13.
[4] "Every one accepts many of his ideas, not on grounds of their rational probability, but because he received them from others, perhaps in early infancy. Probably everyone holds in this way the vast majority of what he takes to be his opinions." *Ibid., pp.* 14-15.
[5] *Public Opinion and Popular Government* (1913), p. 21.

knowledge of facts or arguments, oppose the censorship of books or the suppression of cigarette-selling. He has an opinion.

President Lowell held originally that, apart from such cases, "an opinion worthy of the name cannot be formed without both a process of reasoning and, what is far more difficult, the command of a number of facts." [1] Ten years later he expresed himself differently.[2] His new doctrine cannot easily be reconciled with the old; for he now classed mere off-hand impressions with opinions, on the ground that they may be "deemed to depend on the same general laws." [3] An impression, he now contended,[4] "differs from an opinion deliberately held because it is not reached by weighing the evidence or arguments in the particular case. It is not the result of conscious thought, but comes at once on the presentation of the question. Yet impressions of this kind are highly important, for the conduct of life is based far more upon them than upon carefully reasoned opinion; and in elections and other public questions the great mass of men act upon them rather than upon opinions formed by conscious effort." By a series of stages President Lowell has left reason behind and drawn close to the looser and more common conception of opinion. Observe, however, that he did not rely upon usage, as he might have done. He classed impressions with opinions because the former so frequently affect the conduct of men. If that is the key to opinion, then a place must also be found for cupidity, malice, gratitude, admiration, and all other sentiments to which voters respond.

Opinion may be rational or based on some existing conviction; and, according to the older and more precise usage, it must be. But the realistic usage that commonly prevails regards opinion as proceeding mainly from feeling and emotion.[5] "Orthodox democratic theory," says Bryce,[6] "assumes that every citizen has, or ought to have, thought out for himself certain opinions, *i.e.* ought to have a definite view, defensible by argument, of what the country needs, of what principles ought to be applied in governing it, of the men in whose hands the government ought to be entrusted." Contact with the citizen himself makes one realize, however, "how little solidity and substance there is in the political or social beliefs of nineteen persons out of every

[1] *Ibid.*, p. 23.
[2] *Public Opinion in War and Peace* (1923).
[3] *Ibid.*, p. 60.
[4] *Ibid.*, p. 55.
[5] Kimball Young, *op. cit.*, p. 575. See also E. L. Bernays, *Crystallizing Public Opinion* (1923), p. 62.
[6] *The American Commonwealth* (rev. ed., 2 vols., 1910), vol. II, p. 254.

twenty. These beliefs, when examined, mostly resolve themselves into two or three prejudices and aversions, two or three prepossessions for a particular leader or party or section of a party, two or three phrases or catchwords suggesting or embodying arguments which the man who repeats them has not analyzed.... It is therefore rather sentiment than thought that the mass can contribute, a sentiment grounded on a few broad considerations and simple trains of reasoning; and the soundness and elevation of their sentiments will have more to do with their taking their stand on the side of justice, honour, and peace, than any reasoning they can apply to the sifting of the multifarious facts thrown before them and to the drawing of the legitimate inferences therefrom." Public opinion, in ordinary speech, means the will or desire of the people, no matter how they arrived at it.[1]

In one way or another, we are often told, the popular will originates in the few and is communicated to the many. This aspect of opinion has been emphasized by Sir George Cornewall Lewis,[2] Sir Henry Sumner Maine,[3] Walter Bagehot,[4] Frank Exline,[5] Viscount Bryce,[6] Walter Lippmann,[7] and many others. Ernest Barker explains it in this way: [8] "The instinct of imitation, strong in most men, with its corollary of suggestion, strong in some, is an instinct closely allied with the gregarious. Tarde has emphasized and elucidated its working in his treatise

[1] In *Modern Democracies* (I, pp. 153-154) Bryce asks: "What is Public Opinion? The term is commonly used to denote the aggregate of the views men hold regarding matters that affect or interest the community. Thus understood, it is a congeries of all sorts of discrepant notions, beliefs, fancies, prejudices, aspirations. It is confused, incoherent, amorphous, varying from day to day and week to week. But in the midst of this diversity and confusion every question as it rises into importance is subjected to a process of consolidation and classification until there emerge and take definite shape certain views, or sets of interconnected views, each held and advanced in common by bodies of citizens."

[2] *Op. cit.*, esp. p. 122.

[3] *Popular Government* (1886 ed.), esp. p. 89.

[4] *The English Constitution* (1900 ed.). For example (p. 334): "Public opinion, nowadays, is the opinion of the bald-headed man at the back of the omnibus. ... The English constitution in its palpable form is this—the mass of the people yield obedience to the select few."

[5] *Politics* (1922), esp. pp. 140-141.

[6] Bryce says (*American Commonwealth*, I, 253): "He has been told what to think and why to think it. Arguments have been supplied to him from without, and controversy has embedded them in his mind. Although he supposes his view to be his own, he holds it rather because his acquaintances do the like. Each man believes and repeats certain phrases, because he thinks that everybody else on his side believes them, and of what each believes only a small part is his own original impression, the far larger part being the result of the commingling and mutual action and reaction of the impressions of a multitude of individuals, in which the element of pure personal conviction, based on individual thinking, is but small."

[7] *Public Opinion* (1922) and *The Phantom Public* (1925).

[8] *National Character* (1927), p. 138.

on the *Laws of Imitation.* It explains, in his view, the process by which ideas spread downwards from originating minds, which have a general prestige, through a whole community; and it therefore aids in the formation of the common content of many minds which we call a national tradition. It has been said that it may be called 'a prime condition of all collective mental life.' "[1] Aside from purely emotional reactions, most men take the opinion that, coming from above, prevails in their environment, or else, having conceived an admiration for some particular personality, echo his views. "Though they neither make opinion as thinkers nor help to mould it as critics," Bryce sagely remarks,[2] "they swell its volume" by the convenient method of borrowing. The opinions entertained by the voters may be their offspring only through the polite fiction of adoption and would sometimes, were their lineage known, exhibit a most respectable family tree.

The citizen has been told that "it behooves a red-blooded member of democracy always to have an opinion, even if it is a baseless one."[3] A pose of civic omniscience, he knows, is expected of him. If his low-grade intelligence and preoccupation with personal affairs prevent his thinking things out for himself, he can make a selection between competing ready-made opinions. He defers to the judgment of a man or group of men whose character or attainments or purposes have won his confidence; to the judgment, it may be, of an editor, a politician, a captain of industry, a labor leader; or of a group like the American Farm Bureau Federation or the United States Chamber of Commerce. He begins, perhaps, by forming an off-hand impression from what he reads and hears. This impression tends to solidify; and, when he has committed himself to a definite view, he seizes upon arguments, wherever he can find them, to buttress his position and give it the appearance of rational solidity. He borrows an opinion, because, without it, he would lose prestige with his family, his barber, and his fellow-Rotarians. The less he knows about the wage-and-hour bill or Russian activity in Spain, the more insistent and oracular he is in telling the world about it. At the very mention of the subject he clears his throat portentously, makes an impressive gesture, strikes a special attitude which he has observed in politicians, and conjures up a tone of voice which is universally conceded to be appropriate. Let no blame attach to him: he is acting the part assigned to him by the democratic ritual.

[1] Barker is quoting from W. McDougall, *Social Psychology* (1908), p. 326.
[2] *Modern Democracies,* vol. I, p. 157.
[3] Simeon Strunsky in the New York *Times Book Review,* October 25, 1925.

This practice of borrowing opinions should be subjected to further scrutiny. All sorts of opinions are being peddled about. Why is one opinion borrowed instead of another? The explanation is not hard to find. We start with this assumption: the average citizen is not in a position to generate an opinion by any intellectual process, either because, being stupid, he has no reasoning faculties or because, being apathetic, he refuses to exert himself outside his immediate personal concerns; and yet, in conformity with the postulates of democratic theory and his prestige as a citizen, he is expected to equip himself with answers to every question with which the community is grappling. Among the ready-made answers in the market, he has a wide range of choice. *He takes what appeals to him most—what best satisfies his emotions and economic interests.* Whatever quantity of reason may have gone into the manufacture of the opinions, along with other ingredients, it is not reason that makes them attractive. Nor should it be supposed that, in the long run, the somewhat diluted leadership in opinion determines the direction that the crowd will take.[1] The crowd itself does not know. It moves along a route that no living man can chart in advance, the direction being determined by a series of minor adjustments, by the day-by-day interaction of man and his environment, by stimulus and response.

PROPAGANDA

Ready-made opinions are not merely accessible to the man who wants to borrow one. Like other commodities, they are brought to his attention by skilful advertisement—that is, by propaganda. Since the

[1] In *The Unseen Assassins* (1932), p. 14, Sir Norman Angell maintains that "the opinion or attitude of the ordinary man is not a negligible factor in human affairs"; that "on the contrary, it generally determines public policy and the nature of our society"; and that such evils as war are not imposed upon us against our will or our desire by small minorities or vested interests. Such minorities, to achieve their ends, must first make their will or desire that of the mass of men. It is that will of the ordinary man, however created, which remains the determining factor."

It is no misfortune that the unthinking masses, governed by instinct and so more responsive to nature, pay such little attention to the intelligentsia. Bryce says (*Am. Com.*, II, 255): "The apparent paradox that where the humbler classes have differed in opinion from the higher they have often been proved by the event to have been right and their so-called betters wrong . . . , may perhaps be explained by considering that the historical and scientific data on which the solution of a difficult problem depends are really just as little known to the wealthy as to the poor. Ordinary education, even the education which is represented by a university degree, does not fit a man to handle these questions, and it sometimes fills him with a vain conceit of his own competence which closes his mind to argument and the accumulating evidence of facts. . . . He is apt to underrate the power as well as the worth of sentiment. . . ."

days of the Anti-Corn-Law League in England the possibilities of organized agitation have come to be well-understood. A century ago, Cobden and Bright, as the most effective of the League's active supporters, undertook the conversion of the country to free-trade; and by an adroit appeal to reason and interest—through speeches and economic pamphlets [1]—they facilitated the victory of industry and commerce over agriculture and made it a sweeping one. In the United States the Anti-Saloon League affords the most interesting example of persistent large-scale propaganda.[2] It not only used every resource of argument and every means of publicity to create a favorable popular sentiment, but brought pressure, amounting sometimes to intimidation, to bear upon candidates and legislators for the purpose of getting prohibition enacted into law and upon executive officers for the purpose of having the law enforced. Spending at its most active period some $2,500,000 a year, the League ran its Westerville plant continuously, with three eight-hour shifts, and often despatched carloads of literature on a single day. Far more ingenious, colorful, and dramatic—but not more effective—was the propaganda of the militant suffragettes of Great Britain.[3] It won the attention of the British people and at the same time, most observers believe, their disapproval.

The organized groups that indulge in propaganda are countless in number and varied in purpose as well as method. They reflect the interests of taxpayers, reformers, anti-vivisectionists, churchmen, Townsend-planners, pacifists, longshoremen, mechanics, lawyers, bankers, merchants, industrialists, dairy-farmers, cotton growers, and others. They may be formidable in membership or limited to an office, a letter-head, and a paid secretary; and, when the membership is reckoned in millions, the declarations that the officers make in its name may control the behavior of only a few. Sometimes their methods are open and straightforward; sometimes, hidden and devious.[4] Corrupt

[1] "In an age when political literature was limited in quantity and inferior in quality, the League, in 1843 alone, distributed nine million carefully argued tracts by means of a staff of eight hundred persons." G. M. Trevelyan, *British History in the Nineteenth Century* (1922), p. 270.

[2] E. H. Cherrington, *The Evolution of Prohibition in the United States* (1920); Peter H. Odegard, *Pressure Politics* (1928).

[3] Sylvia Pankhurst, *The Suffragette* (1912) and *The Suffragette Movement* (1931). Both are admirably written.

[4] On the propaganda of interest-groups see: E. P. Herring, *Group Representation before Congress* (1929); E. Gruening, *The Public Pays* (1931); F. E. Lumley, *The Propaganda Menace* (1933); S. McK. Rosen, *Political Process* (1935); E. Schnattschneider, *Politics, Pressures and the Tariff* (1935); Belle Zeller, *Pressure Politics in New York* (1937); and E. M. Sait, *American Parties and Elections* (1927), Chapters IV and V.

methods have been revealed so often that the term "propaganda" has been given, by some American writers, a sinister connotation that does not belong to it. There is nothing sinister in having an opinion, even one based on economic interest, or in trying to convert others to it. In fact, we may assume that the citizen ought to do what he can to make his version of the truth prevail. But in his crusading ardor he is apt to attribute to his adversaries anti-social aims. "The tariff or utility lobbies are bad," says George Soule,[1] "if one opposes the principle of protection or disbelieves in the beneficence of private enterprise in the electricity industry, but not if one adopts a contrary position. How many citizens denounce the prohibition lobbies, and how many believe them agencies of righteousness? What about the lobbies for farm relief, and the lobbies supported by many liberals and progressives themselves, which aid labor and social legislation or combat private greed? The lobby, it is said, has the virtue that it organizes specific interests to affect governmental policy, and, after all, if governmental policy is to be realistic, it must achieve a balance of interests."

The curious aspect of propaganda in the United States is the fear that it inspires. To use the language by which Senator Maclay voiced his objection to the visits of President Washington to the Senate chamber, men are afraid of having their advices and consents ravished from them. According to Walter Lippmann,[2] the most significant revolution of modern times is "the revolution that is taking place in the art of creating consent among the governed. Within the life of the new generation now in control of affairs, persuasion has become a conscious art and a regular organ of popular government. None of us begins to understand the consequence, but it is no daring prophecy to say that the knowledge of how to create consent will alter every political premise." No doubt, in this land of high-pressure salesmanship, a man adopts an opinion against his will, or because insistence has paralyzed his will, just as he buys an encyclopedia or an electric ironer that he does not want! Foreigners have observed this same amiable weakness. Nowhere outside of the United States, says Professor André Siegfried,[3] "can the public be so successfully manipulated by experts.... Nowhere else in the world are associations so powerful, and especially if they have some social or religious propaganda in view. The good will, the funds, and the devotion at their command are enormous. With their excellent equipment and ceaseless and varied activity, they are the real

[1] *A Planned Society* (1932), p. 36.
[2] *Public Opinion* (1922), p. 248.
[3] *America Comes of Age* (1927), pp. 244-246.

expression of the community, and they enable it to carry out definite programs of reform. The reverse of the medal, however, is most alarming, for their unrestricted influence upon public opinion is positively dangerous. An Anglo-Saxon community is a veritable hot-bed of fanatics who know no scruples in imposing their nostrums. Publicity, which is reduced to an exact science, provides an automatic means of reaching the masses. The temptations are too great and the weapons too efficient.... In this land of exaggerations, where ideals are pushed to extremes, public opinion is a formidable weapon. The methods of organizing it, crystallizing it, and inflaming it to the point of hysteria are so well understood and the technique is so perfect that, given the malleability of the people, there appears to be no limit beyond which they cannot be led." [1]

There is, however, a "limit beyond which they cannot be led." If no one knows exactly where that limit is, this much, nevertheless, may be said with confidence. Propaganda cannot succeed beyond the moment unless it runs along with some preëxisting disposition of the popular mind or with sympathetic social tendencies; and it cannot succeed even for the moment if it conflicts seriously with some preëxisting disposition or tendency. An example will make this clear.[2] Persons who lived in the Northeastern part of this country after August, 1914, realized that no propaganda was needed to create a sentiment in favor of the Allies and that none could accomplish much for the Central Powers. The Germans tried open propaganda; it collapsed; and the collapse, says Walter Millis,[3] "drove the agents who remained into the

[1] Aldous Huxley exaggerates the power of propaganda in a similar fashion and thinks that the psychologists can do what they will in molding public opinion. See his article, "Do We Need Orgies?" in *The Yale Review,* Vol. XXIII (1934), pp. 466-483. He says: "What is the use of a Disarmament or a World Economic Conference so long as the people of each nation are deliberately encouraged by their leaders to indulge in orgies of group solidarity based on, and combined with, self-congratulation and contemptuous hatred of foreigners? Our need is rather for a World Psychological Conference, at which propaganda experts should decide upon the emotional culture to be permitted or encouraged in each state and the appropriate mythologies and philosophies to accompany those cultures."

[2] It would be easy, of course, to give many additional examples. As an illustration of credulity, consider the statement often made that the German armies broke at the end of the war because of the propagandist leaflets dropped by airplanes! Why did not the French stop the war at the outset by scattering leaflets among von Kluck's men?

[3] *The Road to War: America 1914-1917* (1935). Millis says (p. 204): "What subterranean activities the Entente agents may have engaged in is not known, for they were never investigated; they were probably few, for the Allies had little need of secrecy. The representatives of the Central Powers, on the other hand, were driven to try everything."

more dangerous method of clandestine subsidy. They appreciated, no less than Sir Gilbert Parker, the importance of getting native Americans to present their case; but where the Allies could command their thousands of devoted American propagandists, the Germans could find scarcely a handful. A list they drew up of possible native spokesmen contained only thirty-three names—a pitiful showing. The Allied propaganda, moreover, enjoyed the inestimable advantage of being self-financing. Our public clamored for books, articles and motion-picture films which conveyed it. Old-established American publishing houses found it profitable, and did not think it unpatriotic, to enter into agreements with the Entente governments for the distribution of propagandist war books, and there was a huge trade in volumes on trench life from the French and British standpoint. Those who voiced the German side of the case found no such markets."

The New York *Times* indulges in some ironical observations at the expense of Senator Nye and his propaganda-investigating committee: [1] "To the mass of oral and written testimony adduced before the committee the Senator might add all the despatches, feature stories and pictures that have appeared in the American press about George V and his successor. The amount of space devoted by the newspapers to the British throne in 1936 should help Senator Nye to get at the secret of American neutrality in 1914-1917. When the Senator from North Dakota has measured up all the newspaper linage about George V and Edward VIII he must ask himself how would it have been if somewhere on the Continent a royal Wilhelm had been succeeded by a Friedrich, or a Ludwig by a Heinrich.... If British propaganda and ballyhoo brought us into the war nineteen years ago, it was not an impromptu piece of press-agentry by Buckingham Palace. Critics of Great Britain have paid tribute to her masterly manipulation of American sentiment, but they haven't told the half of it. The campaign to bring America into the war on the Allied side really began more than three hundred years ago. It will be recalled how the English sent one shipload of propagandists under Captain John Smith to Jamestown in 1607 and shortly after another shipload to Plymouth under Bradford and Carver. From that time the English pressure on American public opinion never let up. With devilish ingenuity the British fixed it so that in 1776 the Americans should rise in revolt against a king named George. This permanently established a King George association-idea in the minds of the American people and came in useful in

[1] "Topics of the Times," January 30, 1937.

1914 for another George. For nearly three years after August 4, 1914, the Americans hesitated because apparently they were not quite sure which George was in trouble. Once they were convinced it wasn't George III they went to the British monarch's assistance."

If men are "suggestible," as the psychologists so often tell us, they certainly do not succumb as readily to one propaganda as to another. They must make a choice between suggestion and counter-suggestion. The Anti-Saloon League conducted a crusade for prohibition; but the opposed interests were equally active and spent as much money.[1] Why did the League win a temporary success over a vigorous opposition? There were several reasons which had little to do with the propaganda of the righteous. Without enumerating these, let it be noted that by 1906 approximately 35,000,000 people were living in dry territory with an area of 2,000,000 square miles and that by 1913 (seven years before the Eighteenth Amendment became effective) half the population of the country and nearly three-fourths of its area had come under prohibition.[2] Nothing succeeds like success; and the Anti-Saloon League floated to victory on a gradually rising tide—which later ebbed and carried it to defeat. In measuring the efficacy of propaganda, we must always have in mind two vital considerations. In the first place, issues are rarely, if ever, presented to the people from one side alone; suggestion competes with counter-suggestion—free speech with censorship, free trade with protection, free worship with conformity, free competition with public regulation. Propaganda can win only by defeating propaganda. In the second place, the propaganda that wins does so, not because of superior adroitness and greater persistence, but because the people are already moving in the same direction. It was not the eloquence of John Bright and the persuasive reasoning of Richard Cobden that converted Great Britain to free trade toward the middle of the last century; the very formation of the Anti-Corn-Law League in 1838 indicated that, with the marvelous growth of industry and commerce, the time was ripe for the change. Nor was it the tireless agitation of tariff-reformers that converted Great Britain back again to protection after the Great War. Whenever we pause long enough to pick out and appraise the factors that determined the result, we come to the conclusion that propaganda has been absurdly overrated. Any

[1] "From all of which it seems fairly clear that the liquor funds spent in the political campaigns of the country ranged from four to ten millions of dollars a year." Catt and Schuler, *Woman Suffrage and Politics* (1923), p. 141. The women, of course, ranged themselves on the side of prohibition—a moral issue.

[2] E. H. Cherrington, *The Evolution of Prohibition* (1920), 255 and 320.

thoughtful reading of history reveals mankind in the toils of a destiny from which no exercise of will and no submission to propaganda can release it.

The most that can be said for propaganda is that it may have a short-time value.[1] When it does not run counter to some settled tendency, it may lead the people to acquiesce, for a while, in novel courses. Twenty years ago, the Russian people got what they wanted under Bolshevik direction—peace, land, and a measure of self-determination for nationalities. If they did not actively favor the expropriation of industrial and commercial establishments, they were at least indifferent to it. Undoubtedly Lenin and his group of Communists set up many social patterns of their own devising, although much that happened was dictated by circumstances contrary to their own plans. But, as Plato and Aristotle contend and as history seems to show, excesses breed reaction; orgy gives way to routine. The edifice of Lenin's dreams has collapsed. Lincoln was right: you cannot fool all of the people all of the time; and the Russian masses have grown tired of propaganda, impervious to it. After indulging in an orgy of experimentation, they are returning to normal routine and moving in a direction that the dictator and his henchmen must accept. In such an outcome there is nothing out of the ordinary. If we concede that the propaganda of the Anti-Saloon League carried the Eighteenth Amendment, we must also acknowledge that it was helpless in the face of the movement for repeal. Generally propaganda lacks even a short-time value. Any one who has studied elections must be skeptical about the value of campaign oratory and literature.[2]

[1] Ernest Barker (*National Character*, 1927, p. 145) admits that it has "a short-time value in moments of excitement," but holds that it has less influence than commonly thought and can create no permanent and universal disposition.

[2] It is often held that the expenditure of millions of dollars and the flood of oratory and literature determine the result of the election and that the campaign resembles a litigation in which the empty minds of the jurors are filled with evidence and argument and in which the verdict is based altogether on what happens inside the court-room. Does such a comparison reflect the actual rôle of the electorate? Nowadays, it is true, jurors are supposed to be empty-minded, or at least open-minded, when the trial begins. But at an earlier time they were witness-jurors, already familiar with the facts of the case and ready to pronounce an opinion. Voters resemble this ancient jury. They are under no obligation to see and hear nothing until the campaign begins; and what they see and hear—and feel—must make some kind of an impression. The mass-mind, however rudimentary, soaks up something from the environment. It would be strange indeed if the voters waited for oratory and literature before taking sides. They do commonly take sides before the campaign has got under way. The campaign does little more than provide entertainment and confirm an existing faith. The politicians suffer from a delusion when they think that a million dollars more, another ton of tariff statistics, and another ten hours on a national radio hook-up would have turned defeat into victory.

Interest-groups sometimes rely upon justice and reason for the success of their propaganda. More often they take advantage of popular credulity. They have heard, especially in America, that voters like to be on the winning side; and they know that legislators, wishing to be reëlected, are peculiarly subject to intimidation. This explains the practice of exaggerating numerical strength. The Townsend Plan and the National Union for Social Justice boasted, in 1936, of their millions of adherents, each having enough, one would gather, to carry an election for the party adopting the correct principles. Apparently, however, neither Townsend nor Coughlin could control the votes of their nominal followers. The executive committee of the American Federation of Labor has been unable to do so in the past; and political experts attach far less weight to the threats of the committee than a solid block of three million votes would warrant.[1] There is no padding about the membership of the Federation, but there is singular delusion in assuming that the members will think and act alike even when their interests are concerned. In fact, the sociologists have given to interest-groups an importance which, in most cases, they do not merit. The theoretical picture often differs from the reality.

JOURNALISTIC INFLUENCE

In the development of opinion the newspaper plays an indispensable part. Without it democracy could not endure in large countries like the United States and Canada; for, aside from local areas of small population where events become a matter of common knowledge through personal intercourse, people are almost entirely dependent upon the newspaper for political information. "The newspaper is," says Walter Lippmann,[2] "in all literalness the bible of democracy, the book out of which a people determines its conduct. It is the only book they read every day." It is the source from which they draw the facts that are essential to an intelligent participation in political life. Therefore, if modern journalism falls short in meeting this need, the very foundations of popular government, at least according to the theory of it, are imperiled. Whether justly or unjustly, there has been a great deal of

[1] A change may be impending; but in the past the workingman has shown himself as much attached to his party as any average American. In a way, says Selig Perlman (*A History of Trade Unionism in the United States*, 1922, p. 288), he considers it "an assertion of his social equality with any other group to take the same 'disinterested' and traditional view of political struggles as the rest."

[2] *Liberty and the News* (1920), p. 57.

criticism, especially among radicals and Socialists.[1] Sir Norman Angell regards the press as "one of the worst obstacles to the development of a capacity for self-government, perhaps the worst of all menaces to modern democracy." Frank Exline declares that "the inexorable law of self-preservation decrees that the existing governments of society must either perish or preserve themselves by restraining and controlling the press." [2]

What are the abuses that have created a feeling of distrust and shaken, somewhat, the credit of the press? It is alleged, against the metropolitan newspaper especially, that it has become a mere commercial enterprise, bent upon an unscrupulous drive for profits, and that the business office dominates the editorial office. In order to pay dividends upon a huge investment, advertisers must be obtained; and the only way to get advertisers is to build up the circulation. The insatiable appetite for circulation overpowers conscience and banishes ideals. Under pressure from the business office, which is sensitive to the wishes of advertisers, news is distorted, suppressed, and manufactured. Sir Norman Angell makes a complaint of a different order. "Newspapers," he says,[3] "are compelled for the profits which are the condition of their existence increasingly to appeal to the most easily aroused instincts of their readers; to pander to the instincts and emotions that can be most easily excited. . . . This competitive process sets up a progressive debasement of the public mind and judgment; of that capacity to decide wisely and truly which is, in the last resort, the theory upon which the well-working of society must depend. . . . The constant stimulus to passion and the herd instinct, entailed by the necessity of finding an appeal that shall be wider and more successful than that of a rival newspaper concern, the consequent violence of the public mind, the impossibility of an unpopular view obtaining adequate expression, all end by destroying the capacity to weigh contrary opinion, by which alone thought on public issues is possible."

It should be said at once that there are many newspapers to which these various charges cannot apply, newspapers deserving and possessing public confidence. In other cases, subservience to business interests, and the resulting distortion of the news, is much over-emphasized. Newspapers with a large circulation need make no concessions to ad-

[1] See Lippmann, *op. cit.;* Sir Norman Angell, *The Press and the Organisation of Society* (1922); Upton Sinclair, *The Brass Check* (1919); Hilaire Belloc, *The Free Press* (1908); Bryce, *Modern Democracies,* vol. I, pp. 92-110.

[2] *Politics* (1922), p. 135.

[3] *The Press and the Organisation of Society,* pp. 23 and 43.

vertisers; for the merchant is actuated by economic motives and displays his wares where they will show to best advantage. Nor does the press, being itself a capitalist enterprise of large dimensions, act as the mere tool of big business. It would be more correct to say that, as an equal and without set purpose, it assumes a benevolent attitude toward other capitalist concerns. For the most part it is the Socialist or Communist who complains of bias in the news. He forgets that, this being a capitalist régime, we are not inclined to look at everything through Marxian glasses and that his own newspapers are the chief distorters of the news.

For the general lowering of tone the newspapers are not primarily responsible. They are not charitable institutions. Like other commodities, they can be made only as long as they can be sold. They must adjust themselves to the market. In this age of large-scale production journalism does not adjust its tone to the refined and fastidious ear of the cultured classes; it must speak with a voice that will attract clerks and errand-boys, mechanics and unskilled laborers. The newspaper proprietor, like the candidate for political office, must employ the arts that captivate the crowd. Journalism and politics reflect the public taste. The newspaper gives its readers what they want and what they deserve.[1]

The inadequacy of the average man to grapple with the complex problems of government [2] and the dubious nature of the opinions that he forms about them must now be apparent. His interpretation of the plainest facts is likely to be wrong, and his decisions vitiated by all sorts of emotional irrelevancies.[3] "We must abandon the notion that the people govern," Walter Lippmann believes.[4] "Instead we must adopt the theory that, by their occasional mobilizations as a majority, people support or oppose the individuals who actually govern them. We must say that the popular will does not direct continuously but that it intervenes occasionally.... When public opinion attempts to govern directly it is either a failure or a tyranny. It is not able to master the problem intellectually, nor deal with it except by wholesale impact.... I set no store on what can be done by public opinion and the action of the masses." Lippmann would have the people intervene only in a crisis of maladjustment, "and then not to deal with the substance

[1] Angell, himself an ardent champion of democracy, came to the conclusion that "the voice of the people is usually the voice of Satan." *The Public Mind* (1927), p. 171.

[2] See chapter XIX.

[3] Angell, *op. cit.*, p. 172.

[4] *The Phantom Public* (1925), p. 61.

of the problem but to neutralize the arbitrary force which prevents adjustment." [1] Angell, too, is realistic. He would recast the voter's job in the light of his notorious deficiencies, allowing him to pass upon general results only—to decide whether he is getting the kind of government that he wants, and, if he is not getting it, to fix the blame. Is he incapable of discharging even this modest function? Will he always be "the helpless puppet of forces outside himself, his blind instincts being indeed part of those forces"? Then Sir Norman "can do nothing for him." [2]

Sir Norman is plunged in melancholy. He remains a convinced democrat—perhaps a little like Senator David B. Hill who said in 1896 that he was still a Democrat, but very still—because he sees no tolerable alternative to democracy; but his faith in the ordinary man, whose capacity is "necessarily very feeble," has been shattered. The ordinary man gives way to "forces outside himself" and to "blind instincts." What Angell does not understand is that those forces and instincts lie at the very foundation of society and that they are the instruments of nature in charting the course among hidden reefs and shoals. The so-called élite of mankind, overrating the power of the intellect, try to chart a course of their own and to wrest the wheel from nature's helmsman. Their presumptuous self-confidence seems to survive the mishaps that should persuade them of their incompetence; but they are saved from actual shipwreck by the crew, which, sometimes countermanding the orders and sometimes appointing a new set of officers, really settles the course of the ship of state. Pride of intellect is a dangerous as well as a shabby thing. It impairs the sensitivity of the receptors—slows down the response that the nervous system should give to the stimuli proceeding from the environment. That may explain why nature condemns the intellectuals to sterility and allows the more animal type of the species—the meek—to inherit the earth.[3] There is no tragedy involved in the conclusions of Lippmann and Angell. If the great mass of mankind are incapable of governing, so are the intelligentsia: nature governs us all.

PARTY: ITS NATURE AND FUNCTION [4]

In a democracy, public opinion is assigned a dynamic rôle. It is supposed to dictate policies and exert constant pressure upon the

[1] *Ibid.*, p. 199.
[2] *The Public Mind*, pp. 191-192.
[3] See Chapter I.
[4] See E. M. Sait, *American Parties and Elections* (1927), especially chapters VI and VII, from which a good deal of the following material has been taken.

elected representatives. But a serious obstacle stands in the way. When opinion is being formed by millions of men, either separately or in numerous interest-groups, how can the desires of the majority be discovered? Can we rely upon elections to give an answer? If the millions went to the polls without any sort of preliminary agreement, they would scatter their votes among so many candidates, representing so many divergent policies, that the results would be inconclusive, even chaotic. There must be, in advance of the election, some process of adjusting differences and of bringing together large numbers of men in acceptance of a common basis of action. "Thus," according to Elihu Root,[1] "the chief work of popular government is to be found in the process which results in the vote." It is the political parties that develop some semblance of order out of chaos and make the scheme of representative democracy workable.

It is almost invariably agreed that parties perform a necessary service and that, under a régime of universal suffrage, they are inevitable, like the tides of the ocean. "Their essential function," says President Lowell,[2] "and the true reason for their existence, is bringing public opinion to a focus and framing issues for the popular verdict." Observing conditions in England and America, where popular government has had so long a history, "we are justified in saying that the existence of parties is not mainly due to differences of temperament, to conflicting interests, or to the basic forces that create variations of opinion and emotion in mankind, but that they are rather agencies whereby public attention is brought to a focus on certain questions that must be decided. They have become instruments for carrying on popular government by concentrating public opinion. Their function is to make candidates and interests known to the public and to draw people together in large masses, so that they can speak with a united voice, instead of uttering an unintelligible babel of sound. In short, their service in politics is largely advertisement and brokerage." They could not adequately perform this business of brokerage, of course, unless they were elaborately and permanently organized.[3]

The necessity of organized parties depends upon the extent of the suffrage. Under an aristocratic régime there is less need of organization, because candidates and issues can be selected and brought to the notice of the limited electorate through informal consultation among

[1] *The Citizen's Part in Government* (1907), p. 40.
[2] *Public Opinion and Popular Government* (1913), p. 70. See also *Public Opinion in War and Peace* (1923), pp. 175-178.
[3] Elihu Root, *op. cit.*, p. 40.

the leaders. In a monarchy, where the rule of one leaves no place for voters and elections, the appearance of parties indicates dissatisfaction; and the monarch, fearing for his throne, is likely to suppress the dissident faction by force or deprive it of *raison d'être* by redressing grievances. The failure of his tactics will bring about his abdication or even the end of monarchy. The dictators or monarchs now ruling in Russia, Italy, and Germany have run true to form in their suppression of dissident parties. In each case, however, an orthodox party survives, it being the medium by which dictatorship was established and by which any menace of counter-revolution is checked. No doubt such a safeguard will be retained until there is—if the dictatorship last that long—an unmistakable evidence of popular attachment to the régime.

If it is the function of parties to consolidate public opinion in advance of the election, how many parties should there be? Logic suggests, perhaps, that there should be a party to reflect every considerable volume of opinion. In certain Continental countries, as a matter of fact, ten, twenty, and even thirty parties have contended for support at one time. Under those circumstances, a voter can surely find a set of opinions that corresponds pretty well with his own. For the moment he is satisfied. But he soon finds out that the compromises that he was not called upon to make at the election must be made, without his consent, after the election. To constitute a majority for the support of the government, or for the passage of bills, the deputies trade their votes and sacrifice their principles. Who can be held responsible for the numerous and secret shifts or for the achievements and derelictions of the chamber throughout the session? [1] Such being the case, the practical convenience of two parties must be preferred to the logical appropriateness of many. Two parties bring the electorate to a point where, faced by a simple alternative, it can use effectively the only words at its command: "yes" and "no." These parties bear a heavy burden. Before the election they survey opinion, in all parts of the country and in all its manifestations, and then, by a series of compromises, formulate the sort of platform or declaration that, while satisfying no one entirely, is designed to suit millions of voters well enough to capture their support as against any possible alternative program. One of the two parties will win a majority and become responsible for the enactment of its policies.

[1] This is by no means the only weakness of a multiple-party system. Ernest Barker (*National Character*, p. 171) speaks of principles being theorized, of discussion becoming too subtle to be practical and too acrimonious to be fruitful in action.

The two-party system prevails in English-speaking countries; the multiple-party system elsewhere.[1] This divergence challenges explanation. Those who direct their attention to a single country often attribute the nature of its party system to purely local causes—perhaps to an intense individualistic spirit and love of abstract thinking among the Germans, or to a theoretical disposition and incapacity to organize politically among the French.[2] So it has been said of the United States that constitutional arrangements discourage the multiplication of national parties.[3] Yet such obstacles are altogether wanting in Great Britain, where the two-party system originated two hundred and fifty years ago and where it has persisted ever since. Indeed, this practice of looking for unique causes has proved quite abortive. What one gets from a survey of various writers is a jumble of inconsistent views without any approach to the discovery of a constant factor. We ought to have an explanation of universal validity. In looking for one, the first thing to notice is that the two-party system, in its origin, was not an artificial contrivance, the outcome of a conscious plan and a belief in its superiority. Like other English institutions, it grew spontaneously under the play of circumstance; and it was transmitted to the colonies along with the rest of their political heritage. But the accident of inheritance does not explain why the system has continued to prevail, always recurring after momentary lapses—why it has revived over and over again, in Canada and Australia and the United States, as in Great Britain, when death seemed imminent.

Can we say that the inheritance was preserved because of its accordance with the character of the peoples who inherited it? As the system matured, with the two parties contending for mastery and appealing for support in a continuous debate, its virtue came to be appreciated.

[1] By the term "two-party" we do not imply that only two parties exist, but that, in view of the negligible strength developed by minor parties, one of the two will control the government without having to effect a coalition. In periods of transition a "third party" may arise, which will eventually supplant one of the major parties or consolidate with it or else sink into insignificance. In Australia Conservatives and Liberals combined to resist the growing power of the new Labor party; and the same development has been taking place in Great Britain, where a Liberal remnant tries to disguise the facts by pretending that a three-party system now exists. Although new parties may come into being or old parties bifurcate, there is a constant tendency in English-speaking countries to restore the normal balance of two parties. This behavior has been so uniform and so prolonged that it must illustrate the operation of some truly fundamental force.

[2] Note the explanations that Lowell gives for Germany, France, and Italy in *Governments and Parties in Continental Europe* (2 vols., 1896); and comments by E. M. Sait, *American Parties and Elections*, p. 182 and notes.

[3] A. N. Holcombe, *The Political Parties of To-day* (1924), pp. 315-317.

A philosophy was devised to justify it. After all, government is a practical art; and, while the variety of interest and opinion that is found in all communities seems to require numerous parties for its expression, a choice between two alternatives is more likely to reflect the average point of view. Such a choice simplifies electoral procedure and makes it more intelligible to the masses, who would be bewildered by the presence of a dozen possible solutions, but who, like the jury in a criminal trial or the audience at a debate, can readily decide between two conflicting arguments. The two-party system commends itself because of its practical advantages; and therefore it may illustrate the practical bent of the English-speaking peoples. To a considerable degree, those peoples are less doctrinaire than the average, less inclined to sacrifice the attainable to the ideal, less ready to adhere to hopeless causes and use their ballots in a mere gesture of dissent. But, if they do possess a dominantly practical character, they must have clung to their inheritance not so much from deliberate choice as from a natural inclination to be guided by the lessons of experience. There is only one other explanation of the two-party system that deserves attention. Elihu Root maintains that it represents a later stage of evolution and a higher type than the multiple-party system of Continental Europe.[1] His theory cannot be accepted until Continental parties show a definite tendency to consolidate instead of forming transitory *blocs*.

The two-party system accords with the practice which—in sport, debate, litigation, or war—usually ranges the contestants on two opposing sides. There is an analogy between party strife and war. The use of so many military terms in political campaigns is not accidental. Sir Henry Maine goes so far as to ascribe the very existence of parties to the combative instincts of mankind. Party strife is, he says,[2] "war without the city transmuted into war within the city, but mitigated in the process. The best historical justification which can be offered for it is that it has often enabled portions of the nation, who otherwise would be armed enemies, to be only factions.... Party feeling is probably far more a survival of the primitive combativeness of mankind than a consequence of intellectual differences between man and man. It is essentially the same sentiment which in certain states of society leads to civil, intertribal, or international war; and it is as universal as humanity.... Party differences, properly so called, are supposed to indicate intellectual, or moral, or historical preferences; but

[1] *The Citizen's Part in Government* (1907), pp. 70-78.
[2] *Popular Government* (1886 ed.), pp. 101 and 31.

these go a very little way down into the population, and by the bulk of partisans they are hardly understood and soon forgotten."

Maine's theory, while accounting for the disposition to form and maintain parties, scarcely explains how they have actually come to be formed. Even though men may long to indulge their combative propensities, they must have something to fight about; there must be a controversy of some kind to divide them into contending camps. The facts seem to show that the origin of parties lies in a sharp difference of opinion over political questions. Maine's theory helps to explain the persistence of partizan spirit, and of the organization through which that spirit finds expression, long after the original points of contention have been settled or abandoned. We have already seen that, in a democracy, parties exist because they discharge an essential function of brokerage. There may be times, of course, when the parties have no distinctive aims to fight for. But the memory of old campaigns in a sacred cause keeps the two armies from fraternizing; and the mere love of combat, sharpened by the hope of spoils, welcomes a renewal of active warfare.

Parties, then, are necessary instruments in the democratic process; and the conflict between them gives some satisfaction to a primordial instinct. It provides a form of orgy, a way of escape from tedious routine. But our curiosity has not yet been appeased. How are men influenced to join one side rather than the other? The two chief answers that have been given may be called the temperamental and the economic. The first is generally associated with the name of Lord Macaulay. When discussing the rise of the Whig and Tory parties in the seventeenth century, he concludes that they rested upon "diversity of temper, of understanding, and of interests" which are common to all societies and all ages. "Everywhere," he writes,[1] "there is a class of men who cling with fondness to whatever is ancient, and who, even when convinced by overpowering reasons that innovation would be beneficial, consent to it with many misgivings and forebodings. We find also everywhere another class of men, sanguine in hope, bold in speculation, always pressing forward, quick to discern the imperfections of whatever exists, disposed to think lightly of the risk of change, and disposed to give every change the credit for being an improvement." [2] On this basis there would be a party of order, authority, tradition—the Con-

[1] *History of England* (5th ed., 1913), vol. I, p. 88.

[2] Twenty-five years earlier than Macaulay, Thomas Jefferson put forward a similar doctrine in a letter to Lafayette. C. A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), note, pp. 420-421.

servatives; and a party of liberty and reform—the Liberals. In fact, any number of parties might be developed through temperamental diversity, since there are different degrees of caution and boldness.

If Macaulay's theory has been praised, it has also met with a good deal of criticism. It fails to account for many phenomena in our political life. Why do the Conservatives in one Canadian city and the Liberals in another win such sweeping victories? Why is Vermont so loyal to the Republican party, and Mississippi to the Democratic? Why should cotton-growers tend to concentrate in one party, and wool-growers in another? Temperament is certainly not the answer. President Lowell draws attention to a further difficulty. "These conceptions," he says,[1] "would be all very well if every political issue could be brought within the framework of authority on the one hand, and popular rights on the other, and if every man took the same side on every question as it fell into one or other of these categories. They would be all very well if progress in human affairs, like that of a stag, took place in only one direction at the same time, and the same party was always in favor of movement in whatever direction it might be. But unfortunately this is not true. A man or party may desire progress, or change, in ecclesiastical or temperance legislation, and not in fiscal or foreign policy; and from a philosophic point of view we do not help matters by calling our opponent bad names, and saying that he wants to progress backwards."

Even when the party cleavage may seem to reflect, in some degree, an opposition between cautious and sanguine temperaments, we may often discover, by looking a little below the surface, that the conflict has really an economic basis. Men of property are inclined to caution, distrusting and dreading change because it threatens their security. Others, having no possessions, entertain the hope that change will improve their lot. Politically these classes respond to a disposition that is not inherent in character, but imposed by circumstance. Macaulay himself qualified his theory by linking together, as if they belonged in the same category, diversities of temper and diversities of interest. Some people are repelled by the suggestion that human conduct is shaped by economic motives. They find something sordid and debasing in a thesis which places self-interest above ideals. They often seek to hide, from themselves as well as others, the materialistic aims that dictate their conduct. The prejudice is all the stronger because the doctrine of economic determinism, having been given such a finished and

[1] *The Government of England* (2 vols., 1909), vol. II, p. 116.

relentless form by Karl Marx, might seem to imply a socialistic bias. But this doctrine did not originate with Marx, nor does it remain today the exclusive possession of Socialists. The men who laid the foundations of American national government put the greatest emphasis upon economic motives. This appears in the proceedings of the convention of 1787 [1] and especially in the tenth number of *The Federalist*, written by Madison.

Few men indeed would ascribe party divisions to diversity of economic interests alone. Thus, Madison regarded the unequal distribution of property not as the sole, but as "the most common and durable," source of party. He made room for several other factors. Arthur Christensen, while insisting that "the economic element is found in all political parties everywhere at all times," admits that "the temperamental element... will hardly be found wanting in any party." [2] Indeed, any observation of individual behavior will show many cases in which the predominant motive has no element whatever of economic interest. Aside from the followers of Karl Marx, those who believe in economic determinism readily admit these facts. They simply claim that, taking men in the mass and thus establishing a norm of behavior, conduct will be found to respond on the whole to the pressure of the struggle for existence. The chief preoccupation of men is the satisfaction of material needs; and so, from the political standpoint, self-interest must commonly dictate their party affiliations. The history of American parties becomes intelligible only when read in the light of economic motives.

It is often said that men inherit their politics and religion. Membership in a party, as in a church, is less a matter of decision by the individual on points of doctrine than of pressure by his environment and particularly by the groups to which he belongs. The family group exerts a potent influence. The young man joins the Democratic party because his father belongs to it and, unless powerful contrary influences (economic in particular) come into play, he remains in it through habit and inertia. Party allegiance, like property, is often transmitted from generation to generation. Of course, what appears to be family tradition is usually a continuing motive of self-interest, father and son being affected by similar economic forces; and self-interest becomes clearly the dominant motive when a man's politics is determined by his desire to stand well with his business associates or his social acquaint-

[1] Max Farrand, *The Records of the Federal Convention* (3 vols., 1911).
[2] *Politics and Crowd Morality* (1915), p. 187.

ances, that is, with the groups that tend to supplant the family in importance as the young man goes out into the world and makes his own career. Here environment and economic interest coincide. The predominance of one party over a particular section of the country may be so overwhelming, especially among certain classes, that dissent would require strong conviction, and courage. In most parts of the Solid South a white man belongs to the Democratic party as a matter of course, even if he started life as a Republican in the North. The sectional predominance of a party does not provide an example of inherited politics. The explanation is economic, or more broadly social.

The major parties in the United States are often accused of lacking boldness, and even honesty, in their attitude toward current issues. Instead of offering clear-cut and straightforward solutions in their platforms, they employ language that is evasive, ambiguous, and perhaps without meaning. Both alike refuse to take a definite stand. Consequently they offer the electorate no real alternatives. The injustice of such a sweeping complaint should be obvious. The major parties, performing an essential function for democracy, must offer the voters what they want, not what some idealistic band of reformers thinks they ought to get. It is the business of the crack party politicians, as they see it and as the democratic process requires, to frame declarations on a great variety of subjects in the hope of pleasing a majority of the crowd; and the only way of achieving this task, except in abnormal times, is to become so indefinite on most questions that men of divergent interests can act together because they plan to do so little. Any one who condemns this transaction is condemning the first postulate of democracy, *i.e.*, that the people should rule. Popular satisfaction with the practice of the major parties has been attested by repeated and overwhelming votes of confidence. To say that the people have no alternative is absurd; they can turn to one of five or six minor parties. But the minor parties received in the aggregate 3.1 per cent of the popular vote in 1932 and 2.9 per cent in 1936.

The platforms of the major parties are designed, as the democratic process requires, for the purposes of victory. They tend to reflect the state of public opinion. Why, then, should they be denounced because of their similarity? Fortunate is the country in which the citizens as a mass think alike on vital policies and divide only on questions of degree or detail. Consensus exists; democracy is safe. On the other hand, when opinion is sharply divided on a fundamental issue like slavery or communism, an electoral triumph by one side will not be

accepted by the other side as a final solution: feelings and interests are too deeply engaged. Ballots give way to bullets. If the cleavage is sectional, democracy may survive an appeal to arms. Otherwise discipline will be reimposed, perhaps, by some form of monarchy, what the ancient Greeks called tyranny and what we to-day call dictatorship; and, as an alternative to anarchy or chaos, the new régime is likely to win, for a time at least, popular approval. Can it be that the growing movement against capitalism threatens the immediate future of democracy in Great Britain and even in the United States? The symptoms are disquieting. Yet in both countries the history of popular government indicates a probable reassertion of certain dominant qualities—caution in experiment, distrust of doctrinaire proposals, and a spirit of compromise.

EPILOGUE

APART from their history and their environment political institutions cannot be studied with much profit. It is deep rootage in the past and consonance with the needs of the community that give them vigor. They are always changing, it is true; always assuming new forms. But they do so only in a gradual fashion, in response to modifications in the environment; and, although appearances may be deceptive, they cannot sever the chain that binds them to the past.

Without applying Aristotle's genetic method our investigations would be woefully incomplete. We cannot understand the present except in the light of the past. We cannot understand the rise of contemporary dictatorships except in the light of similar occurrences in the ancient world of Greece and Rome and in Italy of the Renaissance. Why is the speaker of the House of Commons so completely divested of partisanship, while the speaker of the House of Representatives openly leads the party in control? Why should constitutions be unwritten or dispersed in one age; written or codified in another? Why is one generation devoted to peace and the next bent upon war? History alone can give an answer to questions such as these.

As we look at the origin and growth of any institution, we see how right Montesquieu was in emphasizing the rôle of environment. An institution emerges naturally in some region, as men acquire habitual modes of behavior and as they act to satisfy momentary needs. It takes shape slowly, almost imperceptibly, by slight, successive accretions,—here a little, there a little,—registering the responses of men to their environment. Perhaps one sees the process most clearly in the evolution of the great systems of law—the Roman and the English. Through the centuries many a Roman praetor and many an English judge contributed his little bit, took his cautious and tentative step forward. No one of them contributed very much or traveled very far. But, in the aggregate, what an achievement! Without having recourse to sextant and theodolite, without preparing a chart and setting down a geometrical route, nature proved an effective guide for a long and glorious journey. International law has been taking shape in a similar way. Contrary to a wide-spread illusion, it has not been created by the textbook-writers,

the intellectuals, but by the behavior of States in their mutual dealings, by conflict and compromise. The doctrinaire—the artificer of long-term plans—has never succeeded in building anything—except chimeras.

Institutions rise out of experience. Yet, having been built, by trial and error, in one community and there having established their value, they may serve, in another community, as ready-made patterns for imitation. Culture spreads by diffusion. Of course, a borrowed institution will change in character to the extent that the new environment differs from the old. It will cease to be exotic, undergoing transformation as its roots derive sustenance from the chemical properties of a different soil. Transplanted in France, the cabinet and jury soon diverged from the original British stock. Such modifications may entail no loss of vitality unless the soil proves uncongenial. All that we can foretell with assurance is this: there will be accommodation to the environment.

The historical approach is indispensable. It affords the only means of appreciating the true nature of institutions and the peculiar way in which they have been fashioned. It checks any disposition to substitute excogitated doctrines for realism, to give credence to such imaginative creations as the theory of the social contract or of the rise of modern representation in the German forests. Contemporary phenomena often take on a new significance when illuminated by analogies that we discover in a preceding age; for, although two historical situations are never precisely the same, the resemblance may be close enough to serve as a basis for useful generalizations. We may learn, for example, why popular government commonly has been so fragile and short-lived or what conditions dictate a federal rather than a unitary organization of the State. Surely also we become impressed when we find human activity so often responding to economic motives.

Thus, having seen something of the rise and growth of our own political institutions, having glanced at the opinions of many men who have written about them, having pondered the problems of their origin, perhaps we shall be better fitted to study and answer the pressing political questions of our own day.

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